# Productivity Commission review of the Disability Discrimination Act

**Initial submission: Human Rights and Equal Opportunity Commission**

**Contents:**


| | |
|---|---|
| Introduction: | 3 |
| Definition of disability | 3 |
| Areas where discrimination is unlawful | 9 |
| Exemptions | 11 |
| Definitions of discrimination | 19 |
| Unjustifiable hardship | 22 |
| Definition of reasonable adjustment | 24 |
| Costs of reasonable adjustment | 25 |
| Unjustifiable hardship in sport and Commonwealth programs | 28 |
| Harassment | 29 |
| Requests for information | 29 |
| Objects of the DDA | 33 |
| Effectiveness in eliminating discrimination | 37 |
| Effectiveness in ensuring equality before the law | 39 |
| Effectiveness in promoting recognition and acceptance | 40 |
| Potential economic and competition effects | 40 |
| Alternative ways to meet objectives | 41 |
| Relationship with other Commonwealth legislation | 41 |
| Effect of overlap with State/Territory discrimination laws | 42 |
| Co-operative arrangements with States/Territories | 45 |
| Omnibus discrimination legislation | 46 |
| Prescribed laws | 47 |
| Other matters potentially subject to regulation | 47 |
| Disability Standards | 47 |
| Guidelines and advisory notes | 50 |
| Frequently asked questions material | 50 |
| Action plans | 51 |
| Industry self regulation | 52 |
| Complaints | 52 |
| HREOC education function | 54 |
| Policy functions | 55 |
| Use of inquiries | 55 |
| Future challenges | 56 |
| Improvement in overall operation of DDA | 57 |
| Approaches from other jurisdictions | 58 |
| Employment | 58 |
| Education | 62 |
| Public transport | 64 |
| Access to premises | 69 |

Goods, services and facilities 71
Accommodation, clubs, land and sport 74
Commonwealth laws and programs 79

## Introduction

This submission is being made by the Human Rights and Equal Opportunity Commission (HREOC) as an initial contribution to the Productivity Commission's inquiry on the Disability Discrimination Act 1992 ("DDA"). This is intended as an initial submission only. HREOC anticipates contributing further information during the course of the inquiry, including in response to any specific requests by the Productivity Commission.

Some views expressed here may also be further developed or modified in the light of other views and information received during the course of the inquiry. While HREOC as the lead agency for implementation of the DDA clearly has particular experience to contribute we hope and expect to benefit from perspectives and information in other submissions and from consideration of the issues by the Productivity Commission, further to the useful Issues Paper already released.

HREOC considers this inquiry a valuable opportunity to assess the effectiveness of the DDA and examine possibilities for achieving the objects of the DDA more effectively.

HREOC's overall assessment is that

- the DDA has contributed to significant progress in eliminating discrimination against people with disabilities in most of the areas of life which it covers
- this has included dealing with over 5000 complaints and providing redress through agreed resolution in many cases
- costs do not appear to have been disproportionate to benefits being achieved
- there are however areas (in particular employment) where broad progress in achieving the objects of the legislation is harder to identify
- consideration of additional mechanisms for achieving the objects of the DDA is justified.

Further preliminary comments are offered as follows in response to questions posed by the Productivity Commission's Issues Paper.

### *What have been the effects of the DDA's broad definition of disability?*

HREOC views the current broad definition of disability in the DDA as having worked well overall. This definition has largely avoided resources being dissipated in disputes about who is and is not a person with a disability for the purposes of the legislation, and problems of arbitrary exclusion of people with some disabilities from protection on definitional grounds. Experience under the DDA in this respect compares favourably with United States experience, where the test that a person must be "substantially limited in a major life activity" to be covered by the Americans with Disabilities Act has been the subject of extensive litigation. This test was discussed by the inaugural Disability Discrimination Commissioner in her "Foundations" report at the end of the first 5 years operation of the DDA:

> “The definition of disability in the United States act, with its emphasis on whether a person is "limited in a major life activity" was seen as a model to be avoided rather than followed. Experience with the U.S. legislation has, I think, supported our concerns in this area. A large proportion of the pages in the extensive regulatory and guidance materials issued under the Americans with Disabilities Act is taken up with issues of the identification of who is, and is not, a person with a disability. This is not only a misdirection of effort and attention away from the real objective of eliminating discrimination; it suggests that we are talking about a dangerous or a protected species, and could be expected to encourage a reaction from employers and others that the safest thing to do with people with a disability is avoid having to deal with them.
>
> Reasons for a restrictive definition of disability like this include an understandable desire by people who have to live with permanent and major disability to ensure that they are the main beneficiaries of disability discrimination legislation, rather than attention and administrative resources being dissipated in addressing more transitory or trivial conditions. There are also issues of political credibility of legislation if minor ailments are treated as disabilities.
>
> A restrictive definition of disability is nevertheless an ineffective method for dealing with these issues and works against the legislation achieving its objects. One result is that people with a disability, seeking the assistance of anti-discrimination law in asserting their ability and entitlement to participate equally (including with any assistance and accommodation which may be required and to which the law entitles them), may paradoxically find it necessary to argue that their ability to participate is in fact limited by their impairment in order to qualify for the protection of the law.
>
> There have in fact been cases under the United States legislation where persons who clearly did have a disability were denied a remedy for discrimination because they faced exclusion only from a particular job or small class of jobs, and not from the whole activity of employment. This seems astonishingly absurd and unjust: claimants under race or sex discrimination laws are not told that they have no right to redress for discrimination in their chosen field because they can always look for a job somewhere else; and nor should people with a disability be told this.”

The United Kingdom’s more recent Disability Discrimination Act 1995 adopted a similar definition to that in the United States. This has been identified by the U.K. Disability Rights Commission as presenting major problems, as indicated for example in the following press release (7 May 2003, available on the UK DRC website at http://www.drc-gb.org/newsroom/newsdetails.asp?id=415&section=1:

> “A legal loophole which allows employers and businesses to discriminate against people with conditions such as Cancer and Multiple Sclerosis must be closed

> immediately the Disability Rights Commission said today. Publishing the first major review of current disability discrimination law, the Disability Rights Commission (DRC) is calling on the Government to urgently introduce legislation to cover people with progressive conditions to ensure they are protected against discrimination from the point at which they are diagnosed. Currently the Disability Discrimination Act only provides protection when symptoms develop which make it difficult for someone to carry out daily activities."

HREOC's view remains that the DDA should not be restricted to permanent or substantial disabilities. A disability which is otherwise trivial may nonetheless be the basis for discrimination which is serious in its effects. The broad and inclusive definition has not resulted in a flood of complaints of questionable merit as the issue is whether a person is discriminated against because of the disability. Distinctions between different disabilities based on degrees of "worthiness" would in the context of discrimination legislation lead to arbitrary and unjustifiable consequences.

In its submission to the Australian Law Reform Commission's recent inquiry on protection of human genetic information HREOC supported proposals to confirm that the DDA covers genetic discrimination (although in HREOC's view this is already the case).

### *Are any elements of the DDA's definition of disability too narrow or, conversely, too broad?*

HREOC is not aware of any instances where a person who should be considered as having a disability has been excluded from protection by the DDA because of restrictions in the definition of disability.

Issues about whether a person has a disability have more commonly concerned the need for evidence to establish that the person actually has the disability stated (in particular in relation to Attention Deficit / Hyperactivity Disorder, chemical sensitivities, back injuries, and Chronic Fatigue Syndrome) rather than a dispute about whether the disability, if established, would fit within the definition. This need for evidence would arise under most definitions of disability rather than being an issue resulting particularly from the DDA's broad definition.

There have however been some areas where there has been argument about whether a particular condition fits within the definition of disability for the purposes of the DDA:

### Substance use and addiction

Some confusion and controversy on these issues has arisen in response to decisions by HREOC and the Federal Court in *Marsden v Coffs Harbour and District Ex-Servicemen & Women's Memorial Club Ltd*.

The Federal Court's decision is available at www.austlii.edu.au/au/cases/cth/federal_ct/2000/1619.html, and the HREOC decision at www.humanrights.gov.au/disability_rights/decisions/comdec/1999/DD000110.htm .

The HREOC member sitting in that case took the view that dependence on methadone was not a disability where the methadone was itself being administered to relieve the symptoms of heroin addiction. Further, he found that the complainant had been excluded from the premises for reportedly being intoxicated, rather than because of his methadone dependence per se. The Federal Court however rejected the view that the complainant's dependency on prescribed medication could not itself be a disorder covered as a disability by the DDA. The Court also thought that it would have been open to find that because of the complainant's drug dependency the club had been more ready to regard him as being intoxicated than it may have been regarding a person without this dependency, so that discrimination may have occurred on the basis of a disability rather than on the basis of intoxication.

This complaint was settled by the parties without a final decision being made on whether on the facts disability discrimination had occurred. However, the case led to a number of public comments expressing the views that employers and others had been put in an unacceptable position, including that intoxication in the workplace would not be able to be dealt with.

HREOC's view, consistent with the Federal Court decision in Marsden, is that addiction (whether to legal or illegal substances) is properly regarded as covered by the definition of disability for the purposes of the DDA. Various addictive or dependency disorders are recognised in the standard psychiatric diagnostic protocols, the International Classification of Disorders and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders. Although HREOC does not take the medical opinion embodied in these texts as decisive of the meaning of "disorder" for the purposes of the DDA or of the applicability of this term in individual circumstances, these opinions are clearly relevant to establishing that a person has a disability.

This should not be regarded as bestowing any rights in itself (including any right to engage in illegal behaviour), since a person with a disability of any kind still needs to be able to point to discrimination on the basis of that disability and the concept of discrimination remains limited by provisions including those relating to inherent requirements of the job, unjustifiable hardship and the "reasonableness" element of indirect discrimination.

Thus for example acceptance of alcohol addiction as being a disability should not be regarded as involving acceptance of any right to be intoxicated at work, since in most cases this would not be expected to be consistent with the inherent requirements of the job.

In apparent response to the Marsden decision, the NSW AntiDiscrimination Act 1977 was amended to state that discrimination in relation to employment was not unlawful if "the disability relates to the person's addiction to a prohibited drug, and the person is actually addicted to a prohibited drug at the time of the discrimination." However, methadone is specifically excluded from the definition of a prohibited drug for this

purpose. This exclusion may reflect a recognition of the public health interest in ensuring that an addict who is having their condition treated should not face discrimination in work because of that treatment, so long as he or she can perform legitimate work requirements.

HREOC does not favour a similar amendment to the DDA, and considers that a better approach remains that taken by the DDA in focusing on what is discrimination (including issues of reasonableness and unjustifiable hardship) rather than an exclusionary approach defining what are “acceptable” disabilities. If there is a need for clearer statement of the rights of employers or other parties to deal with issues of intoxication or substance use, the NSW amendment dealing only with addiction to prohibited substances does not appear an effective approach since these issues may arise whether or not a person is an addict and whether or not the substance concerned is illegal.

### Transsexualism

Representations have been made to HREOC on several occasions seeking a statement that the DDA protects people who are transsexual, on the basis that they have a psychological disorder of "gender dysphoria". HREOC has not been prepared to accept this labelling, and does not regard transsexual people or any particular transsexual person as necessarily having a psychiatric or psychological disorder. Classification of transsexualism as a disorder by some medical professionals is not in HREOC's view conclusive - noting that homosexuality was long classified as a disorder by the American Psychiatric Association.

HREOC regards other legislation, where available and applicable, as providing more appropriate coverage of discrimination on the basis of transsexualism.

### Obesity

Cases under other anti-discrimination laws have been decided both for and against obesity being a disability. HREOC does not regard this as identifying a need for clarifying amendments to the definition of disability but as indicating that issues in this area may require case by case consideration.

The definition of disability under the DDA refers to loss of functioning of a person's body or part of the body. In HREOC’s view a person whose weight actually impairs his or her functioning is covered. If a person is not in fact impaired in functioning, but is treated as impaired, this would also be covered since the DDA also applies to imputed disability.

Of course, the more clearly a person is genuinely impaired by his or her weight, the more likely it is that the respondent to a complaint may have a valid defence, in particular in terms of a person's capacity to perform the inherent requirements of employment. On the other side of the coin, people who are within "normal" weight range or are marginally overweight but do not have a disability as most people would understand it are more

certain of winning a claim of discrimination if they are in fact subjected to discrimination because of their weight.

It may appear a paradox that people whose weight has more disabling consequences may receive less protection than people whose weight is less disabling. However, the DDA is not benefits-based legislation which treats people as more deserving and confers more rights on them the more serious their disability is. Rather, discrimination is more likely to be unlawful the more irrational or unreasonable it is.

### *Would an alternative definition of disability be appropriate?*

Although HREOC will await submissions with interest, our current view is that the present definition of disability should be maintained.

### *Are the definitions of disability used for different purposes appropriate? Have there been any unintended effects of using different definitions of disability for different purposes? If so, how should they be addressed?*

HREOC's view is that it is not necessarily inappropriate for definitions of disability to be different for the purposes of different legislative regimes. For example, taxi subsidy schemes and disability parking permits need not extend to all people with a disability as defined in the DDA, since not all forms of disability involve the same issues of mobility and transport disadvantage.

As noted earlier in this submission, the DDA appropriately applies to provide people with trivial or even wrongly imputed disabilities with redress if they are discriminated against, rather than being restricted to permanent or substantial disabilities. By contrast, it appears more legitimate for legislation giving access to benefits to set priorities, eligibility criteria or levels of entitlement by reference to issues of the severity of impact of a person's disability.

However, if there are excessively restrictive definitions of disability for the purposes of some benefits this may lead to discrimination – for example, if only some of those students who require targeted assistance to achieve equal educational opportunity are eligible for that assistance.

It should also be noted that in many cases a lack of necessary assistance or support is likely to be the result of inadequate resources made available rather than being because of purely legal issues of restrictive definitions.

HREOC awaits with interest views and information which may emerge during this inquiry on the impact of eligibility for and forms of income support on incentives and opportunities in employment as well as in education for people with disabilities.

HREOC has not done any work on the merits of different models of income support for people with disabilities – our efforts have been concentrated rather on issues covered

more directly by the DDA. We are aware though of evidence that extra costs of workforce participation do present barriers to employment opportunity for people with disabilities and we would support examination of income support measures which address these costs.

***Do you have any comments on the list of areas in which discrimination is unlawful, or on the specific exemptions? For example, should any areas or exemptions be added or removed? What problems have arisen in the practical application of the exemption provisions? For example, what amounts to "reasonable" grounds for discrimination in the provision of superannuation and insurance?***

## Areas where discrimination is unlawful:

*Occupational relationships*

HREOC would support consideration of additional coverage of discrimination in occupational relationships. At present the DDA covers some but not all such relationships.

For example, it appears anomalous that while partnerships are covered expressly, discrimination in entering franchise arrangements has only been able to be dealt with on the basis that a franchise arrangement may constitute a "club" as defined in the DDA - "an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association".

When the DDA was passed, discrimination regarding voluntary work was not included because of doubts regarding the Commonwealth's constitutional capacity to legislate in this area. In the course of more recent consideration of age discrimination legislation, HREOC has recommended that this issue be reconsidered, noting that some State legislation does cover discrimination in voluntary work. If it is determined that the Commonwealth can legislate regarding age discrimination in voluntary work it would clearly be anomalous not to provide the same coverage regarding disability discrimination.

*Accessibility and usability of products:*

The DDA covers discrimination in provision of goods (as well as services and facilities). It does not, however, contain any requirements for even minor modifications to be made to the goods themselves to ensure that they are accessible to or usable by people with a disability (including by following universal design principles to make products more readily usable to consumers more broadly).

This may lead to some anomalies in coverage.

In particular, obligations appear to vary depending on whether products are hired (which constitutes a service so that reasonable adjustments may be required) or sold (in which case adjustments to achieve accessibility in the goods sold may not be required). For example, a library would be regarded as providing a service and would have obligations to provide access to information in a range of formats (where this can be done without unjustifiable hardship), but a bookshop which sells books as goods may well not have the same obligation.

The accessibility of telecommunications equipment provided as part of a telecommunications service is covered by the DDA, but does not appear to be covered if the same equipment is sold separately from provision of a telecommunications service. This contrasts with the position in the United States where uniform obligations apply to telecommunications equipment and service provides.

These differences in obligations between different classes of business may lead to failures in the legislation having its intended effect, and/or in transaction costs being incurred through complaint processes being required to determine responsibilities not explicitly provided for by the legislation.

For example, while a video hire store considered as a provider of services would have obligations to make captioned videos and DVDs available to the extent this can be done without unjustifiable hardship, there is no clear statement in the DDA of the responsibilities of makers of videos or DVDs to provide captioned versions.

Similarly, in current negotiations with the broadcast television industry to increase the proportion of their programs which are captioned, it has been noted that the lack of requirements for televisions and related equipment to be sold with caption decoding capacity reduces the effectiveness of measures which broadcasters may take as service providers.

Not all accessibility issues regarding products concern the physical design and features of the product. There are also issues regarding the accessibility of information supplied on how to use products, which in many cases appear to be readily able to be remedied. While it is possible that the DDA applies to these issues already (since the form in which information is provided with products maybe seen as part of the terms and conditions on which goods are sold rather than as a feature of the goods themselves), this coverage is not clearly stated.

Extension of the DDA to apply to the accessibility of goods would clearly present significant – including whether such a requirement should be at the same general level as existing anti-discrimination provisions, or should be approached through more specific standards or codes for particular product categories - but may merit further consideration.

## Exemptions

*Special measures*

DDA section 45 provides that it is not unlawful to do an act that is reasonably intended to ensure that persons who have a disability have equal opportunities with other persons; or afford persons who have a disability or a particular disability, goods or access to facilities, services or opportunities, or grants, benefits or programs to meet their special needs.

The purpose of similar provisions in other legislation (in particular regarding race and sex discrimination) has generally been to protect beneficial measures for disadvantaged groups from being struck down through complaints by people outside those groups.

There is not the same need for the special measures section in the DDA to perform this role – since even without reference to this provision it is not possible for a person to make a valid claim of being discriminated against because he or she does not have a disability or does not have the particular disability identified as necessary to secure an opportunity or benefit.

Sex and race discrimination legislation are for the most part drafted in neutral terms to deal equally with discrimination against members of either gender or of any race. The DDA is drafted to deal only with discrimination against people who have a disability (or are associates of people with a disability or are imputed as having, had in the past or may have in the future a disability). It does not attempt to deal with discrimination which occurs because a person lacks these characteristics.

This does not mean the special measures section has no work to do in the DDA.

The special measures section may appropriately apply to protect requests for information which are necessary or reasonable to establish eligibility for a benefit or opportunity directed to people with a disability. A person might object to this information being requested and in the absence of the special measures section might seek to complain of this request as being discriminatory. In particular this section may have a role in ensuring that employers are able to ask questions reasonably intended to identify needs for workplace adjustments to ensure equal employment opportunity (while not permitting questions for discriminatory purposes or intended to cause offence or embarrassment).

Some measures to ensure access for people with disabilities also involve balancing competing needs of people with different disabilities. For example, tactile ground surface indicators which assist blind and vision impaired people in finding direction and avoiding hazards (such as knowing when a footpath reaches a road crossing) present a barrier to smooth passage for people using wheelchairs and some other people with mobility disabilities; but a lack of such indicators may (in the absence of other appropriate cues) present a barrier to blind and vision impaired people being able to use the area safely.

In such a situation, authorities with responsibilities under the legislation require some degree of protection rather than being damned whatever they do or do not do. The special measures section provides that protection so long as decisions are reasonably intended as beneficial. In HREOC's view the "reasonably intended" test is appropriate for this purpose since it gives protection to actions taken for beneficial purposes while requiring some reasonable basis for these actions (and thus not applying for example to actions which might be described as well intentioned but which unreasonably disregard relevant expertise or the wishes of a person with a disability).

However, HREOC has concerns regarding wider interpretations which have been given to the concept of special measures in some decisions under other laws dealing with disability discrimination. In *Re ACT Health & Community Care Service and Discrimination Commissioner and Alexander Vella and others* (available at www.austlii.edu.au/cgi-bin/disp.pl/au/cases/act/ACTAAT/1998/286.html ) the ACT Administrative Appeals Tribunal decided that section 27 of the ACT Discrimination Act, the equivalent of DDA section 45, meant that "nothing done in the course of a program designed to meet the special needs of any disadvantaged persons can be the subject of a complaint of discrimination under the Act by any person, including a member of the class of disadvantaged persons that the program is intended to benefit ...".

The section is not confined to blocking claims of discrimination by those outside the scope of the program; the opening words of section 27 block a claim by any person of discrimination arising from an act done in the course of administering the program". HREOC does not consider this decision provides an appropriate precedent to follow, or that it represents the effect of DDA section 45.

It appears that the ACT Administrative Appeals Tribunal was driven to this wider interpretation by concerns arising from the unusual definition of discrimination in the ACT legislation, which requires only that treatment be "unfavourable" rather than "less favourable" than would be afforded to people without a disability. The case concerned failure to give way to resident objections to a particular new resident. The tribunal thought that because the definition of discrimination failed to require any comparison with what would have happened if people with a disability were not involved, discrimination would be established unless the special measures section applied. The tribunal appears to have been concerned that unless a wide interpretation was given to the special measures provision, the tribunal itself would in effect become responsible for the management of disability specific facilities in the ACT, which as the tribunal noted could not have been the intention of the legislature.

The definition of discrimination in the DDA is not the same as that in the ACT legislation and does not involve the same need to adopt an excessively broad interpretation of special measures in order to avoid absurd results.

The appropriate test under the DDA in HREOC's view (in accordance with both the objects and the wording of the legislation) is whether the action complained of was reasonably intended as beneficial, not whether it occurred in the administration of a

program or facility intended overall for beneficial purposes. The wider interpretation applied under the ACT legislation in the Vella case would itself appear to imply absurd results, such as that authorities responsible for administering disability benefits are free to operate from inaccessible premises and provide information only in inaccessible formats.

At this point HREOC does not consider that changes to the drafting of the special measures exception in the DDA are required to avoid excessively broad interpretations, but submissions on this issue are awaited with interest.

*Superannuation and insurance*

As noted by the Issues Paper, in permitting insurers to make distinctions based on disability, but only where this is reasonable, the DDA leaves much open to interpretation.

To assist in giving this provision more definite meaning, guidelines on the application of the Disability Discrimination Act to insurance and superannuation were developed during 1997 in cooperation with relevant industry associations and in consultation with disability community representatives. These guidelines were adopted by HREOC in March 1998 and are available on the HREOC website.

HREOC would welcome comments during the course of this inquiry on needs and possibilities for further guidance or definition in this area.

In relation to superannuation, there has been a small number of complaints, in most cases regarding restrictive conditions on entry for people with a disability or medical condition.

Consultations have suggested that there may be a need for research on the effectiveness of superannuation for people with disabilities given that disability may involve disruptions in working patterns as well as lower than average income. In addition, there are issues of the effect of past, or continuing, discrimination (both in access to employment and in access to superannuation) on the adequacy of superannuation in providing for retirement income for people with a disability. However, HREOC has not been in a position to conduct such research to this point.

*Compliance with other laws*

When the DDA was introduced, a general exemption was included for actions in direct compliance with any other law. This general exemption expired after three years, the clear intention being to provide time for laws to be reviewed and either have amendments made to remove discriminatory effects, or have laws prescribed under the DDA so that actions in compliance with these laws would remain lawful.

The Federal Attorney-General did request State governments, and other Federal Ministers, to review laws within their responsibility for discriminatory provisions and make appropriate amendments and requests for prescription.

It is not clear whether all laws which might require prescription have in fact been prescribed (noting that as pointed out in the Issues Paper laws of some jurisdictions have not been prescribed although they are equivalent to prescribed laws of other jurisdictions).

HREOC considers the prescribed laws mechanism an appropriate means for determining when the DDA should give way to other laws, noting that this mechanism provides for scrutiny through provision for parliamentary disallowance as well as through consultation between governments.

However, the prescribed laws provision is clearly not the only mechanism which should be considered for determining the relationship between the DDA and other laws. This is indicated for example by extensive work currently under way to develop a disability standard on access to premises, where the intention is in effect to state that compliance with building laws giving effect to an upgraded Building Code of Australia will be sufficient for DDA compliance.

One reason that the more simple method of prescription of these laws would not be sufficient for this purpose is that (in keeping with the views of members of the High Court in *Waters v Public Transport Corporation*, available at www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high_ct/173clr349.html) the concept of direct compliance only appears to apply to protect actions directly required by another law: it does not apply to actions which are consistent with but not directly required by such a law.

For example if another law permits a ramp slope of 1 in 14, a refusal to implement a yet more accommodating slope of 1 in 20 would be consistent with, but not directly required by, that other law, and thus would remain open to potential challenge under the DDA even if the other law was a prescribed law.

This limited effect of prescription of other laws appears appropriate where another law imposes a clearly discriminatory result – so that a decision nonetheless to permit acts complying with that law is confined to the narrowest possible extent. This approach also avoids removing the protection of the DDA against discriminatory means of implementing another law where non-discriminatory means are equally available.

However, where the purpose of the other law (as with access provisions in building law for example) is to provide a code of how to achieve non-discriminatory results (in the same way as a standard within the DDA itself might do), protection of actions complying with that code may be justifiable whether or not they are directly required.

One means to achieve this would be simple removal of the word “direct” from the DDA reference to direct compliance. Consideration should also be given to whether prescription or other methods of recognition should also be available regarding codes or standards which are not contained in other laws.

*Modified wage exception*

HREOC expects that the Inquiry will receive important and varying perspectives from industry, government and disability community organisations regarding issues in the area covered by this exception.

Section 47(1)(c) of the DDA exempts actions in direct compliance with

> an order or award of a court or tribunal having power to fix minimum wages;
> a certified agreement (within the meaning of the Workplace Relations Act 1996 );
> or
> an Australian workplace agreement (within the meaning of the Workplace Relations Act 1996 );
>
> to the extent that the order, award or agreement has specific provisions relating to the payment of rates of salary or wages to persons, where:
>
> if the persons were not in receipt of the salary or wages, they would be eligible for a disability support pension; and
> the salary or wages are determined by reference to the capacity of the person.

This provision in effect accepts that some people will have lower productivity because of their disability, and that to promote their having employment it is preferable to permit payment on a wage scale modified to reflect lower productive capacity, although this is a departure from principles of non-discrimination at least if and to the extent that other workers are not similarly subject to productivity assessment.

As a safeguard this provision only applies where modified wages are contained in an award or have been registered in a certified agreement or workplace agreement.

Issues likely to be raised by submissions in the area of modified wages include:

- Complaint experience has indicated instances of people being paid reduced wages without any award or agreement providing for this being in place.
- Complaints to HREOC and industrial proceedings have raised issues of the level of support and explanation needed to ensure that some workers with disabilities can participate effectively in agreement making processes.

There is no specification in DDA section 47(1)c) of how capacity should be assessed, or of how the process of wage modification by reference to capacity should work, although legally it seems clear that wages being “determined by reference to capacity” requires a reasonable and objective relationship. The development and application of an appropriate wage assessment tool clearly presents critical issues for the appropriate operation of this exception.

In its national safety net decision on 6 May, the Australian Industrial Relations Commission decided that a forum should be convened to discuss issues of the application of enterprise bargaining where employees with intellectual disabilities may have limited capacity to understand and participate effectively in the process, and how to ensure that awards appropriately reflect the supported wage system for people with disabilities. It is not yet known when that forum will be convened.

*Infectious diseases*

Section 48 of the DDA protects measures which are reasonably necessary for the protection of public health where a person's disability is an infectious disease.

HREOC's present view is that this exception has operated appropriately. It requires that public health measures be "reasonably necessary" so as to require some objective justification, but does not impose a test of absolute necessity which would fully substitute judgment by HREOC or the courts for that of public health authorities in this area.

This exception is restricted to infectious diseases and public health issues.

At this point the only other public health issues HREOC is aware of which may require legislative or regulatory action are in relation to assistance animals, including

- interaction between the DDA and health and hygiene laws (particularly regarding food preparation and service areas), and other relevant laws including quarantine provisions; and
- appropriate regimes for recognition and regulation of assistance animals other than guide and hearing dogs to ensure appropriate standards of behaviour and hygiene.

HREOC hopes to issue a discussion paper shortly on possible needs and options for legislative and/or regulatory action in this area.

Issues of the relationship between discrimination law and occupational health and safety regimes are addressed separately in the Issues Paper and in this submission.

*Charities*

The charities exemption in the DDA has on occasion been misunderstood as meaning that charities are entirely exempt from the DDA. The charities exemption is not a general exemption for charitable organisations and in particular does not give charities general permission to discriminate as employers.

In HREOC's view this exception simply confirms what would have been the case under the DDA without such an exception: that it is lawful to establish and administer charitable instruments for the benefit of people with a particular disability (e.g. that the

Royal Blind Societies can operate without having to extend their services to people who are not blind). At this point however although there appears no substantive need for this exemption, HREOC is not aware of this provision causing sufficient problems to justify its removal.

*Telecommunications exemption*

This exemption, regarding payphones, is of no continuing relevance as it expired in 1996. However, it would be useful in the course of this Inquiry to give some consideration to the appropriate relationship between the DDA and the telecommunications regulatory regime.

Currently, the Telecommunications Act includes disability access issues in the definition of the standard telephone service – but does not define relevant obligations other than by reference to obligations under the DDA. There is scope for development of more detailed telecommunications accessibility standards through the co-regulation provisions of the Telecommunications Act but to this point progress in this process has been more limited and if anything slower than processes of development of disability standards under the DDA. Another obvious limitation in this area is that Telecommunications Act obligations in relation to the standard telephone service do not apply to the mobile services which are an increasingly important part of actual telecommunications usage in Australia. It does not appear optimal for coverage of these services to be left to the general provisions of the DDA while other telecommunications services are covered by a more specialised regulatory regime.

HREOC will be issuing a discussion paper on telecommunications issues shortly but hopes that submissions from consumer and industry bodies will also be made on telecommunications issues. In view of the social and economic importance of these issues and questions of appropriate relationships between regulatory regimes in this area HREOC also encourages the Productivity Commission actively to seek out views and information in this area.

*Pensions and allowances*

Section 51 of the DDA states that any discriminatory provisions in the Social Security Act and a range of other benefits legislation are exempt.

The necessity for and effect of this exemption is not clear, since in any event the DDA only makes discrimination unlawful in the administration of Commonwealth laws and programs, rather than the terms of laws or the extent of programs. At this point HREOC is not aware of any pressing reason to review this exemption.

This is distinct however from the need (which HREOC endorses) for continuing review of social security support for people with disabilities to ensure that the right to an adequate standards of living is ensured and that income support arrangements facilitate

rather than presenting barriers or disincentives to participation in employment and education.

*Migration exemption*

HREOC understands the view of this and previous governments that it is government's role and not that of the DDA to decide who comes to Australia. It is also true that there are other review mechanisms specifically established for migration and refugee decisions. But we remain concerned that the very wide immigration exception in the DDA leaves people with disabilities and their families without sufficient protection against unreasonable decisions to refuse entry to Australia because of disability.

In particular there does not seem to be sufficient protection against incorrect judgments that a person with a disability will be unable to contribute economically or otherwise to Australia and will impose an economic burden.

If these decisions are to remain exempt from the DDA HREOC would like to see improved criteria and procedures within immigration law in relation to admission of people with disabilities.

*Combat duties and peacekeeping*

HREOC considers that the inherent requirements exception in DDA section 15 is sufficient to deal with issues in this area, without additional special purpose exceptions for combat duties and peacekeeping.

*Temporary exemptions*

HREOC views the temporary exemption power as an important tool to promote equality where organisations are seeking some protection from complaints while acting to overcome barriers to access. HREOC has not been prepared to grant an exemption to organisations who simply want to avoid doing anything to comply with the DDA, as in our view the power to grant exemptions is required to be exercised consistently with the objects of the DDA

The number of exemption applications to date has been quite small, however, except in the public transport area, where exemptions have been a critical part of the progress that has been achieved. Exemptions have been granted to a number of public transport providers and authorities conditional on development and implementation of a plan to achieve improved access over time.

The limited take up of the exemption mechanism so far may reflect a concern that applying for an exemption could give a negative impression, even when the intention is not to escape responsibility for compliance, but actually to deliver better outcomes in a planned way. HREOC is aware of, although not agreeing with, views in some parts of the

disability community that exemptions (in general and as granted by HREOC in particular cases) undermine the effectiveness of the DDA.

It may be that a positive power to certify compliance plans or codes as complying with the DDA would have wider effect.

### *Do you have any comments on the definitions of direct and indirect discrimination? How could they be improved?*

A number of reasons can be identified for the approach taken of defining discrimination and related key concepts in broad and general rather than specific terms.

Limitations of available models: A similarly general approach was contained in pre-existing State and Territory equal opportunity legislation as well as the federal Sex Discrimination Act, which can be seen to have served as drafting models in many respects.

Difficulty of identifying appropriate more specific requirements: This difficulty is illustrated by subsequent experience in seeking to develop Disability Standards under the DDA regarding employment.

Provision for subsequent development of Disability Standards: The capacity to define rights and obligations more specifically by means of regulatory standards where necessary is clearly an important part of the scheme of the DDA. Although the DDA does not positively require such standards to be made or set a timetable for their making, there is considerably more emphasis on these standards in the terms and effect of the legislation than a general regulation making power.

Since the passage of the DDA, the SDA definition of indirect discrimination has been revised in the interests of simpler interpretation and operation – that is, with the intention of focusing attention on whether a condition or requirement unreasonably disadvantages one gender, and with the hope of moving analysis away from complex debates about appropriate formulas for determining whether a substantially greater proportion of one gender than another comply with a condition or requirement.

These issues of appropriate methods for comparison have not presented the same difficulties in applying the DDA as in applying sex discrimination law. There is no sophisticated mathematics required to determine for example that a requirement to enter a building or vehicle by stairs will disadvantage people who use a wheelchair compared to people who do not.

Despite this, simplification of the drafting of the DDA indirect discrimination provision along the lines of the revised SDA provision may assist people with rights and responsibilities under the legislation in understanding more readily what indirect discrimination involves.

As with indirect discrimination, the definition of direct discrimination in section 5 of the DDA was essentially borrowed from that in the SDA.

However, it was also recognized that (perhaps more often than for the grounds of gender or race) disability can make a difference which needs to be accommodated, rather than uniform treatment being sufficient to ensure equality.

Discrimination laws generally deal with discriminatory effects of uniform treatment through the concept of indirect discrimination, but in the DDA an attempt (which may not have been as successful as hoped) was also made to incorporate the need to make some adjustments for disability into the definition of direct discrimination, through the inclusion of subsection 5(2). Subsection 1 defines direct discrimination as less favourable treatment in circumstances which are the same or not materially different. Subsection 2 states that circumstances are not materially different "because of the fact that different accommodation or services may be required by the person with a disability".

Some uncertainty remains however about how the concept of direct discrimination applies to differences which arise because of disability.

These issues and their consideration by HREOC as a tribunal and by the courts are discussed in a recent report issued by HREOC, Change and Continuity: Review of Federal Unlawful Discrimination Legislation. This review is available at http://www.humanrights.gov.au/legal/review/index.html. The Inquiry and persons making submissions may find reference to this report useful. In summary, issues where there is uncertainty in this area include:

- whether less favourable treatment because of behaviour which is a manifestation of a disability is less favourable treatment because of the disability, so as to come within the concept of direct discrimination; or whether less favourable treatment in these instances can only come within the concept of indirect discrimination (either because less favourable treatment because of behaviour should not be regarded as occurring because of the disability, or because the appropriate comparator is a person without a disability who behaves the same way); and
- if direct discrimination is applicable in this situation, what limits there are on obligations to make adjustments: since there is not an express unjustifiable hardship or reasonableness limitation within subsection 5(2) and unjustifiable hardship defences in substantive provisions do not cover all situations where such a defence might be relevant.

These issues are presently before the High Court of Australia in *Purvis v State of NSW*.

Most (but not all) decisions of HREOC as a tribunal have taken the approach that less favourable treatment because of behaviour which is part of or a manifestation of a disability is less favourable treatment because of the disability, and thus that the concept of direct discrimination is applicable. The Federal Court and Full Court in the Purvis case have taken the contrary view.

The view that direct discrimination is inapplicable in this situation would not leave people with disabilities which affect behaviour completely unprotected by the DDA, since the indirect discrimination provision would continue to apply to unreasonable requirements in this and other areas.

It is also understandable that educational institutions and other potential respondents should wish to maintain and apply reasonable rules regarding behaviour and that they would accordingly be concerned if the concept of direct discrimination does apply to different treatment because of different behaviour at least to the extent that there are gaps in available defences including those based on unjustifiable hardship.

However, to in effect restrict coverage by the DDA of disabilities affecting behaviour to indirect discrimination only would also present some concerns, in view of the complexity of the indirect discrimination section.

There are also some possible gaps in coverage by the indirect discrimination section.

In particular, as the result of an apparent oversight in drafting, proposed acts of indirect discrimination are not expressly covered in the DDA (although they are covered by the SDA).

Review of the definition of discrimination may be required in the light of the decision of the High Court in Purvis, whichever way the result in the particular case goes.

The desirability of provisions addressing the duty to make reasonable adjustments more expressly, rather than this duty and its extent being a matter of implication from subsection 5(2) and section 6, is addressed later in this submission.

The definition of discrimination also requires review in relation to associates (such as friends or carers) of people with a disability.

The substantive provisions of the DDA cover discrimination against associates. However, the definitions of discrimination do not adequately reflect this, making the process of determining how these definitions apply in cases involving associates uncertain and potentially complex.

DDA section 5 currently fails to refer to associates in defining what discrimination means even though associates are covered in the substantive provisions. Fairly simple amendments to this provision would suffice to include associates expressly rather than having to work out some sort of best fit as at present.

DDA section 6 also fails to refer to associates. Redrafting the existing section 6 to include associates seems to be more complicated and this may provide a reason instead to adopt the amended SDA drafting for indirect discrimination.

***How has the concept of unjustifiable hardship enhanced or reduced the effectiveness of the DDA? Does the DDA provide sufficient guidance on the meaning of unjustifiable hardship? If not, what additional guidance would help?***

The inclusion of defences of unjustifiable hardship in most of the substantive provisions of the DDA may be seen as reducing what would otherwise be the effect of the legislation, and as treating disability discrimination as more acceptable than discrimination on grounds of race or sex, legislation concerning which does not contain an unjustifiable hardship provision.

HREOC is aware of some disability community concern that unjustifiable hardship provides an open invitation for organizations to avoid their responsibilities under the DDA. Submissions to the inquiry may be expected to provide useful elaboration of these concerns.

However, HREOC considers that unjustifiable hardship or an equivalent concept is appropriate to include in the DDA as a means of balancing the rights of other parties with measures to achieve the rights of people with disabilities.

While many adjustments to accommodate the requirements of people with disabilities may be simple and inexpensive to make (and may offer net economic benefits even to the provider because of benefits for other customers, employees etc), it has to be recognized that some involve more significant expense and difficulty. Some adjustments to existing premises to provide fully equal access may be financially beyond the means of a small business for example, or prevented by spatial or technical constraints.

Clearly, how far unjustifiable hardship operates in practice to limit progress towards achievement of the objectives of the DDA will be affected by the presence or absence of public sector support for organizations to take measures to increase accessibility and inclusion.

HREOC would support consideration in the context of this inquiry of appropriate incentives for increased accessibility and inclusion, whether at federal level (in particular taxation incentives, possibly comparable to research and development concessions), state level (including perhaps as part of regional development programs) or local level (through the inclusion of incentives as part of accessible community initiatives).

The concept of unjustifiable hardship does not mean that obligations to take measures to achieve equal access and opportunity for people with a disability are displaced by any expense or difficulty being involved at all. The legislation was intended to place an evidential burden on a respondent to a complaint wishing to claim unjustifiable hardship to demonstrate why hardship would be involved and why it would be unjustifiable for this hardship to be imposed.

(For the purposes of comparison with race and sex discrimination legislation it should be noted that while, like the DDA, these laws require some positive measures to remove discrimination, through the obligation to remove indirect discrimination, the extent of this obligation is similarly limited by the concept of reasonableness.)

Unjustifiable hardship, like reasonableness, is a fairly open ended concept and thus does not give definite answers in advance to whether particular measures are or are not required. This provides a high degree of flexibility in dealing with different circumstances – including in relation to the requirements of a particular person with a disability, and the resources of the particular organization being asked to respond to those requirements.

HREOC sees this flexibility as preferable to a simpler rule, such as one stating that adjustments costing less than $500 are always required and adjustments costing more than this never are.

However, as recognized in the development of disability standards and in HREOC decisions granting temporary exemptions, additional certainty can be beneficial for all parties concerned and promote agreement to and implementation of more extensive measures to achieve equality than might have occurred in a more uncertain legal environment.

The temporary exemption mechanism is not in HREOC's view appropriate for use simply to certify that unjustifiable hardship exists. It is however appropriate for use by service providers, employers or other entities with responsibilities under the DDA who wish to seek recognition of a level of achievement or active measures as (temporarily) sufficient rather than awaiting the result of complaints to determine whether to go further, or to take any action at all, would involve unjustifiable hardship.

The exemption process provides a valuable means for giving more certainty to rights and responsibilities but it is clearly not realistic (from the perspective of HREOC's ability to deal with applications as well as the perspective of organizations which might make applications) to expect that every potential respondent to DDA complaints seeking greater certainty than is provided by the unjustifiable hardship concept will seek and achieve that certainty through the exemption process.

The provision for disability standards under the DDA was intended to provide for achievement of certainty on a wider scale.

The development of standards on access to premises aims to replace the operation of the unjustifiable hardship concept (in relation to those premises covered by the standard, that is new buildings and buildings undergoing significant new work) with a more definite series of obligations and triggers for those obligations.

In the development of accessible public transport standards it was found necessary to retain an unjustifiable hardship defence to accommodate exceptional circumstances, but HREOC expects that the degree of specification provided of obligations and timetables for compliance with those obligations will be recognized by all parties, and if necessary by the courts, as indicating that the application of unjustifiable hardship in this area is now more narrowly confined to exceptional cases.

The drafting of the unjustifiable hardship clause in these standards was also intended to provide a list of factors more specifically adapted to public transport issues than the general unjustifiable hardship clause in the DDA itself. The fact that the list of factors provided is longer in the standards than in the DDA does not, however, indicate that more grounds for finding unjustifiable hardship have been added, since the shorter list in the DDA also indicates that all relevant circumstances are to be taken into account and thus would include the factors listed in the standards.

### *Should reasonable adjustment be defined in the DDA? If so, how?*

HREOC supports clearer provision being made within, and under, the DDA on the existence and effect of the duty to make reasonable adjustments.

This has been a major objective in each of the disability standards development processes to date but would also be useful to incorporate into the DDA itself.

The accessible public transport standards attempt to specify as far as possible results to be achieved and timetables for achieving them in place of a general duty not to impose unreasonable conditions on public transport access. The objective of the access to premises standards development process is similar. In the areas of education and employment, it was recognized in developing draft standards that for these topics it would be too difficult to give the same degree of specification of results representing reasonable adjustments, but that some added degree of detail could be given to principles to be applied.

This experience may indicate that rather than a single additional provision requiring reasonable adjustment to be added to the definition of discrimination it might be appropriate to consider an additional provision in each substantive area setting out positive duties which might vary in their wording and extent according to the subject matter.

The draft disability standards on employment would have defined reasonable, or "appropriate", adjustments in the employment context as follows:

> "Appropriate adjustments are workplace adjustments that do not cause unjustifiable hardship and are made for the following purposes:

- providing an employee with a disability with equal opportunities to be considered on merit for selection, appointment, promotion, transfer or training;
- enabling the employee to perform the inherent requirements of the job;
- enabling the employee to perform other requirements related to the job;
- enabling the employee to enjoy equal employment terms and conditions with other employees in comparable circumstances; and
- enabling the employee to participate in and benefit from work related facilities, programs or benefits on equal terms with your other employees.

You must make appropriate adjustments for an employee as soon as practicable if:

- you are aware that the employee requires appropriate adjustments;
- you are able to make them; and
- it is possible for you to make them within a period of time that is reasonable in the circumstances.

This does not mean that you can refuse to employ, or can dismiss, a person with a disability just because an appropriate adjustment cannot be made immediately.

You will be taken to be aware that an employee requires an adjustment if it would be reasonable to expect you as an employer to be aware. What is reasonable will depend on the circumstances."

This draft was not proceeded with due to lack of consensus support for adoption as disability standards having regulatory effect, but was prepared by HREOC on the basis that it reflected and more clearly explained, the existing effect of the DDA.

Current draft education standards which are anticipated to be released in mid 2003 with an accompanying Regulation Impact Statement contain reasonable adjustment provisions with slightly different wording but to similar effect, including the use of the concept of unjustifiable hardship to define the limit of required adjustments.

### *What are the costs of reasonable adjustments? Who currently bears these costs? What is their impact, if any, on competition? Who should bear them and why?*

HREOC is not aware of any detailed Australian data on costs of reasonable adjustments, and awaits input to this Inquiry on this issue with interest. Some data may be available from public sector employment settings. An obvious potential limitation of such data however may be that adjustments which are simple and inexpensive or costless to make may be made without even being identified as being reasonable adjustments.

Recent UK survey data on costs and benefits of reasonable adjustments in service provision are summarized at

http://www.dwp.gov.uk/mediacentre/pressreleases/2002/jun/asd2806.htm and indicate that the majority of businesses which had made adjustments found the benefits had outweighed costs.

There are limited government programs to support adjustments to accommodate people with disabilities at present, which may be expected to be detailed in other submissions.

Commonwealth funding support (of up to $5000, HREOC understands recently increased to $10,000) is provided for adjustments to facilitate initial employment of Disability Support Payment recipients. There is no equivalent payment (or tax offset) available however to facilitate subsequent career development, or the employment of people who have a disability but are not DSP recipients.

Current measures through the Supported Wage System are restricted in scope to persons who would otherwise be eligible for Disability Support payments. Financial assistance for adjustment costs applies on a one off basis for initial employment of a person rather than being applicable to subsequent training or other costs arising when a person might be promoted or considered for promotion.

As such, these measures may be seen as targeted at the greatest areas of disadvantage, to the extent possible within modest funding. They pre-date the DDA and clearly do not address the full range of people with a disability or of opportunities and barriers to opportunity covered by the DDA. Expansion of these measures to apply to a greater range of people and of employment opportunities would require addressing a number of issues including

- need for an expanded funding base
- appropriate boundaries of eligibility and whether these could feasibly be extended beyond the present boundaries
- instances of individual types of need requiring higher levels of funding, for example for significant building alterations or interpreter services.

Any decision to expand the Supported Wage System would also require further evaluation of the operation of this system so far. HREOC is not in a position to initiate or conduct such an evaluation.

Substantial public resources are presently being invested in adjustments to public transport systems provided by public authorities. The Queensland government provides incentives to private sector providers of public transport bus services. This Inquiry may assist in identifying whether similar schemes in other jurisdictions would be effective. Similarly, consideration by the Inquiry of the effectiveness of measures by taxi regulators in different jurisdictions to provide incentives for provision of accessible taxi services could be useful. HREOC is able to provide some additional information and contacts in this respect.

Outside of these programs, the costs of adjustments to accommodate disability requirements appear to fall either on particular employers, service providers and others with responsibilities under the DDA and equivalent legislation, or on people with disabilities and their families.

For example HREOC is not aware of any systematic public program to support disability adjustments in private sector provision of education. There is a Commonwealth funded Special Needs Subsidy Scheme for childcare providers to offset additional costs of accommodating children with disabilities but funding of this scheme does not extend to supporting the level of demand which actually exists.

To the extent that adjustment costs fall to people with disabilities, the result may be either to accentuate poverty arising from already lower than average incomes, or else to prevent the adjustment being made and thus prevent effective participation in employment, education or other areas of potential economic and social benefit and contribution.

Clearly there would be complex issues to consider in any expansion of public sector support for disability adjustments by employers or service providers, including ensuring that this did not reward and give potential competitive advantage to organizations which have delayed or avoided providing equitable services and facilities for people with disabilities, at the expense of organisations which have acted earlier or more extensively to ensure access and equity (and comply with the law).

Additional support directly for people with disabilities to offset costs of participation, while also presenting some complexities, do not appear to present the same issues of moral hazard – since in most cases disability is clearly an unsought result of life's lottery rather than the result of economic calculation.

HREOC would be interested to see any information emerging from submissions on effects on competition in the labour market arising from restrictions on participation and skills formation as a result of avoidable limitations on participation by people with disabilities, including costs of adjustments required for equal participation.

In principle, and other things being equal, measures to facilitate increased participation by people with disabilities in the labour market (both in overall terms and in terms of participation in particular occupations) would be expected to have pro-competitive effects through expanding the effective range of suppliers of labour and skills for employers to choose from.

There is some economic literature on labour market segmentation through discrimination as an anti-competitive force. Although most of this work appears to have dealt with racial discrimination and sex discrimination the same principles would appear relevant to disability.

Consideration was given at an early stage of development of draft standards on employment to the possibility of lower or simpler requirements for small business, as

compared to the obligations provided through standards for larger enterprises and as compared to the existing provisions of the DDA.

This approach was rejected by parties making submissions, referring to

- difficulty and arbitrariness of setting cutoff points for different levels of obligation
- concerns from the disability community regarding reduction of current substantive rights and responsibilities
- concerns regarding legal validity of substantial reduction of substantive rights and responsibilities under the DDA as the principal Act by delegated legislation and consequent concerns about the suitability of such an approach as a means of achieving certainty
- concerns regarding potential anti competitive impacts of granting preferred status to a particular enterprise size
- concerns regarding disincentives for business/employment expansion by introducing additional requirements at a particular employment level, analogous to concerns regarding businesses approaching the payroll tax threshold.

Office of Regulation Review's Design Principles for Small Business Programs and Regulations notes that small businesses may often be less able to interpret and apply principle and performance based standards and recommends consideration of voluntary prescriptive standards for small business to accompany mandatory principle or performance based standards.

Extended consultation processes to date regarding disability standards in this area have failed to identify prescriptive approaches with any broad support and in HREOC's view have confirmed the difficulty of identifying appropriate prescriptive approaches across differing employment situations.

A more productive approach may be for enterprises or business associations to seek effective "deemed to comply" status for approaches of their own devising on specific issues, through the exemption mechanism under section 55 of the DDA or by other appropriate mechanisms which might be identified and provided for in future.

### *Why shouldn't unjustifiable hardship apply in the areas of sport and administration of Commonwealth laws and programs?*

The second reading speech introducing the Disability Discrimination Bill indicated an intention to apply the concept of unjustifiable hardship as a general limitation on the legislation, although the drafting of substantive provisions did not fully reflect this.

If a defence of unjustifiable hardship were included in the DDA regarding administration of Commonwealth laws and programs, HREOC would expect the practical application of this defence to be more restricted than in other settings even if the legal provision were in the same terms – given the more extensive resources available to the Commonwealth

than to some private sector respondents, and the importance of equal participation and access among the public purposes for which Commonwealth programs are established.

### *How has the prohibition of harassment worked in practice? How could it be improved?*

The number of complaints of harassment has been limited. In 2001-2002 for example there were 19 harassment complaints out of 452 total DDA complaints.

One reason for this limited use may be that, as with sexual harassment, there may be particular reluctance for people who have experienced harassment to come forward with complaints. This may indicate that better results would be achieved by increased emphasis on the duties of employers and others to take positive measures to prevent harassment occurring, rather than relying principally on complaints by victims of harassment to provide deterrence and remedy.

Discussions in the development of draft standards on employment also indicated that there may be a need for more definition on what constitutes harassment and on an employer's duties in preventing harassment. The DDA requires but does not define "due diligence" and "reasonable precautions" by employers to prevent harassment by staff or agents. The draft education standards provide significantly more detailed compliance measures in this area than is provided by the DDA. Comments during this Inquiry would be useful on the appropriateness of this provision of the draft standards on education as a model for use in other areas of the DDA.

### *How has the requests for information provision of the DDA worked in practice? How could it be improved?*

There has been very limited experience with this provision in complaints to HREOC. There were no complaints recorded as being made under the requests for information provision in HREOC's Annual Reports for 2000-2001 or 2001-2002 for example. However, in a number of instances complaints have been made where a person has not disclosed a disability because they do not consider it relevant to their ability to do the job, but has subsequently been dismissed for not answering questions honestly.

These issues were discussed as follows in a Resource Paper which HREOC issued in 1995 to assist consideration of possible disability standards on employment:

> "Intrusive requests for personal information in application forms (or at other stages of selection processes) can discourage people with a disability from applying for jobs, from continuing with an application, or from accepting or remaining in a position. Similarly to the impact of questions to women (in particular) about marital status, or concerning intentions about having children, people with a disability may also often be concerned that information requested about disability will be used for discriminatory purposes.

> These concerns have a substantial basis in the experience of many people with a disability.
>
> Equally, however, it is not in anyone's interests for employers to be denied information needed to determine whether a person can perform inherent job requirements; or to identify and make necessary reasonable adjustments. There may also be other legitimate and necessary reasons for requests for information about disability. If employers are prevented (or believe they are prevented) from getting information to resolve concerns about these issues, the end result may often be that the person with a disability is denied equal opportunity."

This paper pointed out that although section 30 of the DDA is headed "application forms" it also covers other requests for information throughout the employment process. It was noted that this section is complex and does not clearly indicate to employers or applicants what questions are permitted and which questions are not.

HREOC's current website Frequently Asked Questions in this area provide the following advice:

*"Can an employer ask questions about a person's disability?*

Yes. Discussion, questions and examinations regarding a person's disability and its effects may be legitimate, necessary and desirable in many cases, for example

- to determine whether a person can perform inherent job requirements
- to identify any reasonable adjustments required, in selection for employment or in the performance of work
- to establish rights and obligations regarding superannuation, workers' compensation and other insurance.

HREOC considers that discouraging, or unnecessarily restricting, discussion or inquiries regarding a person's disability in these or other legitimate work related respects would be damaging to effective equality of opportunity and thus would be contrary to the objects of the DDA as well as presenting difficulties for employers. HREOC does not interpret the DDA as having this effect.

This does not mean, however, that every disability related inquiry should be accepted as permitted or desirable. Inappropriate questions or examinations in relation to disability may lead to, or actually constitute, discrimination. Concerns in this area include

- the potential of inappropriate questioning or examinations to cause humiliation and to distract both employer and potential employee from the real business of establishing effectively whether and how a person can do the job and whether he or she is the best person for the job
- the potential for disability related information (particularly in application forms) to be used as the basis for discriminatory decisions, without sufficient interaction

between the employer and the person with a disability to deal with concerns which the employer may have about the disability

- potential disclosure of sensitive personal information regarding a person's disability to other employees or third parties or failure to protect such information from unauthorised access.

Failure to give appropriate protection to confidential personal information in relation to a person's disability may involve or lead to discrimination in some circumstances, as well as discouraging disclosure and discussion of disability related issues.

Employers should also note that a medical, psychological or other expert report does not displace an employer's responsibility for non-discriminatory decision making.

*Can standard or routine questions be discriminatory?*

A routine question about disability, such as "have you ever had a mental illness?", in an application form or selection process, may have the effect of excluding or disadvantaging applicants with a disability. If a question has this effect it may be unlawful indirect discrimination.

Indirect discrimination occurs where an unreasonable condition or requirement is imposed which disproportionately disadvantages people with a disability and with which the person with a disability concerned cannot or does not comply. The reference to failure or inability to comply with a requirement does not mean that a person can only make a claim of discrimination if he or she refuses to answer a question or fail to answer truthfully. If people who answer "yes" or would truthfully answer "yes" to a question regarding disability are in fact excluded or disadvantaged, a condition or requirement exists in practice of being able to answer "no".

*Can application forms ask about disability?*

Employers should note that questions which may be reasonable and permitted at interview, for example to examine whether a person's disability affects their ability to perform the inherent requirements of the job or to determine whether reasonable adjustment is required and possible, will not necessarily be regarded as reasonable or permitted in an application form.

Employers should be cautious about including disability related questions in application forms, other than for the purpose of inviting applicants to identify any adjustments required to ensure equal opportunity in the selection process itself. Routine or standard questions should be reviewed to ensure that they are included for a good reason and not for discriminatory reasons. The DDA (section 30) specifically makes it unlawful to request information for the purpose of an act which is or would be unlawful.

*So what inquiries and examinations about disability are permitted?*

The DDA does not set out particular forms of words as permitted or prohibited. Rather, the lawfulness of inquiries or examinations under the DDA depends on whether they are for a legitimate purpose and are a reasonable means for achieving that purpose. Employers should ensure that

- they know why they are collecting information
- this is a legitimate purpose
- information is only used for the purposes for which it was properly collected and is protected against improper access or disclosure.

Employers are also advised to make clear the purpose for which they request or require disability information, to reduce misunderstandings which might lead to fears of discrimination. In the case of *White v Westworth and Firvas Pty Ltd* (http://www.austlii.edu.au/au/cases/cth/HREOCA/1996/22.html) , HREOC found that an employer had acted lawfully in asking an employee about her skin condition, since his intention was not to dismiss her or otherwise discriminate but to establish what could be done to solve the problem. This had not been clear to the employee, however, who lodged a DDA complaint because she thought she had in effect been dismissed. Even though in this case the complaint was not upheld, it would clearly be better for all parties in these circumstances if a complaint was avoided in the first place.

*Information for equal opportunity and reasonable adjustment purposes*

Actions which are reasonably intended to provide equal opportunity to people with a disability or to persons with a particular disability are permitted by the DDA (section 45) and are encouraged by HREOC. They include inquiries, examinations or actions which are reasonably intended for the purpose of determining the need for, nature of, and possibility of making any reasonable adjustment required.

There is no requirement in the DDA that such discussion should occur only after a job offer is made. HREOC rejects any interpretation of the DDA to this effect as inconsistent with the terms and objects of the DDA.

However, HREOC suggests that generally it will be more appropriate to discuss reasonable adjustment issues in an interview rather than in an application process, except so far as issues concern any need for adjustment in the selection process itself.

*Determining ability to perform job requirements*

The employment provisions of the DDA implement the International Labour Organisation's Discrimination (Employment and Occupation) Convention 1958. They therefore have to be interpreted consistently with that Convention. The Convention states that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination".

In HREOC's view inquiries, examinations or actions reasonably intended to determine a person's ability to perform the inherent requirements of the relevant job are lawful under the DDA

For example: A man with a disability complained that he had been discriminated against by an employment agency which would not refer him for a particular job which involved handling chemicals because he would not disclose of his disability. The delegate of the President confirmed the decision of a delegate of the Disability Discrimination Commissioner to decline the complaint. He found that a requirement for an applicant for a job handling chemicals to reveal the particulars of his or her disability was a reasonable requirement for the purposes of ensuring the safety of the applicant and ensuring compliance with occupational health and safety requirements by the employer (27 March 1998).

Employers should ensure, however, that inquiries or examinations intended to determine a person's ability to perform inherent requirements are a reasonable means for this purpose. A requirement for information or a medical or other examination, although intended to determine a person's compliance with inherent requirements, might be found to be discriminatory if it is so poorly suited to that purpose that it cannot be said to be "based on" the inherent requirements of the job.

Not all work related requirements will necessarily be regarded as inherent requirements. However, inherent requirements are not the only permitted basis for decisions under the DDA. Other requirements are also permissible, in particular those

- which apply (or would apply) equally to people with or without the disability so as not to involve direct discrimination and
- which are reasonable so as not to involve indirect discrimination.

For example, a requirement to be able to perform additional duties which are not part of a person's own job might be reasonable if performance of these duties is sufficiently important; the prospect of the emergency situation is sufficiently substantial and if it is reasonable that the particular person should have to perform them in this situation (perhaps because no other employee can reasonably be expected to be available).

Inquiries, examinations or actions reasonably intended to determine a person's ability to comply with reasonable and equally applied job related requirements do not, in HREOC's view, involve discrimination.

*Determining insurance and superannuation entitlements*

The DDA (section 46) permits distinctions, exclusions or limitations in relation to insurance or superannuation which are reasonable on the basis of actuarial evidence reasonably available and any other relevant evidence.

In HREOC's view this necessarily means that reasonable requests or requirements for information or examinations to determine insurance (including workers compensation) or superannuation entitlements are permitted.

It may be advisable, however, to separate questions for these purposes as far as possible from questions for the purpose of making employment decisions, to reduce the risk of this information having a discriminatory effect on employment decisions or being regarded by an employee or applicant as having a discriminatory effect.

*Compliance with prescribed laws*

Inquiries or examinations which are undertaken in direct compliance with another law which is a prescribed law for the purposes of section 47 of the DDA are permitted. At present there are no laws prescribed for this purpose. Note however that requirements contained in another law may well be recognised as inherent requirements or at least recognised as reasonable requirements for indirect discrimination purposes."

This advice perhaps indicates that what is permissible and prohibited in this area remains subject to considerable processes of interpretation rather than being clearly stated in section 30 itself.

In its submission to the recent ALRC inquiry on protection of human genetic information, HREOC supported a proposal for the DDA to be amended to prohibit an employer from requesting or requiring genetic information from a job applicant or employee unless the employer can demonstrate that the information is necessary for a purpose that does not involve unlawful discrimination, such as ensuring that a person is able to perform the inherent requirements of the job. That submission stated:

Section 26 of the Northern Territory Anti-Discrimination Act appears to provide a more suitable starting point as noted by the NSW ADB. This is not, however, to recommend precisely the same drafting, as the Northern Territory provision may present some of the risks of discouraging appropriate discussion of disability issues previously raised by HREOC. In particular, consideration is needed of whether employers requesting information should face a legal onus of proof of the legitimacy of requests for information, or only an evidential burden as applies to issues of unjustifiable hardship under the DDA. HREOC regards imposing an evidential burden only as the preferable implementation of a requirement to "demonstrate" a legitimate purpose.

### *Do the objects of the DDA adequately describe the social, environmental and economic problems that the legislation should address? Have these problems changed since the DDA was introduced?*

The objects of the DDA are stated as being:

(a) to eliminate, as far as possible, discrimination against persons on the ground of disability in the areas of:

(i) work, accommodation, education, access to premises, clubs and sport; and
(ii) the provision of goods, facilities, services and land; and
(iii) existing laws; and
(iv) the administration of Commonwealth laws and programs; and

(b) to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community; and

(c) to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.

## Elimination of discrimination

The first object of the DDA refers to eliminating discrimination. There could be benefits in adding reference to more positive objects of promoting equality of access and participation in the areas concerned.

The elimination of discrimination is itself only a means to this more positive end. Also, discrimination may be misunderstood as involving particular actions rather than also including larger systemic and structural issues (such as accessibility of information methods, transport and communications systems, and the built environment); and as involving only actions which are consciously based on disability and involve an intention to treat people less favourably because of disability.

The substantive provisions of the DDA are not restricted in this way and do encompass the need to take positive measures on broad structural and systemic issues, and it may be appropriate to have the objects of the legislation reflect this more clearly. The second object does refer in positive terms to ensuring equality, but only in the context of equality before the law rather than more broadly.

The scope of this object matches the substantive provisions of the DDA which make discrimination unlawful.

A partial exception to this is that there is no substantive provision directly addressing discrimination in existing laws. However, as noted elsewhere in this submission, the time limit on the general exception originally provided for actions in direct compliance with other laws, and the need for prescription by regulation of any laws to attract a continuing exemption thereafter, has produced some action to review discriminatory provisions in other laws both at Commonwealth and at State/Territory level.

HREOC also has a function which permits it to inquire into and report on whether other laws are discriminatory or inconsistent with the objects of the DDA. Use of this function to date has been limited – principally because issues of discrimination identified to HREOC as priorities for action whether through complaints or through other means have generally concerned discrimination in practice rather than discrimination embedded in

laws. There is some scope however for HREOC to give increased attention to this function as and if it is identified as a priority including through this Inquiry.

## Ensuring equality before the law

The DDA lacks any equivalent of section 10 of the Racial Discrimination Act which invalidates discriminatory effects of other laws. Such a provision was originally proposed for the DDA, but was removed at an early stage because of concerns regarding the effect such a provision might have on special legal regimes in relation to people with disabilities in some areas, including guardianship and mental health legislation.

The object of ensuring equality before the law would have related substantially to such a provision if retained in the DDA. Without such a provision, the substantive provisions of the DDA do not have comprehensive coverage compared to this object.

Rules in other laws (including mental health and guardianship laws) governing decision making by or on behalf of people with impairments to decision making capacity are not addressed by the DDA. (This is stated only to make the position clear, rather than to recommend that the DDA should simply override these specific purpose laws.)

Constraints on ability to make decisions in other contexts – for example if it is simply assumed that a person with an intellectual disability lacks the capacity to enter into a transaction such as renting a flat or hiring a video - are capable of challenge through the DDA, although only a small number of complaints has been made in this area to date.

HREOC has not regarded decisions by the Family Court regarding authorization of sterilizing surgery on people with disabilities as governed by the provisions of the DDA dealing with administration of Commonwealth laws – since these do not extend to the content of those laws and since even if court decisions should be regarded as administration than the content of law, judicial immunity from suit would prevent complaints of discrimination in a court decision. Research and policy activity by HREOC in this area has been informed by the equality before the law object of the DDA but has been conducted principally under the provisions of the Human Rights and Equal Opportunity Commission Act instead.

There has however been some use of the DDA regarding administrative aspects of the court system, including accessibility of courts to parties and jurors. Application of the DDA to the conduct of legal proceedings – including issues of access to interpreting and advocacy - is less clear and has not been tested in detail by complaints.

Although the DDA only deals specifically with administration of Commonwealth laws, the provisions regarding access to premises and services and facilities have also been used by complainants in relation to the justice system. This has included a small number of complaints regarding access to services and facilities in prisons.

The Issues Paper refers to issues of privacy rights for people living in institutional accommodation among issues regarding equality before the law.

The DDA has had limited impact to date on issues in institutional living. Reasons for this may have included:

- availability in some jurisdictions of effective mechanisms more specifically directed to standards for disability services, and decisions by disability advocates to use these mechanisms in preference to the DDA
- reluctance by people living in institutions or their advocates to make complaints because of concerns about possible consequences
- perceptions (incorrect in HREOC's view but having some basis in decisions under the A.C.T. Discrimination Act as noted earlier in this submission) that specialist disability facilities are immune in their entirety from discrimination complaints because they constitute "special measures" for the benefit of people with disabilities
- problems in some instances in identifying discrimination as occurring in some instances of inadequate standards of service provision. In particular, direct discrimination under the DDA requires less favourable treatment because of a disability, and less favourable than is or would be accorded to people without the disability in comparable circumstances). Not all instances of inadequate services or inappropriate treatment will meet these tests. There are also issues of finding an appropriate comparator (actual or hypothetical) against which less favourable treatment of people with a disability may be measured, if the services concerned only apply to people with a disability.

However, these barriers to use of the DDA regarding institutional living may not be insuperable. HREOC understands that advocates in some jurisdictions where other review mechanisms may be less adequate are considering using the DDA to challenge provision by State authorities of disability accommodation in large institutional settings rather than providing a wider range of accommodation options. Similar challenges in the United States under the Americans with Disabilities Act – which has similar objects although different detailed provisions - have been successful.

***How should the effectiveness of the DDA in eliminating discrimination be measured? What evidence can you provide of progress in eliminating discrimination in different areas and for different types of disability? What other influences on eliminating discrimination should be taken into account? How should they be measured?***

HREOC has recently released a publication on achievements during the first 10 years of operation of the DDA, which is available in a range of formats including on HREOC's website. However, this publication was not intended as a formal evaluation exercise of the kind which the Productivity Commission has the resources and expertise to conduct in this Inquiry.

HREOC hopes and expects that different sectors covered by the DDA will take the opportunity offered by this Inquiry to place on the record substantial additional evidence of the extent of progress in eliminating discrimination. HREOC's information at present is largely confined to actions in which HREOC itself has been directly involved, including through the complaint process.

HREOC has not been provided with resources or powers itself to conduct large scale auditing of compliance or to require reporting on compliance measures (except where an exemption has been applied for and granted with conditions including reporting on compliance measures).

One limit on an ability to measure the effectiveness of the DDA in eliminating discrimination since it was introduced is that comprehensive benchmarks were not established when the DDA was introduced for the degree of compliance existing at the time.

For example, there was no survey prior to introduction of the DDA, as far as HREOC is aware, of the proportion of the building stock (either generally or in particular categories) accessible to people with disabilities.

One reason for this was that the level of accessibility required for compliance was not fully determined prior to development of standards or the emergence of experience in decisions on complaints. Another reason may be that Regulation Impact Statement requirements which would encourage this type of analysis were not applied to Commonwealth legislation at the time the DDA was passed.

Regulation Impact Statement processes for disability standards as they are developed in different areas may include some development of indicators of the degree of existing compliance with the standards proposed.

Measurement of progress in compliance into the future will also become more feasible as standards development and other processes give greater certainty to the content of the requirements of the DDA.

Despite the lack of comprehensive data, there are some points where the degree of success achieved in eliminating discrimination is fairly readily ascertainable.

In 1992, TTY equipment to permit use of the telecommunications network by deaf or speech impaired people was not provided as part of the standard telephone service but now is.

In 1992, no public transport buses were accessible to people using wheelchairs. Publication of figures for each jurisdiction is presently under discussion within the Australian Transport Council, but available evidence indicates that in most States the proportion of accessible buses is close to or has already exceeded 25%. Individual

jurisdictions and operators may be expected to provide further details during the course of this Inquiry.

Captioning of television programs in 1992 was much more limited than has now been achieved. Australian Caption Centre figures for 1994 indicated captioning even of prime time broadcast programs at 44% for the ABC, 19% for 7, 30% for 9, and 18% for 10, with very little captioning outside prime time, compared to close to 100% captioning of prime time broadcast television programs now being achieved and non-prime time captioning being expanded.

More detailed figures may be expected to be submitted by education authorities, but the percentage of children with disabilities included in mainstream education has clearly risen since 1992.

Some statistics indicate lack of progress, or if anything movement in the opposite direction. Australian Public Service Commission reports indicate that people with disabilities represented 3.6% of Australian Public Service employment in 2002, down from 4.5% in 1997.

To the extent that progress in eliminating discrimination can be identified, there are obvious difficulties in determining how much of this is due to the DDA and how much to other factors including other legislative, social or technical developments. (For example, the DDA has clearly had a major impact in promoting movement towards accessible public transport, but this movement has also been affected by developments in transport policy and technology, so that neither the costs nor the benefits of changes can reliably be ascribed purely to the DDA.)

It is difficult to attribute responsibility for the degree of progress being achieved or not being achieved as between discrimination law and other factors without better availability of information on progress which is or is not occurring.

***How should the effectiveness of the DDA in ensuring equality before the law be measured? What evidence can you provide of performance in ensuring equality before the law? What other influences on ensuring equality before the law should be taken into account? How should they be measured?***

As discussed above, the reach of the substantive provisions of the DDA is limited compared to this object and HREOC is aware of only limited use of the DDA in this area.

***How should the effectiveness of the DDA in promoting recognition and acceptance of the rights of people with disabilities be measured? What evidence can you provide of progress in promoting recognition and acceptance of the rights of people with disabilities? What other influences on promoting recognition and acceptance of the rights of people with disabilities should be taken into account? How should they be measured?***

HREOC is not aware of benchmark data prior to the introduction of the DDA. A number of surveys have found very high levels of acceptance in principle of human rights of people with disabilities as deserving protection (Social Science Data Archive, Rights in Australia 1991-1992: National Household Sample (1992, ANU, Canberra); Australian Election Study (1998, ANU, Canberra); Australian Constitutional Referendum Study (1999, ANU, Canberra). It is less clear however how far this translates into awareness, recognition and acceptance of rights in specific contexts.

***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? Can they be quantified? If so, how?***

Potential reduction in competition might be anticipated from the DDA (as from any other area of regulation) if requirements (either procedural or substantive) were imposed which drove significant numbers of participants out of any area or prevented market entry. However, HREOC is not aware of any evidence of this occurring.

HREOC does not have data to offer on costs. Evidence to the Inquiry on direct and indirect costs of compliance with the DDA may be expected from a variety of business and government sources.

One important qualification to apply to such data is to note that even if the DDA had not been introduced, State and Territory legislation imposes similar obligations on most points.

To set against costs, economic benefits which need to be considered may include:

- Reduced costs of separate or parallel service provision as mainstream services and facilities become more accessible and inclusive
- Increased labour market participation, leading to reduced welfare dependence and increased competition in the labour market
- Improved skills formation and use
- Potential improvements in productivity through requirements for inclusion and accessibility providing incentives for innovation in methods of work and service delivery
- Improved useability of services and facilities for all members of the community through increased adoption of universal design approaches

- Potential reduction in costs of accidents (for example reduced slips and falls in buildings through provision of step free access and adoption of slip resistant surfaces)

### *What alternative ways to meet the objectives of the DDA would have less impact on competition (or would increase benefits or reduce costs) compared with the current approach?*

In HREOC's view, in most instances other ways than discrimination law to achieve the objects of the DDA should be approached as additional means rather than as alternatives or substitutes. This applies in particular to possible expansion of economic incentives; reporting mechanisms; and improved information provision on how to achieve non-discriminatory outcomes.

The Labour and Disability Workforce Consultancy Report commissioned by the then Commonwealth Government, which preceded the development of the DDA, recommended in 1991 that national employment discrimination legislation be accompanied by reporting requirements comparable to those provided for under the Affirmative Action (Equal Opportunity for Women) Act 1986

Consultation prior to the introduction of the DDA indicated strong employer concerns regarding the burden of any reporting requirement, even if limited to employers having 100 or more staff as with the AAA. It appears appropriate in the course of the current Inquiry however to at least re-examine the issue of reporting mechanisms.

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

This Inquiry may identify areas where further laws should be considered for prescription and review in that context.

As noted earlier in this submission, it may be appropriate to consider revision of the current exception for actions in direct compliance with other laws, to cover actions consistent with but not positively required by another law. This could provide a less elaborate mechanism than development of standards for certifying provisions of another law as a code for DDA purposes where appropriate, and possibly providing an incentive accordingly for revision of disability equality elements of other laws.

HREOC has functions of reporting on the consistency of existing laws with the objects of the DDA, and (where requested by the Attorney-General) on the consistency of proposed laws with these objects.

The first of these functions has been little used for reasons including resource constraints.

The function of reviewing proposed laws has not to date been requested to be exercised.

As an alternative or addition to this function, it may be appropriate to consider the role of parliament and government in scrutinising new laws and regulations for human rights impact including in relation to disability discrimination. One possibility would be to have a human rights impact statement accompanying legislative and regulatory proposals, comparable to RIS requirements. Canadian government policy requires application of a "disability lens" focusing on disability impact of all new policy and procurements.

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

When the DDA was introduced most States and Territories already had equal opportunity legislation in place which included disability discrimination or were well advanced in developing such legislation. National legislation was however seen as needed to ensure consistent protection of human rights across Australia in this area; to cover matters which there are legal difficulties in the States regulating (including actions by the Commonwealth itself) and to provide for consistent national approaches to issues where efficiency and effectiveness require this from a business perspective (as applies for example in transport, insurance, banking, and other industries which operate on a national rather than state bound basis).

These reasons for continued coverage of disability discrimination by national legislation remain valid. The importance of national coverage has been demonstrated by development of national strategies for improved access and equity in several areas under the DDA including transport, building access and banking.

Where both federal and local law apply and are in similar terms the effect of overlapping coverage is to give complainants a choice of jurisdictions in which to seek a remedy. This may be seen as a positive aspect in competition policy terms through giving users of anti-discrimination legislation (or at least complainants) a choice of service providers. In practice, some complainants can be seen to opt for locally based State or Territory legislation even where the DDA is in similar terms, while in other cases complainants (particularly disability organisations seeking a national remedy to major issues) choose to proceed under the DDA.

Respondents are afforded some protection against facing multiple complaints through different mechanisms since section 13 of the DDA precludes a person making a complaint where the person has made a complaint on the same matter under State law.

In HREOC's view possible problems presented by overlapping coverage of the DDA and State and Territory discrimination have lessened in recent years with most jurisdictions now having coverage and definitions very similar to those of the DDA. (Some significant exceptions remain, including coverage of employers with less than 6 employees in NSW, covered by the DDA but not by local legislation; people with psychiatric disabilities in South Australia, covered by the DDA but not by the local law, and voluntary workers in Queensland, covered by local law but not by the DDA).

More major issues in HREOC's view arise where there is potential for substantial legal divergence in relation to disability standards and exemptions.

## Relationship of disability standards to general provisions of State/Territory laws

Under section 109 of the Australian Constitution, Federal laws displace the operation of State laws to the extent of any inconsistency between the two. Inconsistency can arise either directly - where the two laws would lead to different results - or through the Federal law being found to be intended to "cover the field" and not leave any room for State laws to operate.

A standard which leaves some issues covered by residual operation of the general anti-discrimination provisions of the DDA is likely to be found to leave those same issues as covered by the equivalent general provisions of State and Territory laws. But on those issues where the standard displaces the operation of the general provisions of the DDA it would also be likely to displace the operation of general provisions of State laws.

It is clear from the decision of the High Court in *Clyde Engineering v Cowburn* (www.austlii.edu.au/cgi-bin/disp.pl/au/cases/cth/high_ct/37clr466.html) that there is direct inconsistency if Commonwealth legislation permits conduct which State legislation prohibits.

For example, a complainant might seek under a State law to have 100% of bus route services made accessible. If the operator is meeting the timetable under the federal Standards for proportions of accessible vehicles in its fleet, there is no unlawful act involved in failing to have gone further than that timetable to achieve 100% access. Following the Clyde Engineering case, it is not valid to say that there is no inconsistency on the basis that both laws can be complied with (since 100% access will not only meet but exceed the Federal standard). The effect of the Federal law is that, until the 100% compliance point in the schedule is reached, less than 100% access is permitted; if the effect of the State law is that less than 100% access is not permitted, then there is direct inconsistency.

If the operation of State laws and availability of State remedies is to be preserved in this situation there may need to be State legislative provisions to apply the Federal standards - either (most simply) as a defence to complaints under general discrimination provisions, or possibly by inserting mirror standards provisions in State legislation and remaking the Federal standards as State standards.

## Where HREOC grants an exemption but State/Territory decision maker does not

Where HREOC grants a temporary exemption, the conduct exempted is protected from being unlawful under the DDA. However, in most cases State or Territory discrimination law is also likely to apply to the same conduct. These laws also provide for temporary

exemptions, but the persons or organisations exempted may not have applied for, or may have applied for but been refused, such an exemption.

This situation arose for example in relation to HREOC's decision to grant an exemption to the Olympic Roads and Transport Authority (ORTA) and bus operators providing ORTA with accessible buses, to provide certainty that this was not unlawful under the DDA. In HREOC's view it was not part of the objects of the DDA to decide which services accessible buses should be allocated to at any time, rather than to promote their deployment as soon as possible, and that in fact for discrimination authorities to seek to manage where these buses should be deployed could provide a disincentive for accessible vehicles being acquired.

State and Territory discrimination authorities concerned however took a different view (as they are entitled to do) under their respective laws.

In addition to HREOC's usual public consultation process on DDA exemption applications, HREOC and State and Territory authorities discussed the respective exemption applications in this case before making decisions. However, it was not possible to reach an agreed view, and each decision maker was of course responsible for making their own decision in good faith as they saw the matter.

The Queensland Anti-Discrimination Tribunal made the point that while the object of the DDA was to promote elimination of discrimination nationally, the objects of the Queensland law were confined to Queensland, and these could not be regarded as being served by removal of accessible vehicles from Queensland to another State (see decision at http://www.austlii.edu.au/au/cases/qld/QADT/2000/10.html). The Victorian Civil and Administrative Tribunal took the same view regarding Victorian legislation (see decision at http://www.vcat.vic.gov.au/2000-vcat-ad-1635.htm )

In HREOC's view the principle in the Clyde Engineering case applies in these circumstances – since (because of the grant of an exemption) federal law permits what State or Territory law prohibits. Clearly, however, the degree of certainty which is provided by a DDA exemption is reduced for an applicant if they must risk a potential constitutional law case to establish whether the exemption is effective to protect them from liability.

Clearly it is not possible or appropriate to compel State law decision makers to make decisions which they do not consider appropriate.

Delegation of exemption decision making in disability related matters to HREOC (either generally or on specific matters where particularly strong reasons for a consistent national approach are identified) could be possible under some laws, but it is unlikely that State and Territory governments and authorities would favour such a course.

It should be considered however whether the DDA should be amended to make clearer (what in HREOC's view is already the position) that DDA exemptions, and also DDA

standards, have primacy over State discrimination laws. This might be addressed by adding subsections explaining the effect of DDA exemptions and standards on State laws to the existing DDA section 13.

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

There are no legal impediments to development of co-operative arrangements between the Commonwealth and States and Territories.

Various arrangements have in fact been in force during the life of the DDA.

Entering into cooperative arrangements for State and Territory discrimination agencies to deal with DDA complaints is a matter for decision by governments rather than by HREOC.

HREOC's view however is that renewal of these arrangements would not be justified.

Co-operative arrangements for handling of DDA complaints by State or Territory agencies in the past involved inconsistent methods for decision making and for counting complaints including for funding purposes, and generally higher handling costs per complaint dealt with by State or Territory agencies than for complaints dealt with by HREOC.

The most recent set of arrangements came to an end around the time of introduction of the *Human Rights Legislation Amendment Act 1999* changes to complaint procedures including centralizing within HREOC of complaint handling responsibility in the President in the interests of consistency in procedures and clearer management responsibilities. Cessation of these arrangements was thus consistent with the objectives of this legislation.

An important benefit of handling of DDA complaints by HREOC is to enable more ready identification by HREOC of issues emerging from complaints requiring a national response.

Administration of the DDA complaint function by HREOC does not in our view have major adverse effects on access to remedies for discrimination around Australia, in view of the presence in all jurisdictions of local law substantially equivalent on most points to the DDA, and measures undertaken by HREOC to ensure accessibility of DDA processes. These include conduct of regular "circuits" by HREOC complaints staff traveling to provide conciliation services where required and to provide face to face information to disability organisations where requested; 1300 number access for complaints information and enquiries; and (increasingly used) provision for making of complaints through the internet.

Similarly HREOC does not see sufficient merit at this point in co-operative arrangements in the reverse direction (as existed in Queensland for some time) being renewed, for handling of disability discrimination complaints under State or Territory laws to be undertaken by HREOC.

There is likely to be more benefit from enhanced co-operation and coordination in public information and education activities. HREOC and State and Territory anti-discrimination authorities meet regularly at Commissioner as well as officer level to discuss these and other issues.

### *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?*

The obvious direct costs in seeking to consolidate Federal discrimination laws into omnibus legislation involve legislative and drafting time and the community consultation processes that would be required.

There are also potential indirect costs in loss of focus on or profile for disability issues if there were no longer a specific Disability Discrimination Act. These are difficult to quantify or substantiate authoritatively, since they concern perceptions and symbolism.

The first Disability Discrimination Commissioner commented as follows on this issue in the "Foundations" paper released at the end of her term:

> People who are accustomed to segregation into specialised services and facilities may not believe that a mainstream general anti-discrimination law actually is intended for their use. In this sense having a specifically named Disability Discrimination Act may serve in a way analogous to the access symbol on the door of a structure which in other respects, perhaps, is not hugely different in its accessibility from the surrounding structures of state laws, and which is not universally superior where there are differences.
>
> Something related to this might explain in part why State and Territory governments and others with obligations under the Disability Discrimination Act sometimes speak as if the Disability Discrimination Act were the only applicable law in the area, rather than there being fairly closely parallel State or Territory legislation in all jurisdictions … . Of course, it might also be convenient to approach obligations to eliminate discrimination as a unilateral mandate from central government for which the central government might be expected to pay, rather than as also existing under imperfectly fulfilled commitments of those State and Territory governments themselves.

Rationales which have been advanced previously for consolidation of Federal discrimination laws into a single law include reduction of the volume of material which businesses and their advisers have to deal with, and providing an opportunity to address

inconsistencies in approach between discrimination laws passed at different times (including differences in definitions, coverage and defences, and in functions or powers available).

The second of these objectives however is equally capable of being addressed by an amending Act which harmonises provisions in each Federal discrimination law to the extent this is decided to be justified, while leaving the laws as separate laws.

The first objective has been achieved to some extent already with the consolidation of provisions for remedies for unlawful discrimination into the Human Rights and Equal Opportunity Commission Act. It is not clear that further consolidation would make using and understanding Federal discrimination laws significantly clearer, considering that in most cases the omnibus laws which exist at State and Territory level are structured with separate divisions for the different grounds of discrimination.

### *What is the rationale for prescribing the particular Acts presently prescribed under the DDA? What would be the impact of extending or removing the prescription?*

The laws currently prescribed for the purposes of DDA section 47 are those which have been identified by State governments as requiring prescription in response to requests from the Federal Attorney-General. HREOC is not aware of the reasons for other governments with similar laws not having requested these laws being prescribed.

Also identified in this respect but not prescribed were provisions of NSW health law regarding presence of animals in food service and preparation areas. Prescription of these was refused because the law concerned did not make adequate provision for the position of guide dogs and other assistance animals.

The limitations of the concept of direct compliance are discussed earlier in this submission. Removal of the word “direct” would make this provision a more widely applicable mechanism for recognition of other laws but would clearly also require a high degree of scrutiny of any laws to be prescribed to ensure that DDA rights were not inappropriately set aside.

### *Are there other matters that should be subject to regulation? Would some parts of the DDA be better addressed by regulation?*

HREOC has no comments in this respect at present.

### *What are the advantages and disadvantages of mandatory disability standards?*

The rationale for Standards has been discussed in a number of published papers - for example in Elizabeth Hastings's 1997 “Foundations” paper, and in the documents

accompanying the draft disability standards on education currently being consulted on by the Department of Education  Science and Training.

As Elizabeth Hastings' paper puts it:

> "It was recognised that, in the interests of everyone involved, there needed to be better ways of deciding how, when and where services should be made accessible, rather than fighting about it case by case by case, or having design of services and facilities dependent on the progress of more or less random complaints and how those complaints are handled by different courts and tribunals interpreting the very general terms of discrimination laws.
>
> Everyone involved in the development of the Act accepted disability community representations, and evidence from United States experience, including under the general provisions of the Rehabilitation Act 1973, that complaints based on general non-discrimination provisions alone would not be sufficient to achieve widespread elimination of disability discrimination.
>
> For example, it is clearly impossible to expect all buildings to be designed to be equally accessible and useable by people with a disability, simply by reference to the terms of a general indirect discrimination provision. The same applies for an equally accessible telecommunications or transport system, even if we add some attractively presented pamphlets from anti-discrimination agencies and some precedent-setting case law."

The importance of authoritative standards in specifying what the access required by disability discrimination laws actually means in practice is now fairly widely recognised.

Equally important is the capacity of standards to provide a structure for compliance over time.

Perhaps more than for discrimination on other grounds, elimination of disability discrimination is not "simply" a matter of hearts and minds, of changing attitudes so that discriminators cease discriminating and harassers desist from harassment. Exclusion of people with disabilities has been built not only into systems and rules and patterns of behaviour and culture, but into millions of tonnes of bricks and mortar and steel, and deeply embedded in the design of ubiquitous technologies, from buses and building designs, to telephones and televisions.

There is increasing evidence that universal design, taking account of the needs of the whole population including rather than excluding people with disabilities, delivers more effective and efficient results for the whole community. However, getting from an inaccessible world to an accessible one involves huge changes, some of which will involve significant changeover costs and take time.

The major intended advantage of Standards, then, for both the disability sector and the potential respondents for whom they are relevant, is to provide clarity and certainty of rights and obligations. It should be easier to ascertain what constitutes discrimination in the particular area, so that complaints are easier to make and resolve but also so that greater compliance will be achieved without matters reaching the stage of a complaint. By providing certainty regarding what measures will be sufficient to achieve compliance, standards may also increase incentives to take those measures, particularly where substantial investments are required. Experience with the transport standards and their implementation to date supports this view.
The potential disadvantage that rights set out in the DDA will be diminished provides a reason for the extensive consultative processes conducted in standards development to this point.

### *How can the process for developing disability standards be improved?*

Disability community and industry representatives alike have raised concerns in standards processes to date regarding needs for an adequate research basis to ensure that specifications where adopted are appropriate. This issue can be minimized but not avoided by adopting performance and principle based standards. In many areas there remains a need to include some specifications if only on a deemed to comply basis, so that standards deliver the certainty they are intended to. HREOC itself does not have the resources to supply such research. In some areas (such as telecommunications) there is extensive overseas research material available to draw on, which might be expected to be applicable with few modifications in Australian circumstances, In other areas however, particularly those involving physical access, overseas research is less readily applicable given differences for example in the distribution of physical size of people as between the United States and Australia, so that a need for Australian research becomes more critical.

### *Should the DDA be amended to allow disability standards to include independent monitoring and enforcement arrangements?*

HREOC already has a function of reporting on the implementation of standards. The impact of this function however is likely to be limited by lack of resources relative to the potential task.

A more active HREOC enforcement role could be provided for (both in relation to standards and in relation to the existing provisions of the DDA) by reinstating a revised version of HREOC's ability to initiate complaints itself, including taking matters to court where appropriate. Again, the extent of effectiveness of such a function would depend on resources available rather than only on legal provisions.

Monitoring and enforcement of standards through or by HREOC should not be regarded as the only possible means of monitoring and enforcement. Further consideration needs to be given to means by which disability can be "mainstreamed" through existing regulatory and self regulatory structures.

### *What are the advantages and disadvantages of being able to formulate disability standards in some areas of discrimination listed in the DDA and not others?*

HREOC does not see any justification for the power to make disability standards being more restricted in its scope than the coverage of the substantive provisions of the DDA. The decision on whether to develop standards on any issue should be based on whether this form of regulation is the most effective means of achieving the objects of the DDA in relation to that issue (including assessment through Regulation Impact Statement analysis) rather decisions on issues which should or should not be considered for standards making being determined by the list of available subjects for making of standards.

### *What are the advantages and disadvantages of guidelines or advisory notes compared to disability standards?*

Guidelines are not a complete substitute for Disability Standards as they do not deliver any additional legal certainty for parties concerned. The Federal Court is under no obligation to give any weight to Commission guidelines and would appear to be not only free, but required, to form its own judgment. HREOC would be able to refer to such guidelines in the course of its complaint handling and other functions, but guidelines do not appear to have any clear additional status for this purpose than any other expression of opinion or advice by HREOC. Like any administrative body, HREOC is ultimately bound to apply the legislation rather than its own guidelines if there is any dispute regarding consistency between the two.

The purpose of guidelines or advisory notes issued by HREOC has been advisory and explanatory rather than to add an additional layer of regulation or to replace the general provisions of the DDA in the way that standards are able to. The aim has been to assist people and organizations with rights and responsibilities under the DDA to understand these rights and responsibilities and to put them into practice. Accordingly, although HREOC has consulted with relevant parties in adoption of guidelines and advisory notes to date, it has not seen them as requiring the same extensive processes as adoption of standards including the Regulation Impact Statement process.

### *What are the advantages and disadvantages of HREOC's Frequently Asked Questions compared to guidelines or advisory notes?*

As with guidelines, the purpose of HREOC's FAQ material is to provide information and advice on the effect and interpretation of the DDA. The only differences in HREOC's view are presentational and that FAQs are updated on a more continuous basis as new developments and questions arise. Consideration is currently being given to repackaging some of the FAQ materials including in relation to employment in more accessible and concise form.

***Are there sufficient incentives under the DDA to submit voluntary action plans? Why have relatively few businesses submitted voluntary action plans? Should there be a formal link between action plans and exemptions?***

The rate of lodgment of action plans has been high among local governments and universities but low for other organizations, including but not only businesses.

This is not surprising for smaller organizations which may not operate in terms of developing formal plans or policies on any subject unless (or even if) positively required by law. Even in larger organizations there may be a tendency to view development of policies such as an action plan as an additional administrative burden rather than as a worthwhile means of improving business processes and services. To deal with this HREOC has sought to emphasise (including in its publication *Developing an Effective Action Plan*) the importance of identifying and taking priority actions to improve equality of access to services rather than pursuing planning for its own sake.

HREOC does not consider it appropriate for every organization which lodges an action plan to receive or be considered for an exemption as a result, or for acceptance of lodgment of action plans to be conditional on fulfilment of conditions which would suffice for granting of an exemption, unless the requirements for an action plan were considerably revised as well as the capacity of HREOC or other appropriate body to monitor the content and implementation of action plans.

Satisfying the current requirements in the DDA for what constitutes an action plan does not seem to HREOC to be sufficient to relieve an organization of substantive obligations under the DDA, without some further consideration of the quality of the actions planned and the degree of implementation being achieved. HREOC does not have the resources or authority to apply a substantial quality control or pre approval process to action plans which would be a sufficient basis for granting some exempt status to all organizations which have an action plan registered.

The existing legislative provisions have been applied by HREOC to grant exemptions on the basis of an action plan where the plan contains sufficiently definite commitments (either in terms of outcomes or processes or a combination of these) and the organization lodging it wishes to secure protection against potential complaints. There have been several important instances of exemptions being granted in the public transport area under HREOC's existing powers on the basis of an action plan.

Similarly HREOC would not favour the lodgment of an action plan being a prerequisite for granting of an exemption, as commitments to actions which advance the objectives of the DDA may be made without being encapsulated in an action plan.

As noted elsewhere in this submission, mandatory reporting requirements comparable to those applying to affirmative action for women were considered in the development of the DDA but rejected in view of opposition by business. Consideration could be given in

the course of this inquiry to the possibility of requirements to develop and report on the implementation of a DDA action plan at least for government bodies.

### *How have voluntary action plans influenced decisions on what is or is not unjustifiable hardship?*

There are no instances to date of court or HREOC decisions where the issue of the relevance of an action plan to decisions on unjustifiable hardship has arisen. Business and government submissions may provide better information on how organisations are making their own assessments on these issues.

### *Could industry self-regulation play a greater role in managing disability discrimination? Should the DDA be amended to facilitate industry self-regulation? How?*

HREOC sees potential for industry codes and procedures, as well as other regulatory regimes, to take a greater role in eliminating and providing remedies for disability discrimination.

The existing temporary exemption power provides one means for DDA recognition of these approaches and HREOC intends to encourage industry bodies to make greater use of this power for this purpose in future. However, in HREOC's view consideration should also be given to adding to the DDA more explicit provision for self-regulatory and co-regulatory mechanisms such as are provided in more recent Commonwealth legislation, for example in the area of telecommunications. The other side of this point is that inclusion of disability access elements into other regulatory regimes would be likely to expand the effectiveness of the DDA. HREOC does not consider it appropriate for disability access and inclusion to be in any sense HREOC's exclusive sphere of authority.

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

HREOC may comment further on this issue after considering views in other submissions. Compared to other legal processes, there are very few formal requirements for discrimination complaints. Complaints do need to be put in writing but people who have difficulty with this can ask Commission staff to assist. Complaints can now also be made by email.

In some circumstances HREOC can also assist complainants to find other supports they might need, like an interpreter or advocate. A network of disability discrimination legal services was funded by the federal Attorney-General's Department from the outset of the legislation and there are also specific legal services focused on mental illness, HIV/AIDS and intellectual disability.

Surveys of people who have used the complaints mechanism indicate that most people find HREOC's conciliation service accessible and valuable. Relevant data is referred to

for example in HREOC's *Review Of Changes To The Administration Of Federal Anti-Discrimination Law: Reflections on the initial period of operation of the Human Rights Legislation Amendment Act (No.1) 1999 (Cth)*, available at www.humanrights.gov.au/complaints_information/review/index.html .)

Some have also found the process to be stressful and time consuming and at times unable to deliver the sort of outcome they were looking for. Some of these concerns can be, and are being, met by continually improving the quality of the service. However, these concerns support the need for examination of means for achieving the objects of the DDA other than by relying on complaints from people who have experienced discrimination, and also the need to achieve the maximum impact from those complaints which are made.

### *What are the advantages or disadvantages of overlapping State and Territory and Commonwealth complaints systems? What factors affect the choice of jurisdiction? What can be learnt from processes in other jurisdictions?*

Comments relevant to this question have been made earlier in this submission in relation to issues of overlapping legislation more generally. HREOC may comment further on this issue after considering views in other submissions.

### *Has the introduction of the Federal Magistrates Service led to improvements in the hearing of complaints?*

As noted above HREOC has published a review of experience to date with handling of discrimination complaints through the FMS.

### *What scope is there to use representative actions to achieve systemic change?*

Use by disability community organisations of the representative action procedure has been limited to date. A number of important cases have involved representative actions but others with equally broad systemic significance have been brought by individuals. In some areas covered by the DDA cases, a successful complaint will almost inevitably have a systemic impact whether it is brought on an individual or representative basis. Access to a public transport service, building, automatic teller machine, or world wide web page, becomes available to everyone with the same needs once it has been achieved for one person. In these instances there is little additional benefit in using the more complicated provisions for representative actions.

There may be more advantage in use of the representative procedure in areas where outcomes in individual complaints are not being reflected in broader systemic change. There have been suggestions that this is occurring on some issues in insurance and in education.

### *Should the DDA be amended to allow HREOC and/or other appropriate bodies to initiate complaints?*

When the Disability Discrimination Act was introduced there was provision for the Commissioner to pursue discrimination issues as if a complaint had been lodged. This power was seen as highly important by disability community organisations, partly because of their own limited resources.

However, the "self-start" power as originally drafted had some technical defects which meant that in practice it went unused. It was removed when the machinery provisions of the DDA and other federal anti-discrimination legislation were revised in 1999. Although issues may remain regarding the consistency of this role with HREOC's role in handling complaints, any actual or apparent conflict of roles must at least have been reduced with the legislative changes which meant that the Commissioner is no longer responsible for conciliation of complaints and that HREOC no longer makes decisions as a tribunal. It would be timely to consider whether and how a self start role could be reinstituted.

### *Is there sufficient publicity for complaints and outcomes?*

HREOC publishes summaries of conciliation outcomes including in its Annual Reports, on its website, and in its recent report on the first ten years of the DDA. More high profile publicity for complaint outcomes achieved through the conciliation process is only undertaken or attempted with the agreement of the parties so as not to discourage parties from entering into conciliated agreements. Complaints which have been resolved through the courts or the former HREOC tribunal role have not been subject to the same constraint and some of these have achieved national media publicity (*Scott v Telstra* regarding telecommunications access for deaf and speech impaired people, *Finney v Hills Grammar School* regarding access to school education, and *Maguire v Sydney Organising Committee for the Olympic Games* regarding information access) which is otherwise difficult to generate for disability discrimination issues and in particular for positive resolution of these issues. (For links to these Commission decisions see www.humanrights.gov.au/disability_rights/decisions/comdec/comdec.html .)

### *How effective has HREOC been as an educator? How could its effectiveness be improved?*

HREOC will await submissions from other parties before commenting further on this issue.

HREOC conducted a significant community information program to publicise the DDA in 1994 with a budget of $700,000. Evaluation indicated that, while the program was effective in increasing awareness of the existence and application of the DDA, this increase was from a very low base and awareness remained low even among specific target audiences including employers and people with a disability.

HREOC does not have and does not expect to have in the immediate future funds to conduct a further large scale information campaign in this area, although it intends to continue information provision within available resources, including through co-operation with business organisations and through low cost distribution of its own information and information from other sources through its Internet site.

As noted elsewhere in this submission most effect in gaining public attention for disability discrimination issues has been through complaint outcomes in a small number of cases involving Commission or court decisions and through public inquiries.

### *Has HREOC's contribution to public policy in relation to disability discrimination been effective? How could its effectiveness be improved?*

HREOC will await submissions from other parties before commenting on this issue.

### *What are the respective roles of HREOC, the Attorney-General's Department and the Department of Family and Community Services in relation to disability discrimination policy?*

HREOC's major policy roles on disability discrimination are exercised through

- making decisions on exemption applications and negotiating with interested parties in this context
- negotiating outcomes through and in connection with complaints
- contributing to standards development processes
- conducting public 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? How could the process be improved?*

One of the major means for promoting awareness and compliance with the DDA has been the conduct of public inquiries. These have been conducted at HREOC's own initiative; in response to selected complaints raising systemic issues; on exemption applications; and at the request of the Attorney General.

The public inquiry process does not guarantee a successful outcome, and will not be appropriate for every issue, but it can have several benefits. It enables broad community participation in discussion of important policy issues. It may enhance the prospects for agreed resolution of issues (including issues which have been or could be the subject of complaints) by gathering a wider range of information, perspectives and options. It may also secure publicity both for discrimination issues and for positive outcomes.

Public inquiries under the DDA have been conducted with modest resources, using the internet as far as possible to gather and publish submissions, and supplementing this with

face to face hearings where required to gain more information or pursue resolution of issues.

The fact that a complaint involves a matter of public interest does not by itself mean it needs a public inquiry by HREOC. In many cases the standard HREOC complaint handling process may be just as or more appropriate for resolving the particular complaint.

The need for broader community input sometimes makes a HREOC public inquiry approach desirable, but it may often be equally or better able to be addressed by disability organisations seeking input themselves before the making and during the running of complaints – through the websites that most peak organisations now have and through on line discussion groups, for example.

The need for public exposure of an issue as part of using the complaint process in an effective political strategy is obviously one of the things that may make a HREOC inquiry and report desirable for complainants. But there is no legal reason why disability organisations cannot make public the fact that they have made, or are considering making, a complaint, as part of their strategy.

Whether that will improve the prospects for resolving the issue or not is a matter for organisations to judge for themselves.

The major limitation on greater use of the public inquiry process outside the complaint context has been one of resources.

### *What changes are likely to affect people with disabilities and the role of the DDA in the future? Is the DDA well placed to meet future challenges?*

A basic challenge to the effectiveness of the DDA is its restricted scope as discrimination legislation rather than as more general human rights legislation.

One aspect of this already referred to is the limited reach of the substantive provisions of the DDA compared to its objects in relation to equality before the law. Limitations which are likely to have even broader impact than this arise from the fact that the DDA only offers legal remedies for inequality in those circumstances which it defines as involving unlawful discrimination.

Thus for example the DDA offers remedies for people who experience discrimination in employment, but not for lack of adequate home care services to enable a person with a physical disability to get out of bed and dressed to go to work. It offers remedies for discrimination in education, but not for lack of adequate early intervention services to ensure that children with disabilities arrive at school with an equal or effective opportunity for participation.

These wider human rights issues are within the scope of HREOC's functions under the DDA and the HREOC Act to inquire into and report on. However, apart from the more limited effect of powers to publicise issues and seek to persuade public opinion as compared to legally enforceable rights, available resources mean that exercise of these functions is very limited relative to the scale and scope of issues worthy of examination.

Within the scope of discrimination legislation, there are also issues presenting challenges.

Development of new technologies presents new opportunities for achieving access and participation for people with disabilities but can also present new barriers. Consideration of access issues is often not built into development of new products and services with the result that people with disabilities are disadvantaged for one or more product cycles in having access to capacities available to other Australians.

Issues in this area arising from information and communications technologies are discussed further in HREOC's report on access to electronic commerce and related services (available at www.humanrights.gov.au/disability_rights/inquiries/ecom/ecomrep.htm ) and in a discussion paper on access to telecommunications services, to be released shortly.

Advances in ability to use human genetic information also present potential challenges. These issues are the subject of current consideration by the Australian Law Reform Commission; HREOC's submission to that inquiry is available on the HREOC and ALRC web sites.

A broader challenge relates to the fact that HREOC's policy activity under the DDA has initially been concentrated principally on issues where broad gains can be achieved. These have mainly been in areas of physical and communications accessibility, rather than in the more subtle or diffuse forms of discrimination which disability discrimination has in common with other areas of discrimination such as race and sex discrimination. Delays in advancing accessibility issues, at least to the extent of getting an initial round of standard setting complete, have postponed a shift in focus to these even more difficult agenda items but clearly these areas of discrimination also require addressing.

### *Do you have any suggestions about how to improve the overall operation of the DDA?*

As discussed in other parts of this submission HREOC continues to view development of disability standards in appropriate areas as an important means for improving the operation of the DDA. As also discussed, however, standards will not always be possible to achieve and may not always be the most appropriate mechanism.

As noted already the temporary exemption power has potential for significantly greater use than it has had to date in managing transitions from discriminatory to non-discriminatory practice, including as a means of managing the interaction between the DDA and voluntary codes and standards.

HREOC would also support provision of a greater range of regulatory tools under the DDA including a more direct and positive power to certify other codes and standards. This might involve the same power as is involved in granting exemptions but more positively described. Alternatively or additionally it could involve provision for regulatory action by government and parliament, through a revised power to prescribe laws for the purposes of DDA section 47 and through addition of a power to prescribe non-statutory codes.

As noted elsewhere it appears timely to examine reinstatement of HREOC's power to initiate consideration of a matter under the DDA as if a complaint had been received.

This is not, however, to presuppose that legal enforcement action is the only or principal means for achieving the objects of the DDA. A critical gap in the machinery for achieving these objects appears to be the lack of any coordinated or large scale mechanism for ensuring that employers, service providers and others with responsibilities under the legislation have ready access to information on practical solutions to access and inclusion issues, and any systematic government support for research into access and inclusion issues where clear solutions are yet to be identified (including for the purposes of standard setting).

### *Are you aware of approaches in other jurisdictions (in Australia or overseas) that work better than the DDA?*

Detailed regulatory provisions equivalent to DDA disability standards entered into force in the United States considerably earlier than has been the case here, under the American with Disabilities Act and also under legislation regulating specific areas such as the Air Carrier Access Act and the Telecommunications Act. Experience with the apparently successful development and implementation of these provisions has influenced HREOC's view in favour of development of disability standards rather than relying purely on open ended discrimination provisions. HREOC also favours consideration of specific accessibility rules for equipment procured by government, including infomraiton and communications technology, as is in place in the US under the Rehabilitation Act 1973.

This is not however to presuppose that all aspects of the US experience can or should be applied here. As noted elsewhere the Americans with Disabilities Act definition of disability provides a model to avoid rather than to follow. Some of the US provisions regarding employment including in relation to requests for information also appear excessively prescriptive and potentially counterproductive.

### *What Australian and international evidence is available on the extent of employer discrimination towards persons with disabilities? How should the effectiveness of the DDA in eliminating employment discrimination be measured?*

Reports leading to the legislation (Discussion Paper on National Employment Initiatives for People with Disabilities: Report of the Labour and Disability Workforce Consultancy, AGPS 1990, p.3; Employment of People with Disabilities: Report of the Senate Standing Committee on Community Affairs, Commonwealth of Australia 1992) and the second reading debates on the Disability Discrimination Bill indicated a range of barriers to equality of opportunity in employment intended to be addressed by the legislation, including:

- discriminatory attitudes or lack of awareness leading to direct discrimination
- existing rules and procedures having disadvantageous effects on people with disabilities
- physical barriers in premises and equipment
- barriers in information and communication.

HREOC is not aware of any recent and comprehensive information on the extent of employment discrimination.

Complaint figures under the DDA obviously do not represent the whole size of problems of discrimination, since there are many reasons why a person who experiences discrimination might not complain. However, complaint statistics do give an important indication, in that disability discrimination presents the largest number of complaints received by HREOC, and other Australian discrimination agencies report similar experience.

Comprehensive evidence on the effectiveness of achievement of the objective of elimination of discrimination in employment is not available but such evidence as HREOC is aware of is not encouraging.

Overall employment rates for people with a disability do not appear to have been improved markedly since passage of the DDA.

Representation of people with a disability within Commonwealth employment has in fact decreased, as indicated by the Australian National Audit Office report *Equity in Employment in the Australian Public Service* and by Australian Public Service Commission reports.

As already noted this has not been because of a lack of complaints.

Meaningful quantitative data on complaint outcomes through conciliation and costs in achieving those outcomes is not reasonably available in view of variations in statistical methods between complaint handling agencies and changes in counting methods by HREOC itself during the life of the DDA.

### *Is there evidence of any counter-productive effects of the DDA on employment of persons with a disability, at the firm, sectoral or economy-wide level?*

HREOC is not aware of any evidence of counter-productive effects occurring to this point. Such effects might be expected from inflexible or unrealistic requirements, but the limitations provided for by the DDA on the basis of unjustifiable hardship and the inherent requirements of the job were intended to avoid this.

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

HREOC does not have specific information on this issue.

### *What influence is better access to public transport likely to have on people with disabilities entering the workforce?*

Some estimates on this issue were contained in the Regulation Impact Statement for the Disability Standards for Accessible Public Transport.

### *How have the terms 'inherent requirements', 'unjustifiable hardship' and 'reasonable adjustment' been interpreted in employment?*

HREOC's Frequently Asked Questions material on employment (available on the HREOC website) seeks to summarise Commission and court decisions on these issues.

### *What are the costs of 'reasonable adjustments' in employment? Who currently bears these costs? Who should bear them, and why? What impact, if any, do they have on competition?*

See comments on costs of reasonable adjustment more generally made earlier in this submission.

As already noted, the Inquiry is encouraged to consider the effect of costs of reasonable adjustment (and current limits of public sector support for people with disabilities or employers to meet those costs) on competition in the labour market, rather than restricting consideration to possible impacts on competition in other markets.

### *What are the advantages and disadvantages of developing disability standards for employment?*

While the existing provisions of the DDA making discrimination in employment unlawful provide a high degree of flexibility, they also carry a high degree of uncertainty and lack of specification of rights and obligations. This may operate to the detriment of both people with a disability and employers and to the detriment of effective and efficient achievement of the Commonwealth's objectives in passage of the DDA.

Potential problems arising for employers may include

- costs of legal or other expert advice to determine meaning of obligations
- costs in management and staff time and other adverse productivity effects where disputes arise due to lack of clarity of rights and responsibilities
- litigation costs where conciliation processes are unable to resolve disputes, which experience indicates is more likely to occur where the legal rights underlying a dispute are unclear
- costs in damages or other unanticipated liability where discrimination occurs because an employer lacked effective advance notice of the meaning of obligations and required measures for compliance, in particular in cases where an element of "reasonable adjustment" is required.

Potential benefits for employers from continued uncertainty of obligations might include a low likelihood of facing complaints and hence low perceived need to take compliance action since potential complainants are likely to be equally uncertain of their rights. This approach, however, is not consistent with the objective of elimination of discrimination as far as possible, which is endorsed by business representatives and to which the Commonwealth must be regarded as committed by the passage of the DDA.

People with a disability face similar potential problems of lack of definition of rights to equal opportunity in employment, which may

- affect their ability to expect respect for those rights in practice, in particular where effective equal opportunity requires an element of reasonable adjustment ; and
- present barriers to effective redress where discrimination occurs.

These include potential costs of enforcement action in the Federal Court.

Some benefits may arise for a person with a disability as a complainant in a particular case from the current lack of definition of rights and obligations, to the extent that it may be possible for a complainant to persuade HREOC or the Federal Court to interpret the DDA in a manner more favourable to that complainant than would have resulted from standards or other mechanisms.

HREOC's view based on experience to date is that occasions when such benefits to a complainant occur will be rare and that present uncertainty of rights and obligations in this area imposes net detriment on people with a disability.

Problems arising for government (in addition to difficulties in its capacity as an employer) appear to include

- reduced effectiveness in the achievement of the objectives set out in the objects of the Disability Discrimination Act through lack of clarity regarding what is meant by and required for the elimination of discrimination

- efficiency costs through over-use of Commission, Federal Court, legal aid and associated resources to process disputes which could be either avoided or simplified by clear specification of rights and responsibilities
- the undesirable policy outcome of making important rights and responsibilities unduly dependent on administrative discretion.

Despite these problems identified with the existing position, extensive work for negotiation of disability standards on employment failed to produce a consensus to move forward to recommend standards for adoption. One issue was that, while most participants in the process agreed that prescriptive standards were not appropriate, the principle based draft standards which were produced instead were not seen by all parties as delivering sufficient outcomes. Employer representatives also expressed a preference for voluntary standards rather than a further level of regulation.

In the absence of standards, HREOC has indicated publicly a view that the exemption mechanism under section 55 of the DDA, in conjunction with appropriate EEO, workplace diversity or other relevant policies and procedures and/or industry codes, appears to offer significant potential for promoting the objects of the DDA and increasing certainty for employers and other relevant parties. Use of this mechanism depends on applications by or on behalf of employers rather than being a matter for initiation by HREOC action.

### *What are the current educational outcomes for people with disabilities in different types of education and training?*

HREOC does not have detailed information on this issue but expects that some statistical indicators should be made available in submissions from education providers to this inquiry.

### *How has the term 'unjustifiable hardship' been interpreted in education?*

The major decisions under the DDA are those of HREOC in *Finney v Hills Grammar School* and of the Federal Court upholding that decision. (The HREOC decision is available at www.humanrights.gov.au/disability_rights/decisions/comdec/1999/DD000080.htm; the Court decision is available at http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/658.html .)

In that case the principal reason for the finding that unjustifiable hardship had not been demonstrated was a finding that the school had overestimated the modifications to its premises which would be likely to be required to accommodate a student with spina bifida and thus had overestimated costs likely to be incurred. However, the decisions make clear that consideration of unjustifiable hardship issues in education is by no means restricted to financial issues and in particular that any issues of educational benefits or detriments have to be considered.

In the Federal Court the school seeking review of the HREOC decision in this case referred to cases under the Queensland AntiDiscrimination Act. The Court said:

> The School also referred to other cases in which expenditures of $41,000 and $4,500 were considered to have amounted to unjustifiable hardship: see *L v Minister for Education* [1996] EOC 92-787 and *K v N School* (Qld ADT, 7 January 1997, unreported). No assistance can be gained from these cases which turned on their own facts and the particular circumstances of the School and the complainant.

### *What are the costs of 'reasonable adjustments' in education? Who currently bears these costs? Who should bear them, and why?*

Quantitative information on these issues may be expected to become available from current processes towards a Regulation Impact Statement for draft disability standards on education, being coordinated by the Department of Education Science and Training.

### *How do different definitions of disability for different purposes influence the effectiveness of the DDA in relation to education?*

HREOC may be in a better position to comment on this issue after considering other submissions.

### *How effective has the DDA been in reducing harassment in education?*

As already noted, complaints have been rare directly regarding harassment.

A number of discrimination complaints however have involved claims that schools failed to take effective action against bullying and harassment of students with disabilities but then punished the student with a disability for retaliation. The draft Disability Standards seek to give greater emphasis to the duty of schools to have effective policies and measures in place to prevent harassment rather than relying only on DDA complaints after the event as the means of dealing with this issue.

### *What are the advantages and disadvantages of developing disability standards for education?*

It does not appear possible to set standards for non-discriminatory education which would specify the required outcomes to the same degree as for access to buildings. However, HREOC sees benefits in standards which set out more fully and clearly the principles to be applied and which give some indications of required performance. There would clearly be some advance in these respects compared to the current position under the DDA if standards were adopted in or close to the form of the draft education standards currently being considered.

This form of standards will not resolve all issues itself but it should provide a clearer basis for formation of policies by education providers and for discussions between providers and students or parents in individual cases, so as to reduce the need for access and inclusion issues to result in DDA complaints; and if complaints are made standards should assist in resolving them.

Apart from reduction in potential legal costs in arguing about the meaning of discrimination provisions, greater clarity of obligations in this area implies time saved in making decisions and thus a reduction in the time during which a student may be falling behind his or her peers and missing out on educational opportunities, as well as reduction in time and stress spent by teachers.

### *Has the accessibility of public transport improved since the DDA was introduced? What more remains to be done?*

It is difficult to give a comprehensive picture of the level of improvement in public transport access since the introduction of the DDA, pending commencement of publication of reports to the Australian Transport Council on progress in implementing the Disability Standards for Accessible Public Transport. It is to be hoped that further quantitative information becomes available during this Inquiry.

HREOC's understanding however based on available information and informal indications is that:

- Close to 25% of publicly operated metropolitan buses are now accessible
- Close to 20% of privately operated metropolitan buses are now accessible
- Accessibility of non-metropolitan buses is substantially lower but has begun to be implemented with around 6% now accessible
- 7% of metropolitan taxis are accessible nationally and 9% of non-metropolitan
- Close to 100% of metropolitan rail carriages provide some degree of access even if not in full compliance with the Standards
- The figure for non-metropolitan rail carriages is lower but still exceeds the first 5 year 25% target.

Rail station access is more difficult to quantify but appears also to have exceeded 25% for physical access in all jurisdictions either for independent or assisted access.

Accessible tram acquisition commenced later than for other transport modes but is at 100% for Sydney's small fleet and will reach 20% shortly for the much larger Melbourne fleet.

Issues where further progress is required include:

- Continued implementation of accessibility for buses, trains, trams, rail stations and tram stops to meet the targets in the standards

- Improved coordination at local and State levels to ensure accessible transport services are matched with accessible local infrastructure including bus stops and access paths connecting with rail stations
- Improved performance monitoring and other measures (potentially including improved economic incentives for introduction and operation of accessible vehicles) which may be identified as effective in relation to taxis to deliver the requirement of equal response times for accessible taxis
- Means of providing access for passengers using wheelchairs regarding regional and rural air services.
- To this point (perhaps paradoxically in view of the relative expenditure involved) less clear evidence appears of progress in relation to information access issues than regarding physical access issues.

### *How has the term 'unjustifiable hardship' been interpreted in the provision of public transport?*

There have not been any court decisions under the DDA specifically regarding the application of unjustifiable hardship to transport issues.

The only HREOC decision on this issue was *McLean v. Airlines of Tasmania Pty Ltd* (available at www.austlii.edu.au/au/cases/cth/HREOCA/1996/37.html .)
Mr McLean uses a wheelchair. He cannot wheel this himself, or get into or out of it without assistance. He complained that Airlines of Tasmania would not allow him to travel unaccompanied. Mr McLean, who had previously travelled unaccompanied on large domestic airlines, alleged that the airline had discriminated against him on the grounds of his disability. The airline argued that their aircraft was very small with an aisle too narrow for a wheelchair, inappropriate emergency exits and equipment and, because it seated only 19 passengers, no flight attendant to assist Mr McLean. Mr McLean stated he was willing to risk being left behind in an emergency. The Commissioner considered that his unaccompanied presence might endanger the crew, the other passengers and even rescue workers. On balance the Commissioner considered that the airline's discrimination against Mr McLean was not unlawful as his presence on the flight would impose an unjustifiable hardship.

To this point therefore there have not been any decisions under the DDA on other aspects of unjustifiable hardship regarding the extent of obligations to make physical adjustments to public transport equipment and facilities.

Under the NSW Anti-Discrimination Act there was a decision by the Administrative Decisions Tribunal (*Moxon v Westbus*) that a bus operator had established the equivalent unjustifiable hardship defence under that Act – on the basis that local government infrastructure made operation of low floor buses impracticable and that retrofitting of high floor buses with hoists would be unduly expensive and would also involve excessive potential for delay to services. This decision was however reversed by an appeal panel of the same Tribunal on the basis that consideration of each of the factors relevant to establishing unjustifiable hardship had not been adequately set out. (See

www.lawlink.nsw.gov.au/adtjudgments/2001nswadt.nsf/webvieweod1 for link to this decision. ) A final decision on whether unjustifiable hardship did or did not exist in this case is not available.

### *What are the costs of 'reasonable adjustments' in public transport? Who currently bears these costs? Who should bear them, and why?*

Estimates of costs and benefits for implementation of the Disability Standards for Accessible Public Transport were set out in the Regulation Impact Statement for those standards. A further Regulation Impact Statement indicated reductions in costs on the basis of implementation of recommendations from the technical review of the standards. Some of the benefits from provision of accessible services were found in the RIS to flow to transport operators including through increased patronage. However, other benefits were cross-sectoral, including facilitation of increased employment participation. There appears to be a case for public sector assistance for private sector accessibility efforts on this basis.

### *What impact do you expect the Disability Standards for Accessible Public Transport to have on discrimination in this area?*

In the area of physical access HREOC expects on the basis of current experience that the standards should achieve their purpose at or better than the rate indicated in the compliance schedule in the areas of bus, train, tram, ferry and larger aircraft services (with the exceptions that some smaller bus operators relying on second hand vehicles may take a few years longer than the timetable to comply, and that dedicated school bus services which are exempted from the standards will become accessible only in the course of general fleet replacement or in response to needs identified by particular complaints).

Identification and commencement of implementation of appropriate solutions for long distance coaches has been slower than for buses (including because of concerns regarding the compatibility with road safety requirements of passengers in coaches traveling in their own wheelchairs rather than in fixed seats, and need for technical development to identifying other means of feasible and dignified boarding and carriage). However HREOC expects that these issues will be able to be resolved such that the standards timetable should also be met for most coach operators.
Some issues have also emerged with experience regarding stability of mobility aids in buses and possible needs for improved restraint or securing methods. These issues are currently being considered by operators in consultation with the community.
Smaller aircraft are exempted from the physical access requirements of the standards because of constraints regarding available space, although remaining subject to the general provisions of the DDA. Some operators have given undertakings in the context of temporary exemption processes to seek to improve access to these aircraft as far as possible over time.

One possible area of concern regarding aircraft relates to increasing use of medium sized aircraft, which are not exempt from the Standards but in which there appear to be difficulties in accommodating people who cannot bend their legs or for other reasons have difficulty in being lifted and fitted into restricted seating space. While it may be an unjustifiable hardship to require an operator to use a larger aircraft than the traffic will bear (for a major operator as much as for a smaller airline which only uses small aircraft exempt from the standards), HREOC is concerned that some people in regional Australia (in Tasmania where alternative modes of transport are limited) may be denied mobility by choice and configuration of aircraft. This issue may require attention in future review of the standards.

In the area of physical access to taxi services, the standards take a different approach to that adopted for other modes. Rather than requiring all taxis to be accessible they require only that response times for accessible taxis should by the end of the first five years be the same for accessible taxi bookings as for other taxis bookings. Requiring all taxis to be accessible was assessed as prohibitively expensive when the standards were developed and as not required to achieve equal access (at least to booked services).
Indications to HREOC's inquiry were that if a fully accessible taxi fleet is required to provide equal access to services this would still require significant economic support from government to achieve.

HREOC conducted an inquiry in this area in 2001-2002 which raised concerns about how far this target was being met or was likely to be met. A number of jurisdictions have adopted revised performance monitoring and other measures recently, but it remains to be seen how far these will be effective to secure reasonably equal access to taxi services.
Outside of physical access, the requirements of the standards are less detailed. This means that although achieving non-discriminatory access and service in areas such as communications access and staff interaction with passengers are expected to be far less expensive than addressing physical access issues, monitoring of progress in these areas will be particularly important as well as challenging.

### *What lessons can be learnt from the process of developing the Disability Standards for Accessible Public Transport?*

The catalyst for development of a national strategy on accessible public transport was people with disabilities making complaints under the DDA. However, complaints alone were not sufficient to achieve large scale national change towards accessible public transport. What was effective was that once complaints had highlighted the issues, both the disability community and the industry and government players involved were prepared to move on to seek resolution of issues through co-operative processes rather than confrontation. Operators wanted certainty about what were their obligations and about how long they had to comply. In return they were prepared to commit themselves to very substantial measures to achieve access over time.

In turn, to get those commitments, disability community representatives also had to be prepared to negotiate, about how long processes of change would take as well as about the substance of changes to be made.

To be able to negotiate effectively, disability community representatives needed to have good processes of consultation in place, to ensure that they were drawing on the widest possible expertise and representing the widest range of views. This required resourcing of community processes by government, which was provided through the Attorney-General's Department.

The co-operative and consultative nature of the development of the transport standards was a most positive feature and in HREOC's view explains why the standards were being widely implemented by many transport providers even before they entered into force legally.

However, there was a very long delay (over six years) from when transport ministers approved the standards in principle to when the standards were finally approved by the parliament.

Some of this delay involved coming to terms with Regulation Impact Statement processes, with which there is now more experience.

Substantial delay also resulted from concerns which arose regarding the appropriateness of some technical elements of the standards and a need for review of these. In particular this related to some elements referencing Australian Standards which were developed for buildings rather than specifically for transport.

The initial draft of the standards sought to avoid this problem by including some specifications developed more specifically for public transport purposes. These however were replaced by references to existing Australian Standards because of concerns at the time that provisions developed specifically for the transport standards had not been subjected to the same degree of research. All concerned in the process in 1995-96 were anxious to achieve certainty through standards as soon as possible but in hindsight a more rapid and possibly more appropriate result might have been achieved by spending additional time and resources at that point in further research and consultation on the technical provisions of the standards as drafted rather than looking to referencing Australian Standards from another environment to resolve these issues.

The development of standards for access to premises has taken an approach consistent with this lesson, that is in spending considerably longer in discussions towards a draft with a view to resolving issues before the Regulation Impact Statement stage and hopefully to achieve entry into force more rapidly once a draft is agreed on than occurred for the transport standards.

However, it is clear that development of any DDA standard will be a very substantial process in the time and resources required. Keeping a DDA standard up to date with

technical developments and changes in other codes also presents complex and time consuming issues, as has been seen already with parts of the transport standards which reference now outdated editions of Australian Standards. These issues suggest that (consistent with the approach recommended by Office of Regulation Review's Guide to Regulation) in any area where a standard is being considered there should also be consideration of whether other approaches which are provided or could be provided under the DDA would be more appropriate. These approaches include use of the existing temporary exemption power but could also include other means for recognition of other codes and standards for DDA purposes.

### *Has the DDA improved access to public premises so far?*

Some specific evidence of improvements in access to premises is provided in information published by HREOC on complaint outcomes and in action plans and reports on their implementation lodged by service providers.

HREOC is not aware at this point of any statistical information on the proportion of Australia's built environment accessible to people with disabilities as at 1993, 2003 or intervening points. Any such data would clearly be useful in evaluating progress to date and as a benchmark for further progress. HREOC anticipates that the RIS process for the proposed disability standards on access to premises will produce some of this information.

### *How has the term 'unjustifiable hardship' been interpreted in access to premises?*

There have only been two Commission decisions specifically regarding unjustifiable hardship and access to premises.

In *Druett and Cooper v New South Wales* (available at www.humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000050.htm ) the Commissioner found that it would have imposed unjustifiable hardship to achieve accessibility of all NSW jury rooms by 1994 given the commencement of the DDA only in 1993. He referred in this context to plans and actions put in place to achieve accessibility of NSW courts over time.

In *Cooper v Holiday Coast Cinemas* (available at www.austlii.edu.au/au/cases/cth/HREOCA/1997/32.html ) the Commissioner said:

> I am of the view that the phrase should be interpreted broadly. I am of the view that it is appropriate not only to look to the complainants themselves but also their families and to other persons with disabilities restricting their mobility who might, in the future, be able to use the respondent's cinema. In the same way, in terms of the effect of the order on the respondent, it is appropriate for me to look at the hardship that might be suffered by the shareholders of the respondent; its employees; and also its current and potential customers. The latter groups of

> people are particularly important in terms of financial hardship from an order forcing the cinema complex to close.
>
> I am of the opinion that, to impose considerable further borrowing and expenditure to be carried out in the very short term, would add to the stress of the respondent's financial position. I agree … that obtaining finance in the amount of $100,000.00 in the very short term would be difficult.
>
> On the other hand, the figure of $100,000.00 involved in installing the platform stairlifts (the actual expenditure is likely to be substantially less than that) is something that a company can plan for and is likely to be able to be amortised without too much difficulty even in an economic environment involving considerable competition from down the road.

This decision indicates a view that it would be an unjustifiable hardship to impose costs which would force a business to close but that substantial costs short of this may be justifiable.

For the purposes of this inquiry, it is relevant to note that in referring to issues of financial resources available and financial impact of making an adjustment, the DDA does not presuppose or impose a completely level playing field approach for businesses. There is some scope to take into account the more limited ability of small business in particular to afford adjustments. The Productivity Commission's views on what degree of variation in requirements for different businesses on hardship grounds is appropriate in terms of between competition policy are awaited with great interest.

### *What are the costs of 'reasonable adjustments' in access to premises? Who currently bears these costs? Who should bear them, and why?*

Quantitative information in this area will be examined in the course of the regulation impact statement process for disability standards on access to premises.

### *What impact do you expect disability standards for public premises to have on discrimination in this area?*

HREOC supports the desire to have a DDA Standard covering access to premises. Such a Standard would achieve clarity and a high level of certainty, for both the building industry and people with disabilities, which this area clearly needs. At present it appears that many developers fail to make buildings accessible because they do not understand clearly what "DDA compliant" means. HREOC supports the proposal that the most effective way of achieving this involves a revision of the BCA to achieve consistency with the DDA.

Improved access provisions which are coordinated between revised building law requirements and a DDA disability standard should result in significant reduction over time in the proportion of Australia's building stock which is inaccessible, as new

accessible buildings are constructed and as new work on existing buildings is required more reliably to provide for accessibility.

The rate of change in accessibility achieved by these means depends on the natural replacement and upgrade cycle for different buildings. (Discussion in the development of an access to premises standard to this point has been on the basis that additional costs of providing access in the context of new construction or of significant new work should not create major disincentives to undertaking new construction or new work. Further material on this issue may emerge in the course of the regulation impact statement process.)

This will still leave to be dealt with issues of accessibility of existing buildings which are not otherwise planned to undergo significant upgrades.

The Accessible Public Transport standards set timetables to apply to public transport facilities such as railway stations which it is intended will continue to apply in addition to requirements to make new premises accessible and to upgrade premises in the course of significant work in accordance with the proposed access to premises standards (although it is proposed that the technical specification s of the transport standards should be replaced in relation to buildings by those of an access to premises standard).

For existing premises not covered by other disability standards, the existing provisions of the DDA are expected to continue to apply, so that upgrading access may be required in response to complaints and subject to the unjustifiable hardship defence.

Disability standards on education as currently drafted do not contain specific additional requirements to achieve accessibility of existing schools. However the obligations set out in the current draft (like the existing provisions of the DDA) would require attention to accessibility of existing facilities rather than relying only on obligations arising under an access to premises standard in relation to new construction and new building work.

### *How effective has the DDA been in eliminating discrimination in the provision of goods, services and facilities?*

Many of the complaints brought under the DDA regarding access to premises have been about shops and shopping centres, bars, restaurants, and other places where goods and services are obtained. A smaller number of complaints have been made about discrimination in the way services are provided.

It is less clear how far complaint outcomes in relation to access to retail premises and other venues including entertainment venues represent changes across the Australian economy.

Some areas of provision of goods, services and facilities show clear success in achieving or moving towards non-discriminatory practice.

Public transport issues are discussed elsewhere in this submission.

There has also been notable success with some aspects of telecommunications, in particular with the provision of TTYs for deaf and speech impaired people on the same basis as standard handsets; with aspects of banking services through adoption of industry standards for accessibility of ATMs. EFTPOS, internet banking and automated voice response systems; and in broadcasting with negotiations close to finalized for significant increases in captioning.

### *How has the term 'unjustifiable hardship' been interpreted in the provision of goods, services and facilities?*

In *Scott v Telstra* (available at www.humanrights.gov.au/disability_rights/decisions/comdec/1995/DD000060.htm) the President of HREOC thought that unjustifiable hardship should be determined by: (1) identifying what magnitude of difficulty would confront the respondent (from the point of view of the respondent and the objective bystander); and (2) establishing whether or not imposing the relevant obligation was justified by the benefits of fairness that would come from imposing it. The President accepted the calculations of the complainants as being the more accurate indication of the financial impact the respondent would experience. He applied these calculations to the test outlined above and found that the hardship involved in a loss which the respondent would suffer, equivalent to 0.04% of its annual domestic billings and which could be recouped by a 30 cent charge on all subscribers, was not unjustifiable in all the circumstances, in particular to provide telecommunications access to tens of thousands of people who would otherwise lack this access.

In *Maguire v SOCOG* (available at www.humanrights.gov.au/disability_rights/decisions/comdec/1999/DD000150.htm ) HREOC found that a cost of $17,500 for 200 braille copies of the Olympics ticket book, compared to an overall budget in the billions, could not amount to unjustifiable hardship relative to the effective denial to the complainant and others similarly situated from the lack of a Braille version.

In *Maguire v SOCOG no. 2* (available at www.humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000120.htm ) HREOC found that making the website concerned accessible would have involved less than one percent additional costs had it been incorporated into the original design, and that although the cost and difficulty of addressing access issues at a later stage would be greater, the respondent could not rely on its own delays in taking accessibility issues seriously to argue that unjustifiable hardship would be imposed. The fact that SOCOG was a major undertaking with significant government backing was relevant to the finding that no unjustifiable hardship would be imposed by the expenditure involved.

In *Milner v Odyssey House* ( available at www.austlii.edu.au/au/cases/cth/HREOCA/1998/29.html ) HREOC, after finding that the complainant had not been discriminated against on the basis of his disability, went on to find that it would have imposed unjustifiable hardship on the respondent to admit the

complainant to the residential facility concerned. This was because of findings that meeting the complainant's needs would have required employment of additional staff and that the respondent did not have the financial resources for this, as well as the impact which changes to the respondent's program to meet the needs of a person with the complainant's disability would have on other participants in the program.

In *Holmes v Northern Territory* (available at www.austlii.edu.au/au/cases/cth/HREOCA/1997/40.html ) HREOC found that an action requested in relation to provision of a service (release of a patient's file) would impose an unjustifiable hardship because it would present an unreasonable risk to staff health and safety.

### *What are the costs of 'reasonable adjustments' in the provision of goods, services and facilities? Who currently bears these costs? Who should bear them, and why?*

HREOC does not have detailed information in this area at this point

### *Should the DDA be amended to allow for the development of disability standards for the provision of goods, services and facilities?*

As noted elsewhere in this submission HREOC supports provision being made for standards across the same range of matters as are covered by the general provisions of the DDA. This does not involve any conclusion that standards should necessarily be introduced in any particular area, only that it should be possible to make standards if and when this is decided to be appropriate, noting that the making of standards would require both further government decision and parliamentary approval.

It is possible that making of DDA standards on telecommunications could provide a means of co-ordinating DDA and telecommunication regulation requirements similarly to the process of development of standards on access to premises in conjunction with the revision of the building code.

### *What has been the impact of industry-based codes of practice on discrimination in this area?*

HREOC sees considerable scope for industry codes of practice (similar to the banking industry accessibility standards) in reducing discrimination, including in conjunction with the temporary exemption process. This could include provision under an industry code for industry specific dispute resolution procedures as well as substantive measures. To this point however HREOC is not aware of experience in industry codes of practice addressing disability discrimination issues.

***How effective has the DDA been in eliminating discrimination against people with disabilities in relation to accommodation, land, clubs and sport?***

## Accommodation

Accommodation complaints have overlapped with those made under the access to premises provision of the DDA, covering issues such as hotel room accessibility. The accommodation provision also extends to premises which are not necessarily open to the public, such as rental accommodation, as well as accommodation specifically for people with disabilities.

Complaints have been made regarding accessibility of public housing under this provision as well as under the goods, services and facilities provision. Complaints have also been made regarding access to aged care facilities for people with medical or other support needs, and regarding refusal of leases for disability accommodation or disability organisations (for example organisations supporting people with HIV).

As discussed below, however, this area is one which shows most clearly the limitations of the DDA as a discrimination law rather than one which guarantees fundamental human rights more broadly. No strategy has yet been found to use the DDA effectively to ensure adequate levels of provision of accommodation for low income people with disabilities, or people with particular support needs, or young people with disabilities to prevent them being consigned to aged care.

## Land

Complaints in this area have been limited. No complaints under this provision were recorded in 2001-2002 or 2000-2001. HREOC has not given issues in this area the same priority as issues which have been raised more strongly in complaints.

## Clubs

The number of complaints made specifically under the clubs and associations provision of the DDA has not been large. The clubs and associations provision remains important, however, because it confirms that the DDA is about equality for people with disabilities in all aspects of social life rather than only in economic activity (i.e. employment and access to goods and services). In 2001-2002, 16 complaints out of 870 were made under the clubs provision.

Some access to premises complaints have also involved premises of clubs and associations.

It should be noted that the coverage of the DDA extends to clubs and associations generally rather than being limited to licensed clubs and incorporated associations.

## Sport

The number of complaints regarding sport has been relatively small. No complaints under the sport provision of the DDA were recorded in 2001-2002. The previous year there were 4 sports complaints recorded out of 789 total.

However, participation in sport is obviously an important aspect of participation in Australian life for many people including people with disabilities. Complaints which have been made have dealt with issues including access for children with disabilities to sports programs; issues about rules preventing use of assistive devices (such as golf buggies) by participants with a disability; and ability of people with limited vision to participate safely. Results in this last type of case have depended on the circumstances: in one case a motor racing driver with limited vision was found able to participate safely while in another a competitive cyclist was found to present too great an increased risk of collision to himself and other participants.

### *How has the term 'unjustifiable hardship' been interpreted in the provision of accommodation and for clubs and incorporated associations?*

No court or HREOC decisions are available addressing the meaning of unjustifiable hardship specifically in these contexts. Other submissions may provide more information on how this concept has been applied in practice by organisations.

### *What are the costs of 'reasonable adjustments' in the provision of accommodation and for clubs and incorporated associations? Who currently bears these costs? Who should bear them, and why?*

HREOC does not have detailed information to provide on these issues at this point.

### *Should disability standards be developed for accommodation?*

HREOC is aware of a desire by a number of organisations representing people with disabilities for disability standards under the DDA to be developed in relation to accommodation.

There would be little difficulty in demonstrating that there are problems to be addressed in relation to accommodation for people with disabilities, including

- physical accessibility, visitability or adaptability;
- affordability;
- abuse and neglect of some people with disabilities living in institutional settings;
- availability of a range of appropriate accommodation options for people with needs for support in relation to accommodation rather than institutional settings being the only accommodation available; and
- occurrences of direct discrimination on grounds of disability including refusal of accommodation.

However there would be substantial issues to be addressed in demonstrating that DDA standards on accommodation would be the most effective and appropriate means for addressing these problems.

## Physical accessibility

Physical accessibility of short term accommodation (hotel, motel and similar premises) is already within the scope of the standards on access to premises being developed.

Availability of rental accommodation which is accessible, or at least visitable by people with disabilities or adaptable for access, could be a suitable area for consideration of development of standards, and is not within the scope of current work on standards regarding premises open to the public. However, using the power under the DDA to make standards on accommodation for this purpose faces some difficulties. To be effective, standards would need to apply to buildings being designed and constructed, rather than only to their being rented out after construction – but in many cases it will not be clear at this stage whether a dwelling will be owner occupied or rented. It is not clear that owner occupied dwellings can be considered as covered by the concept of "accommodation" .

To the extent that regulatory developments are required to promote accessible and adaptable housing, it may be more appropriate to consider use of other instruments such as the Building Code of Australia and development approval powers rather than DDA disability standards at least in the first instance.

HREOC's understanding of relevant aspects of current discussions towards a revised Building Code of Australia and a disability standard on access to premises is that the Building Code of Australia will call for accessibility for common areas of all class 2 buildings (flats) but a standard will deal only with these areas in flats used for rental purposes, so that the BCA will have greater impact on the issue in practice than the standard.

## Affordability

Issues of availability of affordable accommodation (whether through public or private sector provision) do not seem to be within the scope of the DDA or of standards that could be made under the DDA.

As a matter of general administrative law it is clear that standards made under the DDA

- must be consistent with the objects of the DDA (although they may change particular rights and responsibilities by comparison to the existing unlawful discrimination provisions, either to increase or decrease them); and
- must be within the "four corners" of the DDA.

The first of these points has not been found to impose very severe constraints on possible standards to date. For example, in the context of public transport, a wide range of

approaches could have been seen as promoting the objects of the Act, from all public transport becoming accessible within 5 years with no exceptions, to the 20 to 30 year timetable with provision for limited exceptions actually adopted, and potentially to an even longer timetable. The selection between these levels of rights and responsibilities is essentially a political decision (informed by consultations with interested parties and by Regulation Impact Statement analysis) rather than a decision dictated by law.

The second point has more direct implications for what may be contained in a standard under the DDA.

The DDA is a discrimination law. It is not a law providing for a more general code of human rights for people with disabilities.

This does not mean that valid standards need to be confined to the precise concepts of discrimination contained in sections 5 and 6 of the DDA - in fact an obvious purpose for standards is to translate those concepts into more concrete terms capable of implementation and understanding without as great a need for legal interpretation.

The boundaries between non-discrimination and general human rights protection may also be hard to identify precisely. What may appear from one point of view to be an additional specialised service or program for people with a disability may in fact be an adjustment to a more general service to provide access on non-discriminatory terms. This was the basis for the decision in Scott v Telstra, for example.

However, it is clear enough that there are limits to the scope of discrimination law and the DDA even if those limits are hard to specify precisely in advance for all cases.

Requiring enough public housing to be provided to meet the accommodation needs of all those people who have a low income because of disability (their own or that of a family member) would be within the scope of a general human rights provision implementing the right to housing under the International Covenant on Economic, Social and Cultural Rights. The DDA however only requires that whatever public housing is provided should be accessible (subject to possible unjustifiable hardship arguments regarding existing housing stock).

## Abuse and neglect

Some instances of abuse or neglect of people with disabilities in accommodation may constitute discrimination under the DDA. Direct discrimination would be able to be found if abuse or neglect is occurring because of the disability of the people concerned, and people without the disability would not be so treated.

The issue of finding an appropriate comparator to establish that people with disabilities are being treated less favourably than people without the disability are treated or would be treated has been discussed as a major barrier to successful use of the DDA in this area. It is not clear however that this barrier would be insuperable, given the existence of

institutional accommodation in other areas including aged care and corrective services which would enable comparisons of treatment to be drawn. Also, DDA section 5 refers to the way that people without the disability are or would be treated, thus permitting notional comparisons rather than requiring comparisons occurring in fact.

This is not to state that all instances of neglect or lack of protection of human rights of people with disabilities in accommodation can be considered as discrimination for the purposes of the DDA.

In particular, people with disabilities living in boarding houses or similar settings who need some form of support and are not receiving it from the accommodation provider may nonetheless be receiving treatment which is the same as that which is or would be provided to people without the disability.

It could be argued that in these cases there is indirect discrimination, on the basis that people are being required to comply with a condition or requirement of being able to use the accommodation without the support or assistance concerned, and that people with a disability are less able to comply with this condition. However, it could well be argued that (in contrast to a public authority with specific duties to assist people with disabilities) a commercial accommodation provider such as a hotel or landlord is simply not responsible for provision of carer assistance or other forms of support, so that either there is no condition being imposed or that if there is its imposition is reasonable.

Even where issues of abuse or neglect of human rights in accommodation come within the concept of discrimination, it needs to be considered whether standards under the DDA provide the best mechanism for addressing these issues. On question would be whether what is required is better definition of what abuse or neglect does and does not constitute discrimination (which would be a possible purpose for standards), or more effective mechanisms for dealing with abuse or neglect. As noted in the issues paper, DDA standards do not themselves provide any additional monitoring mechanisms beyond the DDA complaint process. DDA standards might therefore not add significantly to procedures which are already available or which could be developed under Disability Services Acts dealing more specifically with standards for services targeted for people with a disability.

## Range of accommodation options

As noted earlier in this submission, HREOC understands that advocates in some jurisdictions where other review mechanisms may be less adequate are considering using the DDA to challenge provision by State authorities of disability accommodation in large institutional settings rather than providing a wider range of accommodation options. Similar challenges in the United States under the Americans with Disabilities Act – which has similar objects although different detailed provisions - have been successful. Testing of the existing provisions of the DDA in relation to this issue through the complaint process appears appropriate before considering whether to embark on a standards development process.

### *Should the DDA be amended to provide for the development of disability standards for land, clubs and sport?*

HREOC supports general provision for standards, but again notes that this would not commit the Commonwealth to proceed with development of standards in any particular area. To this point, specific needs or priorities for standards in these areas have not been identified.

It is however possible that a power to make standards in relation to discrimination in the sale of land could be used in conjunction with the power to make standards in relation to accommodation to provide a DDA standard on accessible and adaptable housing if such a standard were decided to be an appropriate means of addressing issues in this area in future.

Possible needs for standards in the areas of clubs and sport may also be identified over time including in the course of this Inquiry.

### *What effect has the DDA had on discrimination against people with disabilities in the administration of Commonwealth Government laws and programs?*

Commonwealth agencies do not appear to have been a particular target for complaints above and beyond other providers of services. Taking 2001-2002 as an example, no complaints are identified in HREOC's Annual Report as specifically made under the provision dealing with Commonwealth laws and programs. The previous year there were 34 complaints in this area out of a total of 789, or 4% of complaints.

The range of complaints dealt within in relation to administration of Commonwealth laws and programs has included accessibility of government agency premises such as post offices, provision of government information in accessible forms, and accessibility of the electoral process.

Some of these complaints have been made under other applicable sections including in relation to provision of services and access to premises.

### *What effect has the Commonwealth Disability Strategy had on discrimination against people with disabilities?*

HREOC considers this issue more appropriate for comment in the first instance from the Office of Disability and from disability representative organizations.

HREOC has not had the resources to perform any significant evaluation of the effectiveness of the action plans which have been lodged by Commonwealth departments and agencies.

One point to note, however, is that despite a policy requirement in the first version of the Commonwealth Disability Strategy for departments and agencies to develop and lodge DDA action plans, not all departments and only a small number of agencies did so. This does not in itself demonstrate that actions to increase access were not taken (since there may be action without an action plan) but it does raise an issue of how far policy measures should be relied on to deliver results without enforcement measures.

### *Should disability standards be developed in this area, or is the Commonwealth Disability Strategy sufficient?*

It is likely that more specific policy commitments are needed to build on the existing Commonwealth Disability Strategy including in the area of accessible provision of information.

It is not clear whether disability standards are the best means to put these commitments in place. Negotiation of disability standards clearly requires commonwealth policy agreement in any case, and if this is forthcoming it may be questioned whether the additional work to have standards adopted would be justified.

Against this, less than complete compliance with one measurable outcome in the first edition of the Commonwealth Disability Strategy – for all departments and agencies to lodge action plans – may indicate a need for standards so as to provide a complaint mechanism where commitments are not complied with.

HREOC does not see comprehensive standards on all aspects of administration of Commonwealth laws and programs as justified at this point. but some areas of particular need may be identified (including in the course of this inquiry) for standards to provide a clearer legal framework for people with disabilities to enforce their rights and for Commonwealth bodies to refer to as defining the limits and extent of their obligations.

At least the second of these purposes – clarity for Commonwealth bodies on extent of obligations - could also be pursued through the exemption process.

There has been very little use of the temporary exemption power by Commonwealth agencies to date, although the Civil Aviation Safety Authority recently sought and was granted an exemption to ensure that the inherent requirements limitation for employment situations could equally validly be applied to non-employment situations to require aviation licence holders to be able to fulfil the inherent requirements of the role concerned, specifically in relation to safety.

One area where more specific regulatory requirements might be considered is the accessibility of items procured or purchased by government. In the United States, requirements under the Rehabilitation Act 1973 for accessibility in government procurements, and equivalent requirements under some State laws, are regarded as having had substantial impact both within government employment and service delivery and as a means of leading accessibility efforts by private sector providers.

Upfront requirements for accessibility to be at least considered in procurement processes appear likely to have broader and more rapid impact than complaints from individuals affected after the event, and potentially at less cost (since it is generally cheaper if accessible equipment is acquired at the outset rather than equipment needing to be modified or replaced).

### *What are the implications of not allowing Commonwealth Government agencies to claim unjustifiable hardship?*

Section 29 of the DDA, which as noted by the Issues Paper does not contain an unjustifiable hardship exception, applies to the administration of Commonwealth laws and programs. It does not apply to the activities of Commonwealth agencies as employers, so that in this capacity they are able to claim the benefit of the inherent requirements and unjustifiable hardship limitations in section 15. Another important limitation is that section 29 applies only to the administration rather than to the extent of laws and programs. However, it does apply to the administration of Commonwealth laws and programs even when undertaken by non-Commonwealth entities.

To this point, issues requiring adjustments in the course of administration of Commonwealth laws and programs have been approached on the basis that reasonable adjustment is required rather than there being an absolute liability to provide fully equal access regardless of costs and impacts on other parties. Thus for example it has been regarded as acceptable in general to have Braille and other alternative formats of publications available on request within a short period rather than requiring stocks of these to be kept on hand.

This has been because physical access barriers and lack of accessible information have generally been approached as resulting from indirect rather than direct discrimination and thus as being subject to a reasonableness limitation.

### *Should there be any 'reasonableness' test applied to access to Commonwealth laws and programs?*

In HREOC's view the obligations of the Commonwealth and others administering Commonwealth laws and programs would remain more extensive than those of smaller or purely private entities if an unjustifiable hardship limitation were included in section 29.

The resources available to the Commonwealth and the importance of equality among the purposes for which Commonwealth laws and programs are established would mean that unjustifiable hardship would be more difficult to establish in this context. Similar considerations apply to the operation of the reasonableness element of indirect discrimination.

An express unjustifiable hardship provision would however ensure that competing public purposes are not excluded from consideration, without requiring laws reflecting these

purposes to simply override rather than being balanced against the purposes of the DDA. That is, inclusion of an unjustifiable hardship provision in this area might be seen as making the DDA a more flexible instrument.