PRODUCTIVITY COMMISSION REVIEW OF DISABILITY DISCRIMINATION ACT

SECOND SUBMISSION: HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

Contents

Introduction

This submission provides comments on issues raised by other organisations and individuals in submissions and hearings up to 30 June 2003 (that is, up to submission number 172 and in hearings in Darwin, Brisbane, Hobart and Canberra). As anticipated in HREOC's initial submission, comments from other organisations and the public have provided valuable information and perspectives. Industry input to this point has been more limited than might be hoped, other than from the insurance industry and the education sector, but HREOC looks forward to further industry input following from the appearance of the Australian Chamber of Commerce and Industry at the Inquiry's Canberra hearings.

Comments here are made only where HREOC wishes to emphasise, add to, or take issue with comments in other submissions. This document does not seek to provide a summary of all points of other submissions in particular where the same or a similar view is presented in HREOC's initial submission. It should be noted however that there is extensive common ground between HREOC's initial submission and those from State and Territory anti-discrimination authorities in particular. These agencies support the importance of the DDA and HREOC in providing national leadership, development of a consistent national approach including through standards, and a national profile and heightened awareness of discrimination against people with a disability.

Effects of the DDA on competition and productivity

Several submissions make the important point, perhaps not sufficiently clearly stated in HREOC's initial submission, that access to competitive markets for consumers is enhanced if discriminatory barriers which exclude people with disabilities are removed. Other submissions (as well as ACCI's comments in the Inquiry's Canberra hearings) support the points made by HREOC that improved access by people with disabilities to employment may have pro-competitive effects in labour markets.

Submissions (for example s165) also emphasise that costs of disability in Australian society are present already rather than being generated by the DDA, and that the issue is how to distribute these costs appropriately and reduce their impact as far as possible both on individuals and businesses.

Particularly interesting analysis and argument relevant to this issue is presented in submission number 120 from Dr J.Frisch. Dr Frisch argues that in principle the DDA enhances economic efficiency as well as social justice but is limited in performance in both areas by uncertainty and incomplete enforcement – i.e. that clearer upfront standards and more reliable enforcement would enhance rather than detract from economic efficiency. He emphasises the importance for overall productivity of maximising use of capabilities of members of society rather than accepting limitations based on given distribution of endowments (including wealth but also including disability). He points to market failures regarding disability including a missing insurance market for the costs of disability, and refers to premiums which people would be prepared to pay rather than bear these costs individually, as identifying an economically efficient level of public expenditure on promoting access and inclusion. Carers Australia also refer in the Inquiry's Canberra hearings to the possibility of a more comprehensive social insurance scheme for costs of disability funded on similar lines to the Medicare levy.

Other submissions (e.g s165) in common with Dr Frisch also refer to issues of externalities as justifying increased public expenditure to promote access and inclusion and reduce needs for reliance on unjustifiable hardship defences, noting that costs of disability otherwise fall on individuals or particular enterprises while many of the benefits of participation would accrue to society more widely.

Submissions also (in common with HREOC's initial submission) point to the costs and market inefficiencies of parallel services required because mainstream systems and facilities are inaccessible (see for example s157).

Submissions also note that costs of providing access will generally be lower if access can be built in at the outset and that this will be promoted by development of standards and codes. Some submissions (s118, 138) also provide references for estimates of benefits of more accessible environments and inclusive markets.

Some submissions argue that access requirements cannot be anti-competitive if uniformly applied. However, as indicated in our initial submission HREOC accepts that uniform regulatory requirements could be anti-competitive if so stringent as to exclude smaller players or new entrants (since a playing field which is not level but equally steep for all may exclude all but the strongest, a point familiar from indirect discrimination law).

HREOC's initial submission referred to a lack of evidence that the DDA is having this anti-comptetive effect, having regard to the flexibility provided by provision for consideration of unjustifiable hardship.

It must be accepted however that consideration is required of concerns raised in submissions by several education provider associations (including s126) that the operation of unjustifiable hardship in that area is too uncertain to provide the flexibility in practice envisaged by the legislation, for schools which have limited resources to meet significant additional costs which are not addressed fully by government assistance funding. HREOC sees a clarification of obligations in the education area rather than their reduction as the appropriate response to this situation, together with expansion or improved targeting of government support to ensure that students with disabilities have access not only to effective education but as far as possible the same choices available to other students.

In this respect it may be relevant to note very extensive payments which have been made within the framework of competition policy to providers in some other industries to offset adjustment costs in moving to more open market access for consumers.

Objects of the DDA: indigenous issues

One submission (s59) proposes that powers and functions under the DDA should be required to be exercised having regard to the needs and circumstances of indigenous people.

HREOC would agree in principle to inclusion of provisions on these lines in Australian legislation generally. An additional measure more directly relevant to some of the issues of access to basic services and services specifically for indigenous people with disabilities, however, might be to include a provision in the ATSIC legislation and other relevant law requiring powers and functions to be exercised having regard to the needs and rights of indigenous people with disabilities. Comments in another submission (s121) on disability standards as being culturally inappropriate for indigenous communities appear to relate to standards for disability services rather than DDA standards.

Several submissions point to very high rates of hearing loss among indigenous people and a lack of identification of or accommodation for children with hearing loss in education.

Although the DDA cannot be used to address lack of effective prevention of hearing loss, issues of lack of effective accommodation of indigenous children with hearing loss would appear highly suitable for lodgement of representative complaints by deafness and/or indigenous organisations under either local discrimination law or the DDA. HREOC is also currently considering possible areas for inquiry regarding particular disadvantages experienced by indigenous people with disabilities.

Statistics and measurement issues

In common with HREOC's initial submission, a number of submissions (s44, 55, 64) note a lack of an adequate statistical picture of the experience of people with disabilities. Some submissions point to statistics on unequal employment outcomes (for example s72). Other submissions (s86) note current processes towards development of more meaningful indicators in the education area. HREOC is not itself in a position to conduct a "state of the nation" audit but agrees that improved indicators of a range of disability issues would be highly useful to inform policy and program activity and to inform public and media discussion of disability.

Definition of disability

Social model?

A number of submissions (s55, 64, 78) criticise the definition of disability in the DDA as adopting a medical/deficit model and recommend a social model of disability (recognising the disabling effect of inaccessible environments, social attitudes etc) be adopted instead. Some submissions (s92, 112) go further to present the use of the label "disability" in equality legislation as self defeating and call for more general equality legislation without using the term disability or specifying particular grounds of discrimination.

The DDA considered as a whole, however, rather than only in relation to the definition of disability, already reflects a social or environmental model of disability, including in requiring change in various social systems and facilities, rather than accepting a medical or deficit model.

Possibilities for including a social or environmental model of disability purely in the definition of disability were considered when the DDA was drafted. However, these approaches were rejected because they risked leaving some instances of disability discrimination outside the coverage of the legislation (for example, where discrimination occurs in a particular case although not typical of general societal barriers or prejudices). Very extensive theoretical debates in the UK on means of incorporating a social model of disability prior to introduction of disability discrimination legislation there only resulted in a definition of disability which (as advised in advance by HREOC to UK authorities and NGOs and as discussed in HREOC's initial submission in this inquiry) has proved in practice much less inclusive than the Australian DDA definition.

The scheme of the DDA in providing for standards of general application rather than relying purely on discrimination complaints was intended to move away from focus on "disability as difference" towards universal design approaches – thus for example every person should be able to benefit from more universally accessible transport services or buildings regardless of his or her relationship to any definition of disability. As indicated in its initial submission HREOC supports expansion of provision for codes and standards on inclusive systems and inclusive design beyond the areas presently provided for in the power to make DDA standards.

Past and future disability

One submission (s150) raises the questions of application of DDA coverage regarding present, past or future disability to episodic disabilities which might not be seen as fitting neatly into a category either of being past present or future.

HREOC however would see episodic disabilities as clearly covered, whether a person is regarded as having (currently) an episodic disability which may have manifested itself in the past and may again in future, or whether the person is regarded as having had an episode in the past which may or may not be repeated.

One submission (s19) argues past and future disability should be deleted on the basis that this gives benefits to people who do not need it. HREOC disagrees. The DDA is not the exclusive possession of people with "real" disabilities however conceived. These elements of the definition of disability only operate if a person is discriminated against, and confer no other benefits, while being necessary to ensure protection in cases such as those regarding cancer survivors or women who have experienced a past episode of post natal depression .

Determination of psychiatric disability

One submission (s150) questions who under the DDA determines whether a person has a psychiatric disability; whether the DDA limits psychiatric disability to mental illnesses only, or whether it is inclusive of other mental health problems; and whether complaints require proof of psychiatric disability, and if so, what kind of proof.

It is possible that in some cases expert evidence and complex argument might be required to establish that a person has a "disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour"; but in practice to date both in HREOC complaint handling and in the courts (even in the *Marsden* case regarding addiction which might be regarded as an exception) the major issue has been whether or not a person has been discriminated against on the basis of a disability, rather than what is a disability.

Extension of concept of disability

Several submissions recommend extension of the definition of disability to include sources of social disadvantage such as disturbed emotions because of past experiences of indigenous people (s59), and homelessness (s68, 108).

Although there are grounds of discrimination not presently covered by antidiscrimination law it does not appear appropriate to HREOC to recast the DDA to provide an all purpose catch all discrimination law.

It is not clear how disturbed emotions because of past experiences could be defined as a disability where no identifiable disorder has resulted (noting that if a psychological or other disorder results then the DDA does apply). If the definition of disability were to be extended in this way regarding indigenous people's specific experiences it is not clear why it would not also be similarly extended regarding people who are affected by other experiences but who may or may not be indigenous (for example combat veterans whether indigenous or not, or parents whether indigenous or not who have lost children in traumatic circumstances but who may not have an identifiable disorder).

Defining homelessness as being in itself a disability on the basis that it is frequently accompanied by, caused by or causes disability however does not seem any more sustainable than defining old age, or status as an indigenous person, or any other source of social disadvantage or disadvantaged health status as being in itself a disability.

Recognition of depression, addictive disorders and obesity

Some submissions also call for specific recognition of depression, addictive disorders and obesity.

The existing DDA definition already covers depression, addiction and obesity, as is noted in explanatory material and complaint reports available on HREOC's website and (in the case of addiction) in Federal Court case law.

Characteristics appertaining or imputed to people with disabilities

One submission (s74) recommends adding to the definition of disability a characteristic imputed to people with a disability to ensure that issues of discrimination based on behaviour are addressed. HREOC does not view this as being able to be considered in isolation from reviewing the operation of the definitions of discrimination and their relationship to defences such as unjustifiable hardship – since some forms of behaviour actually related to some instances of disability, or incorrectly imputed to be related, must be accepted as requiring some differences in treatment.

Assistance animals

Some submissions (for example s76) argue that the requirement for assistance animals to be trained should be removed as it excludes therapeutic pets and animals where a training regime is difficult to identify.

HREOC agrees there is a need for review in the area of assistance animals but does not agree with a proposal to remove the requirement that animals be appropriately trained to assist a person with a disability. Such a requirement appears essential to balance rights of assistance dog users with rights of other members of the community

including children, older people and people whose disability renders them particularly vulnerable to attack by dogs whose behaviour cannot be guaranteed with sufficient certainty.

Definition of discrimination

Duty to make reasonable adjustments

Numerous submissions support specification in the DDA of a positive duty to make reasonable adjustments to accommodate needs of people with disabilities and also of carers, as is also supported in HREOC's initial submission. Submissions point to the range of adjustments which may be relevant – for example flexible work arrangements for people with a mental illness (s150) rather than being confined to issues of work premises and equipment.

Non-segregated settings / most integrated manner of service provision possible

Several submissions (s13, 112) recommend more detailed specification of what constitutes discrimination in disability services. Some submissions raise possibilities in this area by reference to the Americans with Disabilities Act which requires services to be provided in the most integrated manner and least restrictive setting possible.

HREOC agrees that consideration of additional elements in the definition of discrimination may be useful, and may provide a means of clarifying the application of the legislation to some situations (such as disability accommodation) more rapidly than the process of developing disability standards. As with an express provision for reasonable adjustment such a provision would provide useful affirmation of a principle already implicit in the concept of discrimination rather than extending the legal reach of the DDA. This proposal would appear applicable to all areas covered by the DDA rather than only to specialist disability services and facilities. However, it might assist particularly in dealing with concerns regarding the application of the concept of special measures, including perceptions expressed in submissions and hearings that the DDA cannot be used at all regarding specific disability facilities, as well as in dealing with more substantial legal issues of finding appropriate comparators to establish discrimination regarding these facilities.

Material difference in direct discrimination

One submission (s74) notes that the reference to circumstances which are "not materially different" in the definition of direct discrimination may lead to unproductive and time consuming arguments.

It must be agreed that this phrase does not provide any clear test of what circumstances are or are not materially different so as to justify different treatment. This phrase cannot be regarded as providing a defence for justifiable differences in treatment where the disability itself is regarded as making a material difference, since the Federal Court decision in the *Dopking* case holding that the prohibited ground of discrimination could not itself be the material difference in circumstances for the purposes of the equivalent provision of the Sex Discrimination Act. Justifiable

distinctions have to be defended by other means – either by reference to concepts such as unjustifiable hardship and inherent requirements, or to the reasonableness limitation in the concept of indirect discrimination where that is applicable. In these circumstances it is not clear what useful work the reference to material difference does which would not be done by a simpler reference to "the same or similar" circumstances.

Substantially higher proportion in indirect discrimination

This submission also argues that the reference in the definition of indirect discrimination to a "substantially higher proportion" is problematic. It is not clear that this test has in fact caused any substantial problems in practice but as noted in our initial submission HREOC agrees that simplification of the definition of indirect discrimination along the lines of the revised Sex Discrimination Act definition could be useful.

Doubling up of concepts of reasonableness and unjustifiable hardship

Several submissions and evidence in transcripts of hearings refer to confusion in the same issues being covered by the concept of reasonableness in the definition of indirect discrimination and the concept of unjustifiable hardship and refer to a doubling up of defences with differences in burden of proof at each stage. In HREOC's view these arguments have had little practical significance under the DDA to date. Complainants have not, in practice, had to bring evidence negating in advance each element of a possible unjustifiable hardship defence to pass the threshold of showing a case of indirect discrimination either in lodging complaints with HREOC, in HREOC's former tribunal process or in court. That said, a major aim in attempted development of employment standards and current development of education standards has been to better present the relationship between concepts of reasonableness, reasonable adjustment and unjustifiable hardship.

Human rights and discrimination

A number of submissions note in common with HREOC's initial submission that the DDA does not perform the role of all purpose human rights legislation. Some submissions call for enhanced rights to receive necessary supports or treatment (for example s168 in relation to inadequate early intervention services for autistic children).

One submission (s104) refers to the statement in the Productivity Commission's Issues Paper that " a lack of support services, such as funding for a particular therapy or device (such as a wheelchair), may prevent access to employment or education, effectively discriminating against a person with a disability" and appears to interpret this as meaning that, in contrast to advice provided by HREOC to the author, the Productivity Commission views the DDA as covering this situation.

HREOC does not consider that in this respect the Productivity Commission is in fact presenting a different view from HREOC. HREOC's initial submission also indicates that gaps or limitations in support and services have discriminatory results, but notes that the DDA does not define all of these situations as involving unlawful

discrimination. The limited implementation in Australian law of the rights of children with disabilities as recognised under the Convention on the Rights of the Child is not simply a matter of interpretation by HREOC, or of a lack of recognition of and agreement with the views presented in this submission regarding the importance of early intervention and support for children with autism, but a matter of the limited extent of the laws passed by the Parliament.

One submission (s145) argues that the DDA should prohibit competitive tendering for disability services.

It is not clear from this submission, however, why competitive tendering is thought to be inherently adverse to the interests of users of disability services, rather than potentially providing an additional element of accountability, with concerns arising rather from use of competitive tendering only as a means of reducing costs without sufficient focus on improvement of outcomes. Nor is it clear how competitive tendering in the disability services area could be defined as discriminatory given the more general application of this approach to public services.

Submissions by organisations and individuals concerned with multiple chemical sensitivities or environmental illness (s152, 155,160,167) raise concerns regarding use of pesticides and toxic materials and assert that these prevent access to facilities including health care.

While hazardous materials clearly may present access barriers as well as causing disability in some cases – for example cigarette smoke both causes cancer and related disability and presents access barriers to people with asthma – HREOC does not view the DDA as able to provide the principal means of regulating hazardous substances in the environment or in workplaces rather than these issues being dealt with principally by health, environmental and workplace safety regulation.

Coverage of defined areas only

One submission (s93) criticises the DDA for only applying in defined areas and thus implicitly permitting discrimination in other areas.

It is correct that the DDA only applies in defined areas. HREOC's submission indicates some possibilities for expanded coverage. The DDA does not contain an equivalent of the general prohibition of discrimination in section 9 of the Racial Discrimination Act, which states:

"It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life."

Such a provision could be considered for the DDA. However, some cases under the RDA have raised problems regarding the effective scope of a provision which does not define the human rights protected. These issues could present additional difficulties in the disability area, given that the DDA is not based on a specific

Convention such as the Convention on the Elimination of Racial Discrimination which the RDA implements and which provides a non-exhaustive list (in its article 5) of the human rights in respect of which discrimination is to be prohibited. Inclusion of an equivalent of RDA section 9 in the DDA might also be criticised as giving an impression of greater protection of human rights than it would actually provide – since many disability issues clearly require allocation of resources and more specific regulatory and enforcement action rather than being sufficiently addressed by a simple legal proclamation of legal rights. This is not, however, to argue that such a general provision should not be considered and discussed further.

Disability vilification

Several submissions (s62, 101) call for the DDA to cover vilification on the grounds of disability. HREOC does not have a definite view at this point on whether such a provision would be within Commonwealth constitutional power and on how such a provision might operate but agrees that it merits further consideration.

Harassment

One submission (s74) argues that DDA section 37 should apply directly to students harassing students as well as to educational institutions.

It is not clear how a direct harassment provision of this kind would operate regarding younger school students in particular. The draft education standards instead take the approach of giving clearer recognition to the duty of educational institutions to take effective measures to prevent harassment.

The same submission argues that workplace disability harassment should be covered regardless of the employment status of the harasser or person harassed. Similarly it proposes simplified coverage of harassment in the goods and services area apparently regardless of whether the harasser is provider or customer.

The drafting proposed in this submission is clearer than the existing provisions. It is also wider in its coverage: it would apply to harassment of, or by, workplace participants such as volunteers and work experience students, as well as people who are at a workplace as customers or visitors. For such a provision to be introduced there would need to be consideration of the constitutional basis of provisions applying beyond the employment relationship or similar occupational relationships, although in HREOC's view international concern regarding disability and human rights is sufficient for this purpose. There would also need to be consideration of what implications there might be for duties of employers regarding conduct by people in the workplace who are not employees. It is notable however that the Queensland Anti-Discrimination Commission (s119) which has to administer a general harassment provision also supports inclusion of such a provision in the DDA, rather than expressing any concerns about the practicality of such a provision.

Other areas of prejudice

One submission (s105) argues that the DDA fails to address prejudice by parents of other students in classes including a child with a disability, including in relation to

requesting that schools remove children with disabilities or in removing their own children to other schools.

It is not credible to think that a law such as the DDA could or should restrict the ability of parents to move their children to another school for whatever reason. Contrary to the impression that might be gained from this submission, the DDA does cover incitement to do an unlawful act. HREOC however would not see this provision as properly applicable to reasonable actions undertaken in good faith to discuss difficulties in implementation of inclusive education.

Unjustifiable hardship

Deletion of hardship defence?

HREOC does not agree with recommendations in some submissions (s55, 64) to remove the defence of unjustifiable hardship from the DDA, since as indicated in our initial submission some means of managing competing rights and claims is needed. Rather HREOC agrees with other submissions (for example s77) which support the flexibility provided by unjustifiable hardship but call for increased funding or incentives for disability adjustments to reduce the scope for this defence to operate and thereby to reduce both need for litigation and the hardships presently experienced by people with disabilities.

One submission (s108) argues that the defence of unjustifiable hardship should be removed on the basis that exemptions can be applied for, that this would shift the onus of justifying discrimination, and that hardship defences will rarely succeed but simply invite hostility.

As previously indicated the temporary exemption mechanism is not in HREOC's view available or appropriate simply to certify unjustifiable hardship. It may also be unrealistic to expect at least in the case of smaller organisations that situations requiring a defence would be foreseen sufficiently in advance to make an application for exemption. HREOC regards conditional exemptions based on proactive processes as a potentially more efficient way to manage removal of discrimination for large organisations or on a system or industry basis, but would not favour as efficient or effective an approach requiring applications from many thousands of small employers for example.

Unjustifiable hardship defence less final / winner take all

A number of submissions (s74,110) call for changes to the unjustifiable hardship defence so that such a defence should not operate in a winner take all or final manner and should where possible trigger a requirement to apply for an exemption and/or lodge an action plan.

It is not clear how the DDA could empower a court to make orders against a party who has been found not to have done anything unlawful. HREOC endorses however the aim of ensuring that as far as possible the DDA promotes positive action. The reference to action plans in section 11 on unjustifiable hardship was included with this intent.

The unjustifiable hardship clause in the accessible public transport standards (clause 33.7), which was intended to have the same legal effect as DDA section 11 but to draw out relevant factors more clearly, includes a number of provisions intended to promote positive actions being taken as far as possible both by requiring the possibility of actions to achieve access to be considered before a defence is accepted, and by ensuring that positive efforts receive credit. This clause includes the following factors to be referred to:

(3) …

(l) whether compliance with a requirement of these Standards may reasonably be achieved (including by means of equivalent access as provided for in sections 33.3 to 33.5) by less onerous means than those objected to by a person or organisation as imposing unjustifiable hardship;

(m) any evidence regarding efforts made in good faith by a person or organisation concerned to comply with the relevant requirements of these Standards;

(n) if a person or organisation concerned has given an action plan to the Commission under section 64 of the *Disability Discrimination Act 1992* - the terms of that action plan and any evidence regarding its implementation;

(o) the nature and results of any processes of consultation, including at local, regional, State, national, international, industry or other level, involving, or on behalf of, an operator concerned, any infrastructure providers as relevant, and people with a disability, regarding means of achieving compliance with a relevant requirement of these Standards and including in relation to the factors listed in this section;

(p) if a person or organisation seeks a longer period to comply with these Standards, or a requirement of these Standards, than is permitted by the preceding sections on Adoption and Compliance - whether the additional time sought is reasonable, including by reference to the factors set out in paragraphs (a) to (o) above, and what undertakings the person or organisation concerned has made or is prepared to make in this respect.

(4) If a substantial issue of unjustifiable hardship is raised having regard to the factors listed in paragraphs (3) (a) to (p), the following additional factors are to be considered:

(a) the extent to which substantially equal access to public transport services (including in relation to equality of independence, amenity, availability, comfort, convenience, dignity, price and safety) is or may be provided otherwise than by compliance with these Standards;

(b) any measures undertaken, or to be undertaken by, on behalf of, or in association with, a person or organisation concerned to ensure such access.

This longer version of the unjustifiable hardship clause was criticised by some parties as providing additional defences beyond the scope of DDA section 11, although it

fairly clearly does no such thing (given that section 11 would also allow and require any of these factors to be taken into account if relevant). It may be appropriate to consider whether any similar spelling out of the relevance of positive compliance efforts to an unjustifiable hardship defence would be appropriate for the DDA generally.

Exemptions

Several submissions (s55, 64, 78) criticise the presence in the legislation of exemptions generally and call for their removal on the basis that any defences should be required to be established case by case. Other submissions criticise particular exemptions and call for their removal or restriction. Most exemption provisions are discussed in HREOC's initial submission, but not all. Comments on exemptions discussed in submissions are as follows:

Domestic duties in the employer's home

A number of submissions recommend removal of the exception in section 15 for domestic duties in the employer's home (which was not discussed in HREOC's initial submission) Without necessarily supporting its removal, HREOC agrees there is a need for review of the extent of such an exception.

Disposition of land by will or gift

One submission (s74) raises concerns that the exception for discrimination in disposition of land by will or gift operates not simply to safeguard freedom of disposition for donors or testators but also protects discrimination by executors or administrators. This issue was not discussed in HREOC's initial submission. HREOC agrees that review of the basis and breadth of this exception would be justified.

Special measures

The special measures exception is discussed in HREOC's initial submission.

Insurance and superannuation

In relation to insurance and superannuation, HREOC continues to take the view that because the nature of at least most forms of insurance depends on making distinctions, an exception for reasonable distinctions needs to be maintained (rather than insurers being left to rely solely on an unjustifiable hardship defence). Some submissions (such as s72) while accepting the need for a reasonableness exception call for this to be restricted only to cases based on actuarial or statistical data. In HREOC's view however it is possible that there may be some reasonable insurance distinctions where data is lacking. The need for certainty in this area appears to relate rather to further specification of what is reasonable, including potentially through standards or industry codes and procedures.

Prescribed laws

HREOC regards the prescribed laws exception as forming a sensible and necessary

part of a scheme for other areas of regulation to perform some of the work of eliminating discrimination and in fact would support consideration of its expansion for this purpose through section 47 referring to actions in "compliance or conformity with" prescribed laws rather than only in "direct compliance". Such an expansion would clearly increase the importance of consultation on and parliamentary scrutiny of regulations prescribing other laws.

One submission (s112) criticises the degree of consultation conducted with the disability community prior to introduction of regulations to prescribe certain laws.

Without commenting on the specific degree of consultation conducted in prescribing a range of laws in 1999 (beyond noting that as is its purpose the parliamentary process did provide a means for ensuring a degree of debate on proposals to prescribe laws under the DDA), HREOC agrees that consultation is an important element in considering measures which may limit existing rights and obligations, rather than only being required for measures which may be seen as imposing new regulatory requirements.

One submission (s74) recommends that prescribed laws should be required to be reviewed regularly. It may be appropriate to consider whether the power to prescribe laws should be for five years at a time similarly to the temporary exemption power to ensure that the reasons for prescription remain current and that other laws provide for access and equity as far as is feasible (which may change over time including with technical developments).

One submission (s72) recommends that the prescribed laws exemption be amended to further clarify that only prescribed laws are exempt. HREOC however regards the existing wording as being as clear as is possible on this point. The concern in this submission is that complaints are nonetheless terminated as not involving an unlawful act in some situations involving laws which are not prescribed.

This arises where another law creates a power to act and gives no discretion but to act in the manner complained of. For example, there is no unlawful discrimination in refusing to pay medical or other benefits in respect of a particular disability if the legislation giving the power to pay the benefit provides an exclusive list of disabilities in respect of which the benefit is payable and does not include the disability which the person complaining has.

Related to this is the point that the DDA renders unlawful discrimination in the administration of Commonwealth laws and programs. It does not render unlawful or override discrimination in the content of laws.

The situation is different in cases where the other law is not the source of the power which the complainant is seeking to have exercised. In these cases discriminatory actions in compliance with the other law can be complained about, and will be unlawful unless one of the defences under the DDA applies – either the prescribed laws exemption, or other exceptions including those regarding inherent requirements in the employment context or unjustifiable hardship. For example, a property owner has power to admit people to his or her property or refuse admission. If admission is refused because a person is accompanied by an assistance animal and because health regulations prohibit animals on the premises concerned, a complaint can still be made.

The property owner would only be able to rely with certainty on compliance with the health regulation if it were a prescribed law. However, a defence would also be possible that to admit the animal and risk public health would impose unjustifiable hardship. These arguments may be uncertain in their operation, and it may be preferable for discriminatory provisions in other laws to be prescribed if they are justifiable and removed if they are not.

The DDA does provide a mechanism for HREOC to inquire into and report on the consistency of other Commonwealth laws with the objects of the DDA. Notwithstanding limited resources HREOC would welcome suggestions regarding laws requiring review.

Infectious diseases

One submission (s78) recommends removal of the exception for measures reasonably necessary to protect public health in relation to infectious diseases. However, it is not clear how such measures might be permitted in the absence of such a provision, or how the DDA could operate in a defensible fashion if it did not permit such measures. HREOC does not support removal of this exception.

Charitable instruments

In relation to charitable instruments, as noted in HREOC's initial submission this exemption has no apparent practical importance and may be misleading, so that its removal, while not a high priority, could be supported accordingly.

Telecommunications

Some submissions (including s78) recommend removal of the exemption regarding telecommunications. This exemption expired in 1996. Deletion of this exception would have no substantive effect.

Pensions and allowances

Retention or removal of the exemption regarding pensions and allowances, as discussed in HREOC's initial submission, would make no apparent substantive difference since the DDA does not apply to the terms of the Social Security Act, but only to its administration.

Migration Act

HREOC agrees that the exemption regarding anything done in relation to administration of the *Migration Act* should be reviewed.

Combat duties and peacekeeping

HREOC agrees that the concept of inherent requirements ought to be regarded as sufficient in the area of combat duties and peacekeeping exemptions.

Temporary exemptions

Some submissions (including s78) recommend that temporary exemptions be abolished or restricted.

HREOC does not agree with assessments in some submissions that temporary exemptions delay actions which would have occurred as soon or sooner in any event. In particular, this is not an accurate description of events in relation to accessibility of the South Australian and Western Australian public transport systems or accessibility of the Melbourne tram system, where the exemption process clearly assisted in achieving transition towards accessible systems.

HREOC is familiar with but continues not to be persuaded by the views of some organisations regarding the exemption granted to the Olympic Roads and Transport authority regarding disposition of accessible buses. The purpose of that exemption was to avoid creation of disincentives to acquisition of accessible vehicles – by preventing operators of accessible vehicles having complainants and discrimination agencies rather than transport operators decide on which routes such vehicles should operate. For that reason that decision was not conditional on implementation of further measures to achieve access, as all other exemptions in the transport area have been. HREOC continues to regard the decision to grant an exemption in that case as correct and as not in any way removing the legitimacy of the temporary exemption mechanism as a means for achieving the objects of the DDA. As indicated in relation to development of standards, HREOC agrees in principle with submissions that there should be a requirement for consultation before granting exemptions (consistent with HREOC policy and practice under the DDA) so long as such a requirement does not prescribe the form of consultation to be conducted.

As indicated in its initial submission and for the reasons given there HREOC does not agree with views in a number of submissions (for example s78) that temporary exemptions should only be available to organisations which lodge action plans.

Complaint based approach

Numerous submissions refer to problems in using individual complaints to achieve broad social change.

Legal recognition of individual rights is of course basic to the whole legal system rather than being an unusual feature of discrimination law. As with other areas of the law, however, the DDA does recognise the need for individual rights based approaches to be supplemented by other regulatory mechanisms.

Limitations of a complaint based approach are noted in HREOC's initial submission and other submissions. However, it would be going too far to say that the DDA requires discrimination to be eliminated instance by instance. As recognised in other submissions (for example s. 70, 101, 119) some complaints under the DDA have in fact been effective in establishing wider precedents in law and (more to the point) in practice. In particular, the number of key complaints which have driven the process of making transport systems accessible in practice and the development of national standards would be fairly stated as a handful or two handfuls even though, or because,

these represented millions of similar complaints which could have been made. HREOC agrees however with the need to consider means to make access to remedies under the legislation easier.

The complaint based nature of the DDA is most limiting in HREOC's assessment where the result in a single case is less able to drive policy change – in particular in areas such as employment where the number of potential respondents to influence is very much larger than in transport or telecommunications, or in education where issues to be addressed in providing equality of access and participation are more complex and varied than in providing access to transport or buildings.

Evidence of students and parents finding use of the complaint process too daunting is detailed in submission 112. HREOC notes that the material referred to here does not reflect the views and experience of all complainants, as indicated in outcome statistics and HREOC's surveys of complainants, but accepts that there is a need to pursue alternative approaches to change being driven by individual complaints by parents or students, including more effective use of the legislation by representative and advocacy bodies and systemic changes through standards and/or conditional exemption processes.

Lack of determination power without going to court

A number of submissions refer to the loss of HREOC's power to conduct hearings and make determinations on complaints as providing a barrier to use of the DDA and as making use of State legislation preferable.

This issue clearly does influence some complainants in their choice of jurisdiction, although some organisations raising this issue as a reason for limited use of the DDA do not appear to have made extensive use of State based remedies for discrimination either. Exercise of judicial power under Federal law only by judicial bodies is an unavoidable feature of the constitutional position. The introduction of the Federal Magistrates Service provides an attempt to reduce the consequences of this in costs and formality.

Costs jurisdiction in courts

Numerous submissions raise the prospect of costs being awarded against unsuccessful complainants in court as a barrier to use of the legislation.

HREOC's reviews of complaint experience since the introduction of the Human Rights Legislation Amendment Act 1999 indicates that overall the rate of use of the DDA and the rate of conciliation of complaints has not showed significant adverse change in the move from HREOC's costs free tribunal jurisdiction to the system where recourse following attempted conciliation is directly to the court, despite costs being awarded against unsuccessful complainants in 50% of cases by the Federal Court and 64% of cases by the Federal Magistrates Service in the first 2 years of the new jurisdiction. Comparative data in fact indicates that in 2001 there was a rise in the percentage of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the percentage of complaints that were withdrawn. This data suggests that the procedural changes have not resulted in complainant disadvantage

due to increased respondent resistance to conciliation and decreased complainant bargaining power in conciliation. (More detailed information is contained in *Change and Continuity: Review of the Federal Unlawful Discrimination Jurisdiction*, available at http://www.humanrights.gov.au/legal/review/index.html, and *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* (see www.humanrights.gov.au/complaints_information/review/index.html.)

It should also be noted that only a small proportion of complaints proceed to court, and that a complainant is not committed to taking a matter on to court by making a complaint to HREOC. Potential costs in the small number of matters that are taken to court by complainants thus do not provide an adequate explanation for limited use by advocacy organisations of the DDA at the HREOC stage where costs do not apply.

HREOC agrees however that there is a need to ensure that the prospect of costs against unsuccessful complainants does not deter matters of public importance being brought before the courts under the DDA.

A number of submissions support a role for HREOC itself in bringing complaints to the court as a response to this issue. It needs to be noted however that HREOC's current budget would not permit it to risk costs in more than a small number of cases in any year, and that HREOC does not see a complaint initiation power for HREOC as substituting for effective provision for and use of complaint procedures by and on behalf of people with disabilities. A complaint initiation power for HREOC would thus not remove need for consideration of the impact of the potential for costs on the effectiveness of the legislation.

In the context of debate on *Human Rights Legislation Amendment Bill number 1* HREOC accepted that discrimination law matters could not be completely distinguished from other matters arising before federal courts which might have human rights implications, such that discrimination cases should be a no costs jurisdiction while other matters with significant human rights or other public interest content but arising under other laws would be subject to general rules in relation to costs.

However, HREOC agrees that there should be scope for review of the impact of the potential for costs to be awarded, and for options to reduce this impact in public interest matters. This need not involve acceptance that each and every disability discrimination complaint is of such significance that costs should not be an issue, or even that costs should only apply in cases where the complaint is found to be vexatious or lacking in substance. HREOC agrees with the view in submission 112 that only a partial solution would be provided by the ALRC's recommendation for courts to take public interest considerations into account in exercising discretion regarding costs, since parties would still not know in advance how the discretion would be exercised. As indicated by submission 102, however, other possibilities might be found, for example based on certification by or under the authority of the court at an early stage that a case involves an issue of public importance such that normal costs rules ought not to apply. Such certification might be informed by information from HREOC or the Attorney-General.

Time pressure on complainants following termination of complaint by HREOC

One submission discusses pressure on complainants as a result of the 28 day time limit for lodging a federal court application following notice of termination of a complaint. An alternative procedure based on NSW Court of Appeal processes is recommended, with 28 days for lodging a holding summons and 3 months for a full application.

As indicated in a number of submissions there are strong reasons to finalise discrimination complaints with as little delay as possible. It may however be regarded as anomalous that while the HREOC Act provides a "soft" time limit of 12 months for lodging a complaint with HREOC (soft in the sense of only providing a discretion for HREOC to terminate complaints, and relating to the procedurally simple and cost free step of making an initial complaint) there is a hard limit of 28 days for a step which is more demanding in terms of legal process and in relation to the decision whether to accept the risk of a costs order. There might thus be merit in considering the proposal for extension on the time limit for lodgement of complaints with the court. However, as with the issue of costs it may be difficult to establish different rules for discrimination matters from the rules applying to other federal court matters.

Complaints by representative organisations

Several submissions (including s59, 68, 119) propose that representative organisations be able to make complaints without needing to do so on behalf of a particular aggrieved person.

There is already provision in the HREOC Act for representative complaints to be made on behalf of a class of aggrieved persons without needing to identify particular individuals. Representative organisations have not made extensive use of this procedure to date. As noted by one peak disability organisation, a major limitation on the DDA having broader impacts is in the preparedness of disability advocacy organisations and representative bodies to use the legislation (s71). HREOC would be interested to see further discussion of how capacity for organisations to complain in their own right would alter this experience. Direct standing for organisations with an interest in disability discrimination issues in their own right rather than as representatives would raise some procedural issues requiring careful consideration, given that all areas of civil law impose some standing requirements to commence proceedings. There could also be issues of how to ensure that outcomes of such complaints appropriately represented the views and interests of people affected .

Complaints or court proceedings initiated by HREOC

Numerous submissions support reinstatement of HREOC's ability to initiate complaints or court proceedings itself, pointing to comparable powers held by other agencies in Australia including the ACCC, and to functions of discrimination agencies overseas. As noted elsewhere, some concerns are also expressed (for example in s126) regarding possible conflict of this role with the conciliation role. HREOC agrees that this concern would need to be addressed in considering reinstatement of a self-start power.

Delays in complaint handling

Several submissions refer to protracted complaint processes as presenting a barrier to use of the complaint process.

HREOC recognises that even a period of a few months to resolve a complaint (in accordance with HREOC targets for the majority of matters to be resolved within 6 months) can be problematic when a person's employment or education in particular is at stake. However, it is possible that submissions on this point relate either to the very small number of DDA complaints which take over twelve months to finalise, or else to experience with complaint handling in some State jurisdictions, where there are or have been substantial backlogs resulting in delays before investigation or attempted conciliation of matters commences. In some State jurisdictions there are further significant delays at the tribunal stage. This does not reflect overall experience with complaint handling under the DDA by HREOC.

For complaints under the DDA handled by HREOC in 2001-02, for example, 92 percent of matters were finalised within 12 months and the average time from receipt to finalisation of a complaint was seven months. HREOC does not have a statutory time limit for commencing investigation as some jurisdictions do but in recent years complaint allocation within HREOC has met or bettered the statutory targets which exist in other jurisdictions. While, as noted in HREOC's initial submission, it is understandable for some individuals to be daunted by even a relatively user-friendly legal process, or frustrated by processes which are relatively speedy in the context of the legal system overall in dealing with urgent issues, some community discussion appears to overstate the barriers which exist to effective use of the complaint process.

Geographic accessibility

One submission (s87) refers to barriers in accessing a Sydney based complaint service, including perceptions that Sydney based staff may not understand circumstances of regional areas; perceptions of cost of access despite freecall provision etc; and difficulties for people using communication aids.

Measures by HREOC to ensure access across Australia to the complaint process are discussed in HREOC's initial submission.

Although the Queensland Anti-Discrimination Commission and the NSW Anti-Discrimination Board do maintain a small number of regional offices, most people outside capital cities need to use an antidiscrimination agency which is not based in their own town in any event, even if they use the State or Territory legislation. This would remain the position if co-operative arrangements for complaint handling were reinstated, at least so long as all jurisdictions use specialist anti-discrimination agencies for complaint handling, which are not realistically likely to achieve the same degree of direct local presence as more generalist parts of the justice system such as local courts.

Barriers to use of complaint process by people from non-English speaking backgrounds

The National Ethnic Disability Alliance (s114) emphasises barriers to effective use of the legislation by people from non-English speaking backgrounds and calls for an access and equity audit to be undertaken for DDA processes. This submission also calls for HREOC to be resourced adequately to assist complainants from non-English speaking backgrounds.

Many of the barriers NEDA identifies to individuals from non-English speaking backgrounds using the complaint process are also identified in other submissions as affecting other members of the disability community (which of course does not lessen the importance of addressing these barriers).

HREOC does undertake access and equity planning and regular review with a particular focus on its complaint processes. HREOC established a complaints access working group in 1999 to improve the accessibility of the complaint handling service.

HREOC has resources available in community languages and does provide access to interpreting and translating services where required in complaints processes. HREOC would welcome more detailed information and suggestions on current limitations perceived regarding assistance in formulating complaints and regarding information and education.

Use of the legislation by women with disabilities

One submission (s139) points to indicators of particularly disadvantaged status for women with disabilities and argues that these factors make barriers to use of the complaint process more acute for women with disabilities. It also criticises lack of female representation in HREOC's disability policy unit.

Statistics on gender of complainants under each Act administered by HREOC are presented in HREOC's annual reports. For 2001-02 there were 190 complaints by individual females compared to 254 complaints by individual males, reflecting a degree of disparity but by no means a complete lack of use of the legislation by women.

It is correct that at present none of the three and a half staff of HREOC's disability policy unit or the Acting Commissioner is female. However, the Commissioner or Acting Commissioner has been female for six out of the first ten years of the legislation, and for a substantial part of that time women represented an overall majority of the staffing of the unit. Women have been in the majority in HREOC's complaints and legal sections at most points during the life of the DDA, and from the 1999 legislative amendments until May 2003 a female HREOC President was in charge of handling complaints under the DDA. HREOC has had a particular policy focus on issues of access to telecommunications and issues of sterilisation identified by community organisations as issues particularly affecting women with disabilities. HREOC would support additional focus on disability in services specifically directed to women.

Usefulness of complaint process to people with intellectual disabilities

A number of submissions (for example s117) raise concerns regarding the usefulness of the complaint process to people with intellectual disabilities and make recommendations for complaints by HREOC and directly by representative bodies.

When the DDA was introduced the provision for complaints on behalf of a person aggrieved by discrimination, or on behalf of a group or class of persons aggrieved, was seen (together with the provision for HREOC to self-initiate complaints) as a possible means for dealing with barriers likely to arise in particular for people with intellectual disabilities and for people in positions of dependence or vulnerability in relation to an alleged discriminator. Further discussion of reasons for very limited use of the capacity which already exists for complaints by representatives of or advocates for people with intellectual disabilities would be useful.

Investigation of complaints

One submission (s76) calls for a review of the effectiveness of HREOC's complaint investigation powers and comments that HREOC should not be simply a conduit for correspondence.

HREOC's manual and regular training on complaint investigation emphasises the need for an appropriate investigation in each case. It is not clear to HREOC that there is any inadequacy in the powers available to HREOC. HREOC has adopted a range of investigation approaches including the application of a public inquiry approach in a small number of cases. The scale of investigation conducted is more likely to be limited by the need to achieve a resolution of as many complaints as possible within a reasonable time rather than dedicating all resources to investigating one matter for an extended period in the manner of a dedicated Royal Commission. It also needs to be emphasised that there are many matters where no amount of investigation by any lawful means will produce the decisive evidence sought (for example on the true reason for an allegedly discriminatory decision).

Use by HREOC of powers to decline or terminate complaints

Some submissions (for example s88) refer to greater use of the power to decline or terminate complaints by HREOC compared to State agencies as a disincentive to use of the DDA.

HREOC does not have anywhere near the delay in allocating matters for investigation and conciliation that is experienced with some State authorities and has a lower rate of withdrawal by complainants as a consequence. One reason for this is the more extensive and systematic use by HREOC of the power to terminate complaints which lack substance, do not raise an issue of unlawful discrimination, are better remedied elsewhere or do not have reasonable prospects for resolution by conciliation. Whatever the level of resources provided, HREOC regards management of complaint functions in this manner as essential in order to offer an effective service. This includes focussing on complaints where results may be achieved and avoiding waste of time and resources of the parties to complaints, as well as issues of abuse of jurisdiction or of bias which could be seen to arise in proceeding with complaints

which lack substance. Terminating complaints where there is no reasonable prospect of conciliation provides the parties with the opportunity to have access to the courts for effective resolution of disputes without unnecessary delay.

Requirements for conciliation processes

One submission (s56) expresses concern that inaccurate figures may be presented in complaint processes to substantiate unjustifiable hardship, and argues that figures should have to be in sworn statements. It also argues for guidelines in legislation on the nature of the conciliation process.

Formal requirements for material that can be presented in a conciliation conference do not appear consistent with the nature of the process as one which is informal and where essentially the parties are in charge of whether they will agree on an outcome and on what basis. Conciliation processes do not involve determination by HREOC of unjustifiable hardship issues on the basis of evidence presented as would be the case in a judicial process.

One of the advantages of conciliation processes is the ability to adapt the process according to the nature of the matter rather than having completely set procedures to apply – for example some conciliations occur by phone or exchange of letters while others may involve a series of face to face meetings; another area of possible variation is that while conciliation conferences are generally conducted in private, with the agreement of the parties the process could include other approaches such as a public forum.

HREOC already provides information for parties and potential parties to complaints on what to expect in the conciliation process. Legal requirements including those regarding privacy and natural justice already apply to HREOC staff involved. If principles applying to conciliation and further description of what the process is were to be included in legislation (presumably in the HREOC Act which now contains the relevant complaint handling provisions) HREOC would be concerned to ensure that this did not remove existing flexibility in adapting the process appropriately to the circumstances of different cases.

Several submissions express disappointment with HREOC's conciliation role on the basis that complainants had expected HREOC to act as an advocate for them.

HREOC is aware that a number of complainants are surprised or disappointed when they find that HREOC staff including conciliation officers cannot act as advocates for them, and supports the importance of resources for independent advocacy.

Conflicting HREOC roles?

One submission (s78) sees a conflict between current HREOC roles as a source of advice on the legislation and as a mediator of complaints, and recommends that this conflict be terminated through the removal of the conciliation role.

HREOC does not accept that these roles are conflicting.

First, there is administrative separation between conciliation of complaints (by specialist conciliation and investigation staff under the direction of HREOC's President) and the major public awareness functions, including development of guidelines and participation in standard setting by the Commissioner and policy staff under his direction.

More fundamentally, there is not a conflict between advising on what the legislation means and mediating impartially regarding the application of the legislation to facts which may be disputed between parties to complaints. In most cases conciliation involves reaching an agreement without admission of liability, so that a definite determination of the precise effect of the law in the circumstances does not occur. However, one of the roles of a conciliator, which HREOC does not see as involving bias or conflict of roles, may be to provide the parties with information on possible or probable outcomes if an agreed resolution is not reached, since conciliation under the DDA occurs against a background of legal rights and responsibilities rather than in a vacuum.

Concerns are raised in one submission that HREOC capacity to initiate complaints could compromise the confidence of parties in impartiality of conciliation proceedings.

Clearly this is a significant concern which needs to be addressed in considering restoration of capacity for HREOC or the Commissioner to initiate complaints. The separation which now exists between the complaint role of the President and the roles of the Commissioner may provide part of a response to this concern. It must be conceded that there could be difficulties in HREOC seeking to conciliate complaints brought by a Commissioner, although this would not prevent such complaints proceeding to the court either for decision or mediation there. If the Commissioner were in effect acting as a representative complainant on behalf of people with disabilities in such complaints there would also be a need for appropriate processes (which might include public inquiries or consultations) to ensure that outcomes sought reflected the views and interests of the people represented.

Enforcement of conciliation agreements

One submission (s56) calls for measures to improve enforceability of conciliation agreements. It is not clear however what possibilities there are in this respect. Conciliation agreements are legally enforceable by the parties like other contracts. If the terms of a conciliation agreement are not fulfilled it is also possible to make a further complaint and have access to judicial remedies by that means.

Publicity for conciliation agreements

One submission (s80) recommends that confidentiality clauses not be permitted in conciliation agreements and that it be made an offence to propose a confidential settlement. A number of other submissions, without going this far, express concern regarding confidentiality in conciliated settlements.

While HREOC endorses the need for public awareness, to require that every complaint outcome be entirely and identifiably public would clearly serve as a disincentive to resolving matters in some cases.

HREOC seeks to make matters of public importance in complaint outcomes public wherever possible, with identifying details removed where necessary to protect personal privacy and to the extent necessary to maintain the confidence of parties to complaints in the process. There is no legislative requirement on complainants to keep complaint processes or outcomes confidential. HREOC complaint staff raise the issue of whether and how far a settlement should be confidential as one for parties to consider in negotiating. Whether complainants agree to settlements including a confidentiality clause is up to them, although in some cases respondents may be more willing to settle a complaint if the agreement includes such a clause.

Local rather than external agency conciliation

In comments at the Inquiry's Canberra hearings the Australian Chamber of Commerce and Industry support the appropriateness of conciliation as a means of dealing with discrimination complaints but indicate a preference for local rather than external agency conciliation.

The DDA and the complaint provisions in the HREOC Act do already provide for some recognition and encouragement for enterprise or industry based complaint procedures. Under the HREOC Act HREOC's President has power to terminate dealing with a complaint if satisfied that the matter has already been adequately remedied, which may include remedies through an internal or industry specific complaint process. Instances of exercise of this power are provided on HREOC's web site. This still leaves complainants able to pursue matters before the courts if they choose. Legally conclusive recognition of enterprise or industry based processes would however also be possible through the temporary exemption power. To this point industry bodies have not approached HREOC to seek exemptions on this basis. Such exemptions could however be considered if reasonable prospects could be shown that the objects of the DDA would be advanced by this means.

Overlap between Federal and State jurisdictions

Some submissions raise concerns about confusion caused by indistinct lines between federal and state jurisdictions.

HREOC and State authority staff regularly provide advice on these issues whenever it is requested. HREOC is not convinced that choice of jurisdiction presents a major barrier to people lodging complaints, any more than consumer choice in markets should be viewed principally as presenting confusing barriers rather than opportunities.

Standards development

One submission (s50) recommends that consultation be required prior to adoption of disability standards.

HREOC would support amendments to apply requirements for consultation to occur in development of disability standards as well as in consideration of exemption applications, without however specifying the particular form consultation should take as this is likely to vary with the nature of the issue. Current practice in development of disability standards has involved extensive consultation despite a lack of a specific legislative requirement for this to occur. Similarly HREOC consults on applications for temporary exemption although the DDA fails to provide a specific requirement for this. It should also be noted that contrary to what is asserted in one submission (s149) there was substantial public consultation before the DDA itself was introduced.

Several submissions argue that the funding conditions for the Disability Standards Project have required it to support development of standards and not express contrary community views; and that consultation is restricted to national disability peaks and the National Disability Advisory Council.

These comments are not accurate. Project representatives have put forward a range of community views in standards development processes including views opposed to adoption of particular standards. Consultation on standards to date has in fact been very much wider than peak level. A brief description of the process adopted in relation to the accessible public transport standards is included in HREOC's DDA tenth anniversary publication. It is not clear what if any model would be regarded as adequate consultation if this process is not so regarded. However, HREOC does support calls for additional resourcing in standards development processes to ensure that an appropriate research base is available.

Submissions (for example s12) raise issues of the complexity and cost of Australian standards and recommend that DDA standards should provide clear standards without having to refer to and purchase external materials. HREOC agrees that this has been a concern in DDA standards processes to date and that future development and review of standards under the DDA should as far as possible achieve standards which are easy to understand and access.

Submissions (for example s102, 123) also refer to the length and complexity of processes of development of disability standards. As indicated in its initial submission HREOC endorses the need to examine alternatives to development of DDA standards, including use of temporary exemptions and other applicable powers existing or possible under the DDA to endorse for DDA purposes other codes, standards or compliance plans.

Standards as minimum only

Several submissions (s80, 120) call for standards to provide only minimum requirements, with continued capacity to complain being retained for people whose needs do not fit the standards.

HREOC endorses the need for standards to be as inclusive as possible and to make clear that on issues not covered by a standard general non-discrimination provisions continue to apply, so that rights are not inadvertently removed through an issue not being thought of or being able to be agreed. However, where a standard does apply to an issue, action conforming to that standard will not be unlawful even though some

people's needs may not be adequately addressed. For example, any standard on access to premises needs to specify a minimum door width. If standards are to be meaningful it is not feasible to add a requirement that it is also unlawful not to have a wider door if anyone requires it.

Unjustifiable hardship in standards

Some submissions (including s78) recommend that disability standards not provide for an unjustifiable hardship defence.

It is clearly desirable for standards to provide the greatest degree of certainty possible for all parties. However it is also necessary for standards to be able to apply appropriately in diverse circumstances. Whether standards can work effectively without provision for a concept such as unjustifiable hardship depends on the subject matter and on the level of obligations otherwise provided for. It would be possible in some cases to adopt a standard which all parties with responsibilities could comply with without reference to unjustifiable hardship, but only by adopting a lowest common denominator set of obligations and / or providing for extensive detailed exceptions.

For example, no reference to unjustifiable hardship would have been required in the accessible public transport standards, in relation to the time permitted to replace inaccessible buses with accessible vehicles, if the timetable adopted for all operators had reflected the longest replacement schedule for any small rural operator in Australia. HREOC and other parties to the negotiations however did not consider this approach more conducive to the achievement of the objects of the DDA than adopting a timetable which it was recognised most, but not all, operators could meet, with provision for an unjustifiable hardship defence to deal with exceptional cases.

In the areas of employment and education, the key obligation to make reasonable adjustments requires definition of what is reasonable, which requires use either of the concept of unjustifiable hardship or some equivalent concept.

Defences in standards

One submission (s74) argues that standards should not provide defences beyond those provided in the DDA since standards should ensure rather than limit the objects of the Act.

It is inherent in the nature of disability standards that they specify both obligations and limitations on obligations which are not explicit in the existing provisions of the DDA. Whether standards advance the objects of the DDA requires an assessment of the standards as a whole, rather than comparison on a single point of whether the result would be more or less favourable to a complainant than the existing provisions. Thus for example the transport standards in providing a timetable for access give transport providers defences which they might not otherwise have but also define obligations which they might not otherwise have. HREOC regards provision for an unjustifiable hardship defence at all stages of education processes rather than only at enrolment as defensible in the overall scheme of the draft standards in this area and in fact as desirable in order to avoid creating disincentives to admit or enrol students

which would otherwise arise if unjustifiable hardship had to be applied once and for all prior to admission.

Monitoring and enforcement of standards implementation

Some submissions (s55,147) propose a role for HREOC in detailed monitoring of the implementation of accessibility, including matters such as the appropriate fitting of harnesses in accessible cabs and the correct slope of ramps.

HREOC does not regard these detailed monitoring roles as appropriate or realistically achievable for HREOC, other than through the complaint process as a backup to other regulatory and monitoring process. In addition to issues of availability of resources for such a role, HREOC considers a more effective model involves responsibility for accessibility to be incorporated as far as possible into the responsibilities of mainstream regulatory bodies for each subject matter.

One submission (s157) expresses concern that enforcement of the transport standards continues to depend on complaints, and raises issues of complexity of proof of discrimination even with standards in place.

As indicated earlier it is clearly preferable if possible to have standards on particular areas monitored by mainstream regulatory bodies for those areas (as is intended with coordination of building code revision and development of disability standards on access to premises) rather than implementation being driven principally through the DDA complaint process. Current work towards revision of the Building Code, development of an access to premises standard, and introduction of an administrative protocol to promote appropriate local decision making is described in submission 153 from the Australian Building Codes Board.

In relation to transport, however, no transport sector body could be found able to be given responsibility for such an enforcement role. HREOC notes that widespread implementation is in fact occurring by reference to the transport standards rather than people with disabilities having to pursue each operator through the complaint process.

Action plans

Mandatory action plans

A number of submissions call for action plans to be mandatory for government agencies and larger organisations. In HREOC's view and as argued in some submissions (for example s44) an appropriate model for governments to consider as far as their own agencies are concerned is to establish their own requirements and monitoring arrangements, as has been done in Western Australia and NSW under the Disability Services Acts of those jurisdictions, rather than looking to HREOC to perform all roles in this area.

Monitoring of action plans

Lack of HREOC resources to monitor action plans is referred to in several submissions (including s15). However, in comments in hearing transcripts (Maroochy

Shire Council, Brisbane hearings) the point is made that making action plans public permits monitoring by community members and organisations. Several submissions support mandatory reporting requirements for implementation of action plans. Comments in transcripts (Maroochy Shire Council) support HREOC's view that this would represent a disincentive to voluntary lodgement of action plans and would only make sense in a setting where lodgement of action plans was also mandatory.

Effect of action plans

Some submissions (for example s95) raise concerns that action plans may result in dismissal of complaints despite lack of any effective action planned or implemented.

Having an action plan is not a complete defence against complaints; the DDA only provides that an action plan is to be taken into account in assessing unjustifiable hardship issues. Concerns that complaints will be dismissed simply because a respondent has an action plan do not reflect any actual instances of complaint handling decisions by HREOC or by the courts.

Education and awareness

A number of submissions (s62, 64, 67, 90,114) call for improved information and education on the DDA, including

- Information for complainants and potential complainants
- Information for non-English speaking background people
- Information for employers
- Information for business
- Information for local government

HREOC supports the need for effective education and awareness and seeks to achieve these aims within limited resources. HREOC does in fact provide extensive information through its website and publications in print and other formats as well as through use of the media, community networks and other public awareness work. HREOC would welcome both more resources for expanding its educative functions, and suggestions for means of exercising these functions more effectively. This includes possibilities for expanded cooperation with business, disability community organisations, local government, or other agencies in providing information on the DDA and its application and on related disability issues.

HREOC is particularly interested in pursuing partnerships of this kind in recognition of limits on its own resources, expertise and ability to reach people with appropriate information. (For example it is not clear that HREOC has the resources and authority to conduct education for architects and building surveyors on access requirements as recommended in some submissions, rather than its efforts being best spent in improving mainstream building standards which mainstream building education and information processes can then promote.)

One submission (s120) recommends plain English redrafting of the DDA including provision of examples along the lines of the Queensland Anti-Discrimination Act.

HREOC agrees that provision of examples and other plain English drafting approaches could be helpful, and would view redrafting on these lines as having greater benefits in accessibility and simplicity of federal anti-discrimination laws than the possibility raised in the Issues Paper of further consolidation towards omnibus discrimination legislation.

Strategies for disability organisations

One peak disability organisation (s71) suggests that the legislation would achieve greater outcomes through more active strategies for disability organisations including more active use of the complaint mechanism; monitoring of action plans; and development of guides for service providers on best practice.

HREOC agrees that there is room for disability organisations to use the legislation more effectively and has sought to provide assistance and advice to this end.

Disability in the media

One submission (s60) notes limited representation of people with disabilities in mass media, in particular television. HREOC agrees with the view in this submission that these issues may be better addressed through industry codes rather than through the DDA.

Education and awareness regarding mental illness

Several submissions note that more thorough education (including through schools and the media) is required to reduce discrimination against people with mental illness and their families. One submission (s36) compares education to achieve greater awareness and reduced stigma regarding mental illness to the installation of ramps etc as bridges to equal participation for people with physical disabilities.

It may be recalled that HREOC did dedicate a large part of its resources over several years to conducting a national inquiry on human rights and mental illness; however it is not possible for HREOC to maintain this level of activity on mental illness issues given the scale of its resources and responsibilities. The comparison of education and awareness with physical access measures is a useful one. It indicates the importance of education but also the scale of the task. Clearly HREOC is not able to deliver or finance itself all the necessary changes to achieve physical access across Australia and is likewise not able to deliver all of the information and education needed to change community attitudes and awareness regarding people with a mental illness. The Mental Health Council of Australia released a proposal recently for a national Mental Health Commission similar to that established in New Zealand with public education on mental health issues as a major function. The Acting Disability Discrimination Commissioner has written to the Minister for Health and Aged Services supporting that proposal.

Offences

Several submissions (including s76) raise concerns regarding lack of prosecutions for offences under the DDA.

The offences provisions of the DDA are only ancillary to the civil law provisions which are intended to do the major work of eliminating discrimination. Lack of prosecutions for offences may indicate that the provisions concerned are working (by deterring the actions concerned from being committed) – as in HREOC's assessment is the position regarding the offences in relation to HREOC proceedings. In relation to advertisements, it is not clear that an offence with a $1000 fine provided will necessarily be a more effective deterrent or remedy than provision for complaints regarding the same matter as an unlawful act – since there is no $1000 limit on potential damages. Section 3 of the Human Rights and Equal Opportunity Commission Act confirms that "unlawful discrimination" in respect of which complaints may be made includes conduct that is an offence under Division 4 of Part 2 of the DDA. The offence of victimisation carries a more substantial penalty – imprisonment for 6 months – but, as would be expected for a criminal law provision, requires proof beyond reasonable doubt and may therefore also be less practically useful than a discrimination complaint on the same matter.

Equality before the law

A number of submissions (s30, 72, 91, 108) highlight the limited effect of the DDA in dealing with discriminatory provisions in other laws. HREOC's initial submission noted the possibility in this respect of inclusion in the DDA of an equivalent to section 10 of the Racial Discrimination Act, subject to the need to consider how to preserve the operation of beneficial special purpose legislation.

Several submissions (for example s108) call for the DDA to apply to other jurisdictions including criminal proceedings, child protection, and family law.

There would be difficulties in providing for DDA complaints against judicial bodies, including the general immunity of judges from civil suit. More effective means of incorporating duties to avoid discrimination into the duties of courts and other bodies administering other laws might however be possible to identify.

One submission argues that equality before the law issues including overrepresentation of people with intellectual disabilities in the criminal justice system should be a major focus of future HREOC activity. A number of other submissions (s112, 117, 130) also highlight issues in relation to people with intellectual disabilities and the justice system.

Issues in this area, including for people with intellectual disabilities, but also for people with other disabilities including brain injuries, psychiatric disabilities or sensory disabilities are clearly important. Making these issues a major focus of HREOC activity requires however that effective options for action be identified. HREOC intends to continue consulting with relevant organisations with a view to identifying appropriate areas for inquiries and other policy activity.

One submission recommends that corrective systems be required to develop action plans outlining how prisoners with disabilities can expect to access rehabilitation and education opportunities.

HREOC agrees that action plans (either under the DDA or under laws or policies adopted by each jurisdiction) could have important benefits within the justice system

in general and not only in relation to prisons since, as noted in other submissions (for example s91), people with disabilities also experience inequality as accused persons and as victims as well as in other roles in the legal system.

One submission (s91) raises concerns regarding evidence of unequal treatment of parents with disabilities by child protection services (including inadequate access to information and lack of access to supports) but states that the DDA cannot be used in relation to these issues because the person receiving services is the child rather than the parent with a disability.

Although HREOC would not present the DDA as providing a complete remedy it is not clear that the DDA is in fact entirely inapplicable in this area. To the extent that child protection agencies provide services to parents as well as children, complaints could be made regarding discrimination against parents with disabilities in provision of these services. Where children of parents with a disability are removed from their families in circumstances where children of parents without a disability would not be removed, or where other differential restrictions are placed on family life, it would be possible to argue that the child is being discriminated against as an associate of a person with a disability. Removal could also constitute indirect discrimination if it occurs because of factors disproportionately affecting parents with a disability and which could have been addressed by the responsible authority providing supports or services which reasonably could have been provided.

Employment issues

Some submissions (s8,27,135) raise issues of the relationship of the DDA to occupational health and safety laws, including whether more specific OH& S standards could be developed and recognised under the DDA, either through the prescribed laws mechanism or through development of disability standards, to give employers more certainty regarding restrictions which are and are not permitted and to reduce unnecessary exclusion or restrictions on health and safety grounds.

HREOC's initial submission referred to possibilities for coordination between the DDA and other regulatory regimes, including through development of disability standards in conjunction with review of other regimes as with the current access to premises process. HREOC also agrees that the relationship between discrimination law and OH&S law is one of those which may require review in the light of the High Court decision in the *Purvis* litigation.

One submission (s25) raises a concern that a history of having made a workers compensation claim leads to exclusion from work and that DDA does not provide an effective remedy because employers find other reasons for not employing.

Providing some evidence that failure to be employed was for discriminatory reasons does provide a problem in many cases. Any system of legal entitlements however has to require some evidence rather than it being possible or appropriate for the law to assume that if a person with a disability does not get a job this is for discriminatory reasons. The requests for information section of the DDA was intended to deal with the situation described in this submission but as indicated in HREOC's submission this section has not been particularly effective.

Submissions from an employer/recruitment perspective (s29) as well as from the disability community (s83, 90) emphasise the importance of assistance in meeting costs of workplace modifications to provide more effective employment opportunity – including issues such as provision of support workers where required as well as physical modifications to premises or equipment.

A number of submissions (for example s72) support HREOC's view that in considering the relationship of income support arrangements to employment outcomes it is important to take into account needs for support in meeting costs of participation rather than adopting models which only consider disincentives to participation which might be provided by payments through the welfare system

One submission (s74) recommends that the DDA be extended to apply clearly to training and apprenticeships.

In HREOC's view application of the existing DDA employment provisions to apprenticeships is clear in law, but if users of the legislation are not finding this point sufficiently clear in practice this may justify additional provisions to put the position beyond doubt.

In relation to training, there is one decision (*Clark v Internet Resources,* available at www.humanrights.gov.au/disability_rights/decisions/comdec/2000/DD000110.htm) which raises doubt about whether training providers in some circumstances would be considered educational authorities so as to be covered by section 22 of the DDA. It may be appropriate to consider clearer coverage of training accordingly.

Several submissions discuss the interaction between the DDA and industrial law. One submission calls for the DDA to cover awards, enterprise agreements and industrial agreements.

Other than modified wage arrangements recognised under section 47, the DDA does not exempt discriminatory actions only because they are in compliance with an award or agreement. In HREOC's view the terms of applicable awards and agreements will be relevant to but not necessarily decisive of the inherent requirements of a job. There is thus some existing scope to use the DDA to review discriminatory effects or provisions of awards and agreements.

However, it is not clear how a provision applying more directly to awards would work if what is proposed is to make it unlawful for the Industrial Relations Commission and equivalent State bodies to make an award having a discriminatory effect. The Workplace Relations Act itself already has non-discrimination provisions. In keeping with views already indicated by HREOC on the desirability of mainstream regulators for different areas of activity exercising appropriate responsibility for non-discriminatory outcomes in those areas, it may be more appropriate to consider whether non-discrimination provisions in industrial law are sufficiently effective than to seek to use unlawful discrimination provisions of the DDA directly against industrial bodies.

Several submissions (s90, 112) emphasise low rates of pay of people with disabilities (predominantly people with intellectual disabilities) employed in supported employment business services, with 87% earning less than $80 per week. Submissions criticise a lack of use by business services of the supported wage system wage assessment tool, and raise concerns regarding the use of enterprise bargaining in this area having regard to limited capacity of employees concerned. Submissions refer to the recent AIRC safety net decision endorsing need for review of enterprise bargaining and wage fixing in this sector.

As discussed in HREOC's initial submission section 47 of the DDA only permits payment of lower wages on the basis of disability where this is based on the productive capacity of the person, and thus would only provide a defence where a reasonable relationship between productivity and wages can be shown. However, recognising the difficulties of pursuing rights in this area through a DDA complaint process and as a matter of more general principle, HREOC sees it as preferable for issues in this respect to be resolved through mainstream wage setting processes if possible, and thus commends the AIRC for its decision to convene further discussions in this area.

Affirmative action

A number of submissions (s44, 90) support consideration of quotas for employment of people with disabilities as implemented in some overseas nations. HREOC, although agreeing with the need to consider further measures to address disadvantaged employment status of people with disabilities, is not aware of evidence of quota systems working effectively. Other submissions (s70, 101, 119, 129) refer to other forms of affirmative action measures provided for in employment equity legislation overseas, including requirements for reporting and development of plans and policies, which HREOC would see as more promising.

Standards and definition of unjustifiable hardship and reasonable adjustment in employment

Several submissions call for greater definition of unjustifiable hardship in relation to employment.

One submission (s66) discusses the *Humphries* case, which involved several rounds of litigation regarding the existence and basis of duties under the DDA to provide reasonable adjustment in employment, and consumed considerable financial resources as well as imposing stress on participants including the complainant.

It is clear that had employment standards in or near the form of either draft issued for consultation been in force much of the litigation in this matter regarding the meaning and basis of reasonable adjustment obligations in the DDA could have been avoided. HREOC has emphasised since the inception of the DDA that a primary purpose of standards is to reduce the need for litigation to define rights and responsibilities and the history of the *Humphries* case amply demonstrates the need for this to occur.

However as already noted HREOC does not regard it as productive to attempt to progress employment standards further without clear indications of support from

employer and disability community representatives, given the extensive resource commitment required by this process to date, including consultative processes which were in fact extensive notwithstanding assertions to the contrary in some submissions to this inquiry. HREOC's understanding of the present position is that employer representatives regard the content of the draft standards as appropriate and useful but do not support their introduction as regulatory standards. Comments in a number of disability community submissions in contrast indicate continued criticism of the non-prescriptive nature of the standards, although this was not an approach imposed by HREOC but one decided on by consensus among government industry and community representatives in the drafting process.

A preferable approach in this area, and one not involving the large processes and larger process expectations which have grown around development of disability standards, may be to pursue legislative amendment confirming a duty of reasonable adjustment under the DDA and setting out in brief and general terms the extent and nature of that duty.

Education issues

Several submissions (s39,86) raise concerns that the number of students with disabilities requiring specific support far exceeds the number receiving it and that resources provided by government to assist with education of students with disabilities has not kept pace with increased rates of integration. Submissions also raise problems with eligibility for assistance including rigid classifications; failure to include some forms of disability; and time spent in categorising rather than assisting. Several submissions (s46, 86,148) refer in particular to limited public funding assistance available for students with disabilities in non-government schools.

HREOC's initial submission also refers to concerns in this area which have been raised with us. Several other submissions however note the levels of Commonwealth assistance going to some relatively privileged independent schools, albeit not targeted to students with disabilities. It would clearly be a serious concern if priority in allocation of public funds were going to facilities such as additional cricket pitches at elite schools rather than to basic support for students with disabilities whatever school they attend. HREOC is not in a position to assess this or the competing claims of public and independent schools, but is concerned that current arrangements do not appear to be directing sufficient resources to support equal and effective participation by students with disabilities overall.

Some submissions (such as s39), while supporting integration aims, argue that in some cases specialised resources may not be available at all schools and call for education authorities to be the final arbiters of best placement of a student.

The DDA provides for students or parents to complain if denied a choice of school available to other students and parents. Educational authorities can seek to defend these complaints by reference to unjustifiable hardship. Although this defence only applies at the enrolment stage under the existing provisions of the DDA, HREOC views this as a drafting oversight and supports the intention to provide an unjustifiable hardship defence generally through Standards. A defence which is available at all stages however is the special measures exception. Where education authorities make

placement decisions which they consider in the best interests of the student concerned they may seek to defend those decisions by reference to this exception. A means by which education authorities could perform the role of being the final decision maker on placement issues after appropriate consultation, or to ensure that "clustering" approaches are lawful, would be to seek an exemption on the basis of implementing appropriate policies and procedures. No education system has sought such an exemption to date.

Most submissions in relation to education (in common with HREOC's) support introduction of standards as a means of increasing certainty and reducing stress on all concerned in dealing with issues through complaints. Some submissions (s86) however question whether the current draft standards will achieve significant improvements in certainty of rights and responsibilities.

Providers and users of education are clearly in a better position than HREOC to judge whether the draft standards will be effective to deliver significant improvements in certainty of responsibilities and required outcomes. The Regulation Impact Statement process on the draft disability standards for education and accompanying consultations would be expected to give an appropriate opportunity for consideration of these issues.

One submission (s112) states that segregated education provision either in special schools or special units is inherently inferior and discriminatory.

Clearly there is nothing unlawful in provision of education in specialised settings where this is the choice of students or parents. Non-voluntary placement in a specialised setting, i.e. exclusion from mainstream classes or from mainstream schools, would be unlawful discrimination under the DDA, except where inclusion would impose unjustifiable hardship or where placement in a non-mainstream setting can be justified as a special measure reasonably intended to provide access to services etc required because of a person's disability. These exceptions mean that the DDA does not impose 100% inclusion in mainstream classes as an absolute rule, but does require departures from the most inclusive approach possible to be justified.

Child care funding

One submission (s28) raises concerns regarding child care centres raising unjustifiable hardship together with lack of sufficient funding under the Commonwealth's childcare Special Needs Subsidy Scheme (SNSS) as a reason for not admitting children with autism.

Although the application of unjustifiable hardship in this area could be further tested by complaints it would clearly be preferable if the need for complaints and determination of issues of the strict extent of legal liability in this area could be avoided or reduced through provision of further Commonwealth funding to assist integration of all children with disabilities in child care and early childhood education. The recent announcement of increased SNSS funding is thus welcome.

Access to premises issues

Several submissions (for example s19) argue that unjustifiable hardship should not apply to new buildings.

In the development of the access to premises standard it is intended that the application of the unjustifiable hardship concept will be restricted to existing buildings.

Several submissions as well as comments in transcripts raise concerns regarding lack of certainty on what actions in relation to existing buildings may be sufficient for DDA compliance. One submission (s35) suggests the use of the temporary exemption power for this purpose.

The adoption of a disability standard reflecting a revised building code should significantly reduce problems in this area including by providing for improved approval and advisory processes. Pending this, as indicated in HREOC's submission and in previous public statements and decisions, HREOC favours use of the exemption mechanism to support increased access through provision of increased certainty. For exemptions to be granted by HREOC they need to be applied for. HREOC would consider any application for exemption which provided in return some reasonably definite process or actions for improving access over time.

A number of submissions call for standards on access to premises beyond Building Code areas of coverage. One submission (s144) gives the example of inappropriate geometry being used for kerb cuts such that they do not provide effective accessibility.

This issue illustrates limitations referred to in some other submissions of current Australian Standards based processes, and possible needs for DDA standards to be adopted beyond the scope of the building code. Successful DDA complaints have however been made on this issue in some instances although it would clearly be preferable for standards to be sufficiently clear to avoid the expense and delay of accessibility works having to be re-done in response to complaints. HREOC is discussing with other parties involved how best to move on to deal with issues not covered by the building code once the current standards process based on revision of the building code is completed.

Local government submissions (for example s75), while supporting provision of flexibility through the unjustifiable hardship defence, raises concerns regarding the uncertainty of application of unjustifiable hardship and potential liability of local government for permitting discrimination if it accepts unjustifiable hardship arguments.

HREOC is aware that a number of local government bodies have similar concerns.

In *Cooper v Coffs Harbour Council* HREOC decided that a local government body should not be liable for permitting unlawful discrimination under the DDA where council made a reasonable decision on unjustifiable hardship issues even where (as in this case) HREOC took a different view of the hardship issues and found unlawful discrimination by a building owner. However in 1999 the Federal Court reversed that decision, pointing out that section 122 of the DDA in imposing liability for permitting unlawful acts does not contain any reasonableness defence. The court noted availability of a much more restricted general law defence only of an honest and

reasonable mistake of fact, which might apply where a council acted on the basis of incorrect information despite reasonable inquiries, but would not include a reasonable conclusion on hardship issues, based on given facts, with which a court subsequently disagreed.

In response to this HREOC consulted publicly in 1999 on a proposed policy involving exercise of the power to decline to deal with complaints (by the Disability Discrimination Commissioner as the then holder of the power) where a council had adopted a framework of appropriate policies and procedures (including a development control plan or access policy) to ensure outcomes consistent with the objects of the DDA, and an owner or operator of premises had obtained approval to vary the need for full compliance with the DCP or Access Policy from a properly constituted body (including key interest groups) applying the framework. This proposal was not proceeded with. Disability community organisations raised concerns regarding reduction of rights while some industry and government representatives raised concerns regarding a lack of certainty (given that it would still be possible for complaints declined by the Commissioner to proceed to the Court).

Development of standards was seen as a preferable solution. This process has taken considerably longer to this point than was hoped at the outset but is anticipated to deliver greater certainty for all parties.

Pending the adoption of standards on access to premises it would be possible for local government bodies to apply for an exemption to ensure that decisions made by them are not unlawful under section 122. The outcome of decisions on exemption applications clearly cannot be pre-empted here but it is possible that HREOC in deciding on such applications would be persuaded that to grant such an exemption would advance the objects of the DDA where in return a local government agreed to adopt and apply procedures to ensure appropriate decisions; and/or took other measures to promote access in its community (possibly including incentive or educational measures for local businesses as well as local access surveys of the kind referred to for example in Leichhardt Council's submission and which are beyond HREOC's resources to conduct itself).

Car parking eligibility

Several submissions (for example s19) raise issues of eligibility for disability car parking permits.

As with other disability specific entitlements, these issues are not regulated by the DDA or necessarily governed by the same definition of disability.

Transport issues

A number of submissions raise concerns regarding the pace of movement towards accessibility contained in the transport standards compliance timetable. As indicated in HREOC's initial submission however, the standards only provide a minimum and do not prevent operators or governments providing additional resources to accelerate the pace of change to accessibility.

Submissions raise a range of specific technical issues in relation to public transport including safety of pedestrian rail crossings (for example s19). There are processes available for review of these issues including through the Accessible Public Transport National Advisory Committee rather than needing to be dealt with through this inquiry.

One submission (s117) raises a concern that people with intellectual disabilities were not included in the consumer reference group for development of transport standards and thus argues that people with intellectual disabilities were not consulted.

Given the range of disabilities and experience of disability which exists, no workable drafting or advisory body could cover all types of disability: for example although people using wheelchairs were directly involved at the level of the taskforce drafting the transport standards, people with other types of physical disability were not. There were however broad community consultation processes conducted (rather than direct representation at the table being the only form of consultation provided) which did include input from people with intellectual disabilities and representatives and advocates of this sector of the disability community. The standards which emerged may not have addressed intellectual disability issues in detail or extensively (with the result that some issues in this area remain covered by the general anti-discrimination provisions of the DDA instead) but this was not the result of a lack of consideration or consultation. Input on these issues through community representatives and/or through HREOC on possibilities for items to be included when the transport standards are reviewed would be useful.

Some submissions (for example s34) raise transport access issues such as in relation to accessibility of ticket machine controls which are not addressed in the standards. It is important to note that issues not addressed in the standards remain subject to the existing provisions of the DDA and as such can be the subject of complaints.

One submission (s157) raises concerns regarding a lack of processes to coordinate local government and transport provider roles.

In HREOC's view these issues are most likely to be pursued effectively by discussions between local governments and transport providers with the involvement of relevant State government authorities and disability community organisations rather than being capable of being advanced directly by national authorities.

Telecommunications issues

Submissions on telecommunications issues (for example s31) call for up front standards and processes on communications accessibility rather than requiring consumers to achieve change through complaints and exposing industry to consequent uncertainty. As indicated in our initial submission HREOC shares this view. The most appropriate mechanism for developing and adopting codes or standards in this area require further discussion with interested parties (which HREOC is currently seeking to promote) rather than being for HREOC to specify.

Electoral access

Some submissions raise issues of unequal access to electoral processes including for people with physical disabilities or vision impairment.

HREOC has conducted a small scale public inquiry on electoral access and has dealt with several individual complaints in this area which however have produced limited results. The United States has more specific legislative requirements in place requiring accessible polling places to be used unless the responsible officer certifies no such place is available in the district. It may be appropriate to consider such a provision for inclusion in Electoral Acts to give greater specificity to the general application of the DDA in this area

Insurance issues

Several submissions (s45, 83) raise an issue of whether some areas of insurance (in particular workers compensation) should be considered as social insurance rather than subject to the general exception for reasonable distinctions in insurance based on actuarial data.

Complaints and disability community discussion with HREOC have also raised issues of people with disabilities being excluded from employment opportunities because of employer concerns regarding workers compensation. In particular concerns have recently been raised that workers compensation insurance may not apply where an injury results from a pre-existing condition. HREOC is not sufficiently expert in the working of workers compensation systems to assess how far these may be concerns based on perceptions rather than on actual features of workers compensation systems, but is concerned that insurance arrangements should facilitate rather than prevent participation by people with disabilities.

Several submissions refer to experience of people with a psychiatric disability finding travel insurance, income protection or mortgage insurance practically unobtainable, and call for changes to the insurance exemption in the DDA.

It is not clear what changes to the exception for reasonable distinctions in insurance would improve the experience of people with psychiatric disabilities in this area. HREOC considers that improvements may rather be achieved by more effective use of mechanisms provided for under the DDA including complaints, public inquiries, conditional exemptions recognising industry codes and procedures, and potentially by changes to DDA enforcement procedures.

Submission 142 from the Investment and Financial Services Association expresses concern that, despite indications in HREOC guidelines, assessments based on industry underwriting manuals may not automatically be accepted as reasonable, and that a need to justify decisions more individually by reference to medical and other evidence imposes substantial costs.

HREOC accepts that the nature of insurance and the conduct of a viable insurance business requires grouping of risks rather than entirely individualised assessment. However, HREOC has never intended to give the impression that standard industry underwriting practice would automatically be regarded as reasonable on every issue, since, as IFSA notes, standard underwriting approaches may themselves be based on outdated information or assumptions. The proposal however made by IFSA for certification (whether through the exemption process or by other means) for DDA

purposes of underwriting approaches appears to have potential for improved efficiency in dealing with potential disputes.

This submission recommends that the DDA allow for appointment of experts to assist in making determinations on insurance issues.

The legislation currently permits HREOC to investigate in any appropriate manner. The principal constraint on appointment of expert assistance relates to resources. The use of a public inquiry approach has been intended as one means of providing for more extensive expert input (from industry and community sources) than HREOC could afford through commissioned reports.

Information access

One submission (83) recommends that the Copyright Act require publishers to make materials available in accessible formats.

While HREOC understands publisher concerns regarding protection of intellectual property, direct access to digital material (from which in most cases print material is subsequently generated by publishers) would clearly be more efficient as a means of meeting the needs of many people with a print disability than existing systems using permission under the Copyright Act to scan print materials into computer formats. HREOC is participating in discussions on these issues with publishers in relation to access to materials for tertiary education, but the issues also have application beyond this context.

Government procurement requirements

Several submissions (s71,72,122) support introduction of requirements for accessibility in equipment procured by government, comparable to those existing in the United States. HREOC's initial submission supported consideration of similar requirements.

Application of DDA to equipment imported from overseas

Several submissions (for example s76) raise issues regarding uncertain liability of overseas suppliers of equipment imported into Australia.

In the example given – importation for sale of a video or DVD without captions – as discussed in HREOC's submission there is no current coverage by the DDA irrespective of the location of the manufacturer. The DDA covers discrimination in the sale of goods but does not require goods for sale themselves to be accessible.

Any Australian law to deal with this situation would appear to need to address importation or sale rather than attempting to make it unlawful to manufacture items overseas not meeting Australian requirements. HREOC also considers there are more substantial issues in the lack of accessibility requirements for products comparable to those which exist in some overseas markets and in particular in the United States, rather than the major issues being concerned with keeping inaccessible overseas products out of Australian markets. That is, it is likely that in some cases restrictions on overseas competition may also restrict accessibility in Australia, subject to the need to prevent possible "dumping" of inaccessible technology in Australia which

would not be accepted in countries of origin. In particular, HREOC supports application in the Australian market of requirements similar to those in the United States requiring all televisions with screens above a certain size to provide caption decoding capacity.

Deinstitutionalisation policies

Several submissions (s21, 22, 26) argue that policies of closing institutions for people with intellectual disabilities are discriminatory by denying choices to residents and families, at least in the absence of other adequate services and supports.

Deinstitutionalisation policies have not been driven by DDA complaints.

Individuals (people with disabilities or parents) or organisations who consider that government policies regarding disability accommodation involve a discriminatory lack of choice are free to lodge complaints under the DDA. Complaints could involve either a lack of alternatives being provided to institutional living, or the imposition of other models against the wishes of residents. However, as noted in HREOC's initial submission, in either case there would be a number of legal issues to address, including those of identifying appropriate comparators and assessing the applicability of the special measures defence for measures reasonably intended to address special needs.

Conversely other submissions (for example s13) argue that the DDA has not been effective enough in ensuring choice of non-institutional living arrangements.

As already noted, other mechanisms under Disability Services Acts have been used effectively in some jurisdictions in this respect. It may also be appropriate in this context to consider adding specific reference to concepts of the least restrictive setting and non-segregation as far as possible to the definition of discrimination to make clearer the possible application of the DDA to these issues.