VICTORIAN GOVERNMENT SUBMISSION
TO THE PRODUCTIVITY COMMISSION REVIEW OF THE
FEDERAL *DISABILITY DISCRIMINATION ACT 1992*

EXECUTIVE SUMMARY

The Victorian Government welcomes the opportunity to provide comment on the Draft Report (October 2003) of the Productivity Commission's Review of the Federal *Disability Discrimination Act 1992* (hereafter "the DDA"). This submission has been prepared in consultation with all affected State Government departments. It does not seek to duplicate submissions already provided by a number of Victorian statutory authorities; nor does it seek to present detailed arguments and evidence on specific areas of application of the DDA. Rather, it focuses on a number of broad issues that impact on the appropriateness and viability of the mechanisms through which the DDA is implemented.

We note that there has been very limited engagement with State Governments in the course of this review. Given the wide ranging implications for States, we urge the Commission to pay more attention in its final report to processes for early and up front resolution of inter-jurisdictional issues and for maximising cooperative and collaborative arrangements for the ongoing implementation of the DDA**.** Unclear division of responsibilities and communications between State and Commonwealth Governments have considerably slowed the development of a number of key implementation measures and caused continuing confusion for actual and potential users of the complaints processes that underpin the DDA.

The active pursuit of equal opportunities for people with disabilities is a significant priority for the Victorian Government. The *State Disability Plan 2002-2012* (September 2002) provides a framework for proactive efforts to ensure that people with all disabilities are able to participate as fully as possible in community activities. The Plan has three broad goals:

- Pursuing individual lifestyles for people with a disability
- Building inclusive communities, and
- Leading the way by making public services accessible and inclusive.

The Plan also emphasizes the protection of people's rights and the importance of community advocacy. In particular, the Plan calls for government action plans across all departments, and a range of measures to improve access to education, transport and employment.

As the Draft Report notes, the reported rate of disability within the Australian population continues to increase steadily. It is also important to understand the changing composition of this "eligible population" and the nature of the demands and pressures likely to be placed on particular service systems to ensure equitable access. For example, the number of people in Victoria with a severe or profound core activity restriction is estimated to grow by 14% (21,300 people) between 2001 and 2011. A higher proportion of people aged 45 to 64 will fall into these categories. Other critical aspects of the context for operation of the DDA include increased community expectations of access and participation for people with disabilities, the

declining numbers and availability of informal carers and the continued mainstreaming of disability services (as a result of both government policies and social preferences). Together, these trends create increasing pressure on mainstream services to overcome barriers to participation, and increasing exposure to potential complaints.

In these respects, the second decade of action under the DDA may prove considerably more difficult and costly than the first in some areas of operation. This point underscores the argument made in this submission for more clearly defined hierarchies for the application of Disability Standards introduced pursuant to the DDA.

It is also worth noting more explicitly that the DDA is at something of a crossroads with respect to its application across sectors. While early attention was paid to major areas of public sector responsibility such as public transport and schools, current and emerging areas requiring attention impact much more heavily on the private sector, such as housing and employment. While costs of compliance in these areas may be more evenly spread between government and business, as suggested in the Draft Report, the direct and indirect costs to State Governments have in general not yet been assessed in any detail.

In summary, the submission:

- **supports the continued operation of the DDA, in parallel with state based equal opportunity systems,** and a move towards proactive, systemic change through a range of mechanisms including Disability Standards and Action Plans where appropriate;

- **expresses significant concerns about certain recommendations relating to the status of standards** and the potential adverse impact they could have on state law, and opposes proposed amendments that could result in erosion of state powers;

- **advocates for considerably improved processes for gaining high level agreement on Disability Standards,** including cost sharing principles, and cautions against the proliferation of Disability Standards without detailed examination of alternative strategies including voluntary co-regulatory models;

- **supports the proposal to amend the DDA to extend the defence of unjustifiable hardship** and to widen the criteria for determining unjustifiable hardship, and to clarify the relationship between the DDA and other laws;

- **indicates Victoria's willingness to consider a more streamlined shop-front system** to assist potential complainants; and

- **encourages a greater outcomes orientation in the operation of the DDA,** more explicit recognition of a hierarchy of compliance and more scope for flexibility in the implementation of Disability Standards.

The submission notes that the costs of ensuring equal access and participation by people with a disability through various different means have not in general been

well evaluated and documented. In particular, cost-benefit analysis has proved contentious and inconclusive in many areas (as experienced in the processes of developing the Transport and Education Disability Standards). The submission argues that significant changes to the DDA should only be made on the basis of more detailed data and evidence, and high level agreement on cross-sectoral and cross-jurisdictional cost sharing principles.

These points are presented in Part 1 of the submission. Comments on the application of the DDA to particular areas are provided in Part 2.
Part 2 highlights that:

- in the area of **disability services,** the DDA should not be utilized as a tool to determine government resource allocation decisions. It is problematic to extend the DDA to the administration to disability services;
- the development of Disability Standards in the area of **transport** highlights the need for flexibility and a hierarchy of compliance to ensure that standards are both reasonable and achievable;
- in the area of **accommodation and housing,** strict Disability Standards in the area of private rental may have the unintended adverse effect of reducing access to affordable housing and is not supported;
- in the area of **education and training,** the experience of the development of Disability Standards highlights that establishing principles prior to the development of Disability Standards is central, and that alternative policy instruments can sometimes be more relevant and useful than Disability Standards;
- in the area of **sport,** the current educative approach is proving successful, and the value of instituting standards in this area is questioned; and
- in the area of public access, linking the Disability Standard on Access to Premises to the **Building Code of Australia** (BCA) is an efficient and practical way of achieving the aims of the DDA.

As noted above, these are not intended to be comprehensive arguments to advance action in these areas, but are included in order to illustrate more general points made in the body of the submission and to respond to specific requests for information made in the Draft Report. Victorian initiatives addressing the objectives of the DDA are profiled in Part 3.

PART 1: COMMENTS ON GENERAL PROVISIONS AND MECHANISMS

1.1 Scope and Application of the Act

The existence of a stand alone Federal Act focusing on disability is strongly supported. This is justified in terms of the positive, systems based approaches such an Act facilitates – approaches that require consistent national action – as well as by the broad population group affected. The external affairs powers of the Commonwealth may also provide a basis for this type of legislation. In this respect, reference to the draft United Nations Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities (currently being negotiated) would be appropriate.

The Victorian Government emphasises that the DDA must retain a focus on the prevention of and effective response to discrimination. The tendency to use the DDA in order to progress government or intersectoral programs for the general advancement of people with disabilities needs to be carefully monitored. Disadvantageous outcomes for people with disabilities result from a number of causes other than either direct or indirect discrimination.

Notwithstanding this caution, the Victorian Government would like to see a greater outcomes orientation in the objectives of the DDA. This would provide the necessary framework for a more flexible and cost-effective approach to Disability Standards and a more conciliatory approach to complaints.

The Victorian Government supports the Draft Report's argument that the objects of the DDA should be about formal equality of opportunity rather than equality of outcomes. However, we contend that this distinction is not as clear cut as suggested. There is a significant gap between objects (a) and (c) of the Act. To eliminate discrimination is an appropriate goal, but it cannot be assumed that this translates into universal access which is unrealistic given competition for public funding. To promote human rights, on the other hand, is a worthy but very broad objective that is not solely the task of the DDA. More specific reference to the goal of supporting the fullest possible access and participation for persons with disabilities could provide a more useful framework for Voluntary Action Plans and Disability Standards, as well as for resolution of individual complaints.

The objects also do not appear to allow for positive discrimination to allow actions to support people with disabilities, although elsewhere it is suggested that failure to provide different or additional services or support may be a breach of the requirements of the DDA. If reference to the objective of participation and inclusiveness were to be made, this would flow more clearly.

1.2 Definitions of Disability

The Victorian Government notes the debate that has ensued throughout this review about the definition of disability. **Overall, we support the argument that a broad definition, but one that continues to be based on objectively assessable impairment, is appropriate.** The existence of the DDA definition of disability has been useful in establishing a benchmark for state legislation and guidelines.

The Productivity Commission recommends that consideration be given to amending the definition of 'disability' in section 4(1) of the DDA to include "behaviour that is a

symptom or manifestation of a disability" (Draft Recommendation 9.1). Whether the definition of 'disability' extended this far, was the subject of the recent High Court decision of *Purvis v New South Wales (Department of Education and Training)* [2003]. The case considered whether the exclusion of an intellectually impaired boy from school for his violent behaviour (which resulted from his disability) constituted direct disability discrimination.

In *Purvis*, the majority and minority of the High Court agreed that the definition of disability in the DDA should be construed widely to include disturbed behaviour that is a symptom or manifestation of a disability. The High Court (per McHugh, Gummow, Kirby, Hayne and Heydon JJ) held that the definition of disability should not be confined to the underlying condition to the exclusion of the resulting behaviour.

However, *Purvis* was not determined according to the definition of disability. Rather, the case was decided by applying the appropriate test for direct discrimination. The critical issue in determining whether direct discrimination has occurred in a particular case is identifying the appropriate 'comparator'. In *Purvis*, the majority found that the comparison ought to be made with someone who did not have the same underlying disability, but who behaved in the same way. The court held that the 'circumstances' for the test of direct discrimination may include disturbed or violent behavior. The High Court held that the comparator must be identified on a case-by-case basis.

The amendment of the definition of 'disability' to include behaviour that is a symptom or manifestation of a disability may expand the current scope of the DDA and will have cost implications. Such costs need to be assessed, along with the benefit to the community, before such amendments are considered.

The DDA should guard against a circularity of definition in which a person is judged to have a disability allowable under the Act as a consequence of displaying particular behaviours or attributes that may or may not be the result of an objectively defined disability.

Notwithstanding the above, we believe that levels and types of disability may need to be more explicitly defined within the various implementation mechanisms of the DDA. While not wanting to limit access to complaints resolution processes for any individual under the DDA, the reasonableness of adjustments and the implementation priorities for Disability Standards can only be assessed in relation to the particular patterns of disability relevant to the service in question (including reference to current and likely future patronage). A requirement to develop and comply with Disability Standards covering <u>all</u> disabilities is likely to make these processes very difficult.

It should also be acknowledged that conflicts may occur between disability groups and trade-offs may need to be made. For example, to achieve DDA compliance for wheelchair access at tram stops, one option is to remove a number of stops in order to reduce the burden and cost of compliance. This may adversely affect older users who are faced with a longer walk to their nearest tram stop. Unless such trade-offs are made explicit and permitted under reasonable adjustment provisions or exemptions are granted, further complaints may result.

Moreover, while a broad definition of disability is important, it is also relevant that the Draft Report appears to be relatively silent in relation to some disability cohorts which could emerge as future points of demand and budget pressures. These cohorts include young people with disabilities transitioning from school to work or within the Vocational Education and Training (VET) system, people with disabilities in adult training settings, young people with behavioral or mild learning difficulties in school and VET settings, and centrally, the ageing population, who increasingly present with age-related disabilities, placing demands on sectors ranging from accommodation to life-long education. There is the need for future work that scopes co-regulatory models, to assist governments, non-governmental organizations and private industry to develop cross-sectoral approaches which can respond to increasing demand and 'gap' cohorts in the disability population. By identifying the relevant cohorts and the pressures they could place on the system, innovative and cross-sectoral work could be initiated.

1.3 Compliance with other laws

The Victorian Government agrees with the finding "there is some uncertainty about the application of the DDA to acts (actions) done in compliance with laws that have not been prescribed under section 47 of the DDA." (Draft Finding 6.7)

The Victorian *Equal Opportunity Act* 1995 has a general exemption from discrimination where the conduct necessary to comply with, or is authorised by, an enactment, such as another piece of legislation, regulations or Orders: section 69. Under the *Equal Opportunity Act*, there is no requirement for the other law to be expressly 'prescribed'. Section 69 has specifically been relied upon, with varying results, where the respondent contends that their conduct was necessary to comply with, for example, occupational health and safety legislation.

Whilst under the *Equal Opportunity Act*, direct compliance with the *Occupational Health and Safety Act* 1984 may be a defence to discrimination, the same does not apply for the DDA. Unless the other law is prescribed under section 47(2) of the DDA, compliance will not exempt the conduct from challenge. At present, there is no occupational health and safety law prescribed for this purpose. If the DDA were in direct conflict with State OHS legislation, the DDA would prevail to the extent of any inconsistency due to section 109 of the Commonwealth Constitution.

Within the DDA, there are no express exceptions relating to occupational health and safety or the general health and welfare of others. Whilst there is a so-called 'defence' of unjustifiable hardship, this is difficult to establish for Government respondents and, in respect of schools, does not apply once a student is enrolled at the school.

In *Purvis*, the majority of the High Court acknowledged that the respondent was obliged to comply with other laws. The court acknowledged the educational authority's occupational health safety responsibilities and its common law duty of care obligations, despite the absence of any express reference to such laws in the DDA. Gleeson J found that if there is a construction of the DDA which avoids a conflict between the responsibilities of the school to its staff and the other students, and the obligations imposed by the DDA, then that construction should be preferred.

In light of these comments, the Victorian Government supports an amendment which is consistent with s.69 of the *Equal Opportunity Act* and which clarifies the

obligations on respondents to comply with other laws, such as occupational health and safety, as suggested in Draft Recommendation 6.3.

1.4 Disability Standards and Costs of Compliance

1.4.1 *Areas for Application of Disability Standards*

The Victorian Government recognises the potential value of Disability Standards in driving more proactive systemic change. The introduction of Disability Standards that will achieve demonstrated benefit is supported. To this end, the Victorian Government supports opening up the possibility of disability standards "to be introduced in any area in which it is unlawful to discriminate on the grounds of disability." (Draft Recommendation 12.3) Restriction of the areas under which standards can be developed appears too arbitrary and subject to changing views to be enshrined in the Act. However, proper assessment and examination of certain areas may reveal that alternative policy instruments are necessary or preferable to achieve the best outcome. Moreover, it is important that Draft Finding 12.1 is adhered to, and Disability Standards are not utilized to widen the scope of the DDA.

Any amendment to the range of areas in which the Disability Standards can be introduced needs to be accompanied by improved processes for defining and gaining agreement on the areas for which Disability Standards will actually be developed. Proper assessment and examination of certain areas may highlight that alternative policy instruments are necessary or preferable to achieve the best outcome. Prior to introducing standards, consideration needs to be given to exactly what this 'potential value' encompasses, and ensure that the existing complaints-based approach to enforcement is incapable of achieving such value. There is also a need to clarify what constitutes 'demonstrated benefit' and how it will be measured. An agreed upon high-level process of initiating development of a specific set of Disability Standards will ensure that this mechanism is the most appropriate way to address the issue in question. This is discussed further below under "Development and Implementation of Disability Standards".

In general, the use of Disability Standards is supported where clear, unambiguous, technical specifications can be provided and a cost-benefit analysis can be conducted. This may include the definition of processes as well as physical infrastructure. The use of Disability Standards to force governments and other providers into broad programs of service enhancement is not supported.

We suggest that certain areas could be more effectively addressed by a targeted approach rather than attempting to introduce general Disability Standards to cover an entire area. For example, a set of Disability Standards could readily be developed to address recruitment processes - an aspect of employment - while trying to develop Disability Standards that cover the whole gamut of issues under employment could be protracted and difficult. In many cases it would be more appropriate to apply a specific set of standards to a fairly narrow area rather than trying to apply a blanket standard. Doing so will ensure the process of implementing and regulating standards is even more time and resource intensive.

As a general principle, better use of existing mainstream generic standards can in some cases be more useful than the development of specialised Disability Standards that create duplication and unnecessary confusion.

Comments on the suitability of Disability Standards for particular areas is provided in Part 2 of this submission.

1.4.2 *Legal Status*

The Victorian Government agrees with Draft Finding 12.4 that, "There is some uncertainty about the relationship between State and Territory anti-discrimination legislation and Disability Standards." The legal status of Disability Standards and their interaction with standards in State and Territory anti-discrimination Acts has not been settled. The Productivity Commission's draft recommendation states the legal position in relation to the Federal/State law inconsistency too simplistically. The Victorian Government has obtained a legal advising in relation to the Transport Standards that is contrary to Draft Recommendation 12.2. Section 13(3) of the DDA provides that the DDA is not intended to exclude or limit the operation of State law which is capable of operating concurrently with the DDA. Crown Counsel's opinion is that Disability Standards are delegated legislation and as such, cannot cover the field and render State legislation invalid.

As the DDA and the *Equal Opportunity Act 1995* have been operating concurrently the DDA commenced, if the existence of Disability Standards were now to nullify the provisions of the State Act to the extent of any inconsistency, this would represent a significant policy shift and would result in the *Equal Opportunity Act* becoming increasingly redundant. **The Victorian Government therefore disagrees with Draft Recommendation 12.2,** that "The DDA should be amended to make it clear that Disability Standards displace the general provisions of State and Territory anti-discrimination legislation. Any jurisdiction wanting to introduce a higher level of compliance in an area should request that allowance be made for this through a jurisdiction-specific component in the Disability Standards." **The Victorian Government is not supportive of the outcome of the Productivity Commission's view as it may result in the redundancy of the Victorian *Equal Opportunity Act* and would be a significant erosion of State power.**

If a set of Disability Standards does render some provisions in the State act invalid to the extent of any inconsistency, people with disabilities may actually find themselves less protected, rather than more protected after the introduction of Disability Standards. If Disability Standards are very broad, this could actually take rights away from people with disabilities. For example, a strict standard may require 70% of workplaces to have wheelchair access by 2008. If this were achieved in 2008, those people with disabilities affected by the lack of wheelchair accessibility to the remaining 30% of workplaces would be denied a remedy under both State and Federal legislation.

Moreover, **the exclusion of State law would not only result in a loss of State control, but could also lead to the restriction of the complainants' choice of jurisdiction.** Complainants could be forced to lodge their complaints at HREOC rather than State agencies, which provide alternative and potentially cheaper services for the consumer complainant. Complainants have expressed a clear preference for dealing with State equal opportunity bodies, because they find it faster and cheaper and they seek to avoid the possible cost implications of appealing to the Federal Court or Federal Magistrate's court and fear a costs order could be made against them in the federal jurisdiction. Many complainants, particularly those with disabilities that may affect communication skills, prefer to utilize the Victorian Equal Opportunity Commission's complaint drafting service and personal face to face interviews with a complaint handler. These services are not widely available through

HREOC. If Disability Standards were to weaken the State anti-discrimination system, complainants could potentially lose access to the State-based complaints system.

Further, the Productivity Commission's suggestion of specific state standards or components of Disability Standards could lead to a lack of uniformity in the provision of services and accessibility for people with disabilities across Australia, as one State or Territory could decide to make much higher Disability Standards than another. The utility of the Federal Act would hence be undermined. The Victorian Government contends that Disability Standards should be specific enough so that it is clear whether they are applicable in a certain state, for example, accessibility to trams may only be an issue in Victoria under the Transport Standards. Separate implementation plans that incorporate references to alternative means of achieving the objectives will ensure that different Disability Standards are not needed for separate states.

1.4.3 *General Problems with Disability Standards*

The Victorian Government supports the concept of promoting a more proactive systemic approach to preventing discrimination. Standards are one possible way of achieving such an outcome. There are several inherent problems with the introduction of Disability Standards that may limit their broad applicability.

Disability Standards have the potential to be very inflexible. This imposes high costs and requires constant updating to keep them in line with technological development. Disability Standards that are too prescriptive and inflexible have the potential to inhibit innovation.

Disability Standards may actually diminish the rights of people with disabilities. Under the complaints based approach people are free to lodge a complaint if and when they felt discriminated against. Introducing Disability Standards could mean the alleged instance of discrimination would be evaluated against the set standard. The respondent could be able to avoid action provided they meet specific conditions, regardless of the actual discrimination suffered by the person with the disability. This disregards the individualised and interactive nature of discrimination.

To minimise the possibility of this adverse outcome of Disability Standards, the integrity of the complaints system must be maintained. Hence, the Victorian Government is concerned by Draft Finding 12.3, which includes the statement that "It is appropriate that compliance with Disability Standards should provide protection from complaints." However, the Draft Finding is supported in application to public transport services. Standards provide the basis for long-term implementation plans and give clarity for operators and passengers. They reflect an agreed position on what is required to be provided to avoid any discrimination. Mass transport systems by their nature must become standardized and cannot be modified to suit individuals. Compliance with standards should insulate operators from complaint.

Disability Standards should be evaluated for their utility. If Disability Standards nullify the complaints process, or help to protect those who may be discriminating against individuals, they go against the spirit of the DDA. If Disability Standards end up being very basic, due to lack of agreement or concern over costs involved, utilising Disability Standards as a protection against a complaint may in fact weaken the DDA and narrow its scope, rather than strengthen it and make it more effective for people with disabilities. Disability Standards should not be

developed or implemented in a vacuum; sufficient thought and emphasis must be devoted to ensuring that the outcome of Disability Standards is not one that diminishes the strength of the DDA in eliminating discrimination. Disability Standards should be evaluated and developed to ensure a positive and beneficial outcome for people with disabilities, not necessarily to have strict inflexible and universal standards.

Moreover, the strength of the Disability Standards mechanism could be weakened by Draft Recommendation 12.4, that, "Where possible, monitoring and enforcement of Disability Standards should be incorporated into existing regulatory processes." If Disability Standards were simply enforced by complaints, and not by a regulatory body or independent mechanism (for example, mandatory action plans outlining adherence with Disability Standards, HREOC administering the implementation of standards), the burden of enforcing Disability Standards would still be on those who are supposed to be protected by the DDA. This will further entrench a reactive, rather than a systemic approach to addressing discrimination.

1.4.4 *Development and Implementation of Disability Standards*

An agreed upon high-level process is required to ensure that the potential problems and barriers to the successful development and implementation of Disability Standards are minimised. This might involve the Council of Australian Governments (COAG) formally considering the Productivity Commission Report, and agreeing to high-level principles to underpin legislative processes and cost-sharing principles involved in the future development of Disability Standards, prior to Ministerial Councils further developing industry-specific Disability Standards. For example, a set process for evaluating costs and benefits could be laid out, as well as process and forums through which to consult with relevant parties before the development of standards. A formal process of delegation to Ministerial Councils would clarify the procedures and simplify the process of developing standards. COAG's "Principles and Guidelines for National Standard setting and Regulatory Action by Ministerial Councils and Standard-Setting Bodies" should provide a sound basis for this and should be applied in the case of Disability Standards.

If COAG were to agree to a set of high level principles, Ministerial Council deliberations are likely to be more efficient and effective, and potentially reduce non-transparent compliance cost-shifting between the Commonwealth, States and Territories, local government, non government organisations and private industry.

Relevant sectors should be consulted in an inclusive manner, to ensure that Disability Standards are developed that address both the needs of the disabled and the capacity of sectors of business and industry. This development must be based on an agreed upon cost-benefit analysis (see below). A certain level of agreement around the development of Disability Standards will aid the speed at which they are developed and the level of consensus around them.

Flexibility in the development and implementation of Disability Standards is essential. The Transport Standards, developed over several years with wide and public consultation nationally, include heavy cross referencing to various versions of Australian Standards which were written for the building industry, and do not apply to or fit well with public transport services. This points to the fact that while for some areas existing Disability Standards may be very useful, each area should be examined independently, and it should not be assumed that what works in one area

– eg. Buildings – will be applicable to another area – eg. Public transport – simply because they both fall under the area of infrastructure.

A key policy lesson from the ongoing process of the development of Education Disability Standards is that when the development of regulatory instruments results in the likelihood of wide system changes across multiple sectors and with associated significant financial and legal pressures, alternative approaches, particularly voluntary co-regulation, may be preferable. If jurisdictions, as in the case of Education Disability Standards, agree to the policy instrument of subordinate legislation, there may be benefit in considering a phased implementation of Disability Standards over 2 - 10 years. This would have the effect of achieving the benefits for people with disabilities whilst managing system change over time, across a number of budget cycles and achieving minimal financial and legal risk.

Standards need to be clear, precise and specific if they are to work effectively and efficiently. A Canadian study investigating the implementation of standards found that because the standards were unclear, the costs of enforcement were very high relative to the barriers removed. (D. Barker. *"Barrier Removal Legislation"* Disability Policy and Programs. Government of Canada. http://www11.hrdc-drhc.gc.ca/pls/edd/DPPTR_81005.htm) Although disability standards have been applied relatively successfully to the provision of public transport for people with disabilities, it is unlikely such prescriptive standards could be effectively imposed in the same way in areas such as education, employment, accommodation and sport. General Disability Standards are likely to face serious problems during implementation due to the varying and diverse range of circumstances they would apply to. These areas would require a more outcome-based approach to setting Disability Standards. This is not to say that Disability Standards may not be possible in these areas, only that the actual content of standards must be relevant and applicable to the area for which the standard is developed.

1.4.5 *Competition and Costs of Compliance*

Under the complaints based mechanisms the costs of adjustment are likely to be imposed rather arbitrarily on respondents, as only the party who has the complaint successfully made against them will bear the costs of non-compliance. This can cause an inequitable distribution of costs and/or impaired competition. Disability Standards may impose a more equitable distribution of costs, assuming a uniform standard is applied across each industry/group. However equity is by no means guaranteed; certain industries and specific competitors within industry will bear greater costs than others.

There are 3 key areas where competition may be affected by the imposition of Disability Standards -

1. Where not all industries/businesses that compete with each other are subject to the Disability Standards, those who are exempt will have an unfair competitive advantage.
2. If the unjustifiable hardship defence continues to be unavailable to certain service providers such as large government school systems, reasoned on the basis that these providers have access to large financial resources, then these groups will find themselves at a competitive disadvantage. This effectively discourages growth and expansion in the provision of other services in the industry.

3. The costs imposed on existing organisations of complying with Disability Standards are likely to be greater for existing competitors than for new entrants. Retrofitting or accelerated replacement of existing assets is likely to be more costly, assigning an advantage to new entrants when Disability Standards are imposed.

Overall, however, Disability Standards may mean that the costs to businesses are more predictable, and can be more precisely estimated and factored into future business costs. Hence, unexpected complaints would not necessarily impact on businesses to the same degree as can currently occur.

Given that Disability Standards can impose considerable costs of compliance a more extensive cost-benefit analysis must be undertaken, consulting with different sectors of industry, to capture the social and economic costs and benefits of certain Disability Standards. Cost-benefit analysis processes in the transport and education sectors have been contentious and inconclusive. An agreed upon framework is required, including processes for regular revision. While undertaking this, the Equal Opportunity Commission of Victoria's assertion that "the value of protecting human rights and addressing discrimination cannot be fully captured in economic terms" (submission, p.i) should be kept in mind. A cost-benefit analysis must attempt to balance the true economic costs to industry and business, and the social benefits that Disability Standards would bring.

Under the DDA and the *Equal Opportunity Act*, a significant proportion of the cost of monitoring compliance with the legislation falls on complainants who lodge and pursue complaints. Re-distribution of compliance costs from complainants to business and government will occur with the introduction of each Disability Standard. In determining the net cost of compliance, other financial offsets need to be taken into account. For instance, the Transport Standards may provide a complete defence to complaints of discrimination where the respondent can demonstrate compliance with the Transport Standards, thereby reducing the current cost of complaint handling, litigation and settlements under DDA and the *Equal Opportunity Act* for potential respondents, including business and State departments.

A further issue for consideration relates to what can be termed a 'hierarchy of compliance.' The objective of the DDA of eliminating discrimination as far as possible is supported, yet in many areas in which Disability Standards will be developed, the concept of universal access as soon as possible is not realistic. The Transport Standards eventually require a level of 100% access for all parts of the disabled community. Yet, achieving this could come at a cost for other sectors of society, or other people with disabilities. For example, to achieve universal access to all train carriages would require the rebuilding of almost every station platform in the network, and hence, to minimise exorbitant costs associated with this, some stations might be closed, impacting on other disability groups or specific cohorts, for example, the aged, who would need to walk further to public transport.

This points to the need for a hierarchy of compliance within the Disability Standards, establishing priorities that will benefit the most people with disabilities and achieve the most significant change in a short time frame. Consulting with peak disability groups to assist in establishing priorities for the implementation of particular upgrades would help to identify which issues should be tackled first and which aspects of Disability Standards would achieve the most for people with disabilities.

1.5 Complaints Processes

The complaints mechanism is a necessary means of implementing the DDA. It allows people with disabilities to enforce their rights before the law. Moreover, numerous disability organisations point out that the threat of complaints can be a powerful tool for addressing discrimination.

Yet, the complaints process also has inherent weaknesses, and, as the central mechanism for enforcing the DDA, cannot go far enough in redressing systemic discrimination and eliminating discrimination against people with disabilities. Any improvements to the complaints system must occur in parallel with an overall paradigm shift, moving the DDA from a reactive to a proactive model through the introduction of Disability Standards and other means.

1.5.1 *Accessibility*

The complaints mechanism of the DDA is only as effective as it is accessible. An individualised complaints system will always have certain limits, and these limits are exacerbated when dealing with a population of potential complainants who are disabled in a range of ways. Some of the limitations on access can certainly be addressed, if not removed, but substantial barriers still exist for many people with disabilities.

Accessibility can be broken down into material, socio-cultural and legal factors.

i) Material accessibility issues – this refers to all impediments to making a complaint involving cost and physical access issues. Some barriers might include:
   - cost of hiring a lawyer to advise throughout the process
   - cost of having to pay respondents' costs in court if found against
   - lack of physical access to information or assistance
   - difficulty of providing clear documentation and information to prove the discrimination.

ii) Socio-cultural accessibility issues – these barriers are less tangible and identifiable, and hence, less able to be fully addressed. Reasons why people discriminated against may not lodge a complaint can include:
   - wanting to fit in and not bring further attention to themselves
   - fear of victimization and exposure of their case
   - stress that will be endured during the case potentially exacerbating their disability
   - lack of emotional resources and support

iii) Legal accessibility issues – the Productivity Commission identified many of the legislative barriers to the accessibility of the DDA for complainants:
   - the definition of disability
   - the definition of 'indirect discrimination' (burden of proof and proportionality requirements)
   - representative complaint mechanism
   - lack of certainty for complainants about election of jurisdiction.

It is very difficult, if not impossible, to completely overcome some of the material and socio-cultural accessibility issues. The complaints mechanism, as it stands, assumes that the complainant will have the financial, mental and emotional resources to be able to lodge and follow through a complaint. This is particularly

difficult for mentally ill and intellectually disabled people (particularly those in institutions). These issues can be addressed to some extent through advocacy support and targeted education programs that aim to remove any information asymmetries.

The Productivity Commission has raised the issue of accessibility to the DDA. The Productivity Commission recommended that the position in relation to whether disability groups can initiate representative complaints be clarified (Draft Finding 11.12). **The Victorian Government supports clarification of this issue to ensure maximum access to the legislation.** Clarifying the ability of organisations representing disabled individuals to lodge complaints on behalf of a group of people with disabilities will allow a more systemic approach to the elimination of disability discrimination. However, sufficient interest to lodge a representative complaint should be based on demonstration of substantial connection over an extended period with the relevant group of people with disabilities.

In terms of access to early intervention and prevention in dispute resolution, the Draft Report could be strengthened by acknowledging the priority already afforded to administrative or alternative dispute resolution processes which are already in place in relation to most systems and industries.

Best practice management of disputes in local institutions is a core component of existing planning and case management, and disputes managed in these local settings are often more effective, cost efficient, accessible and responsive than commission, tribunal or court-based dispute management. Such local approaches to conciliation ought to be encouraged and supported through State and Federal complaints systems.

1.5.2 *Changes to the definition of 'indirect discrimination'*
The burden of proving that a requirement or condition is unreasonable (which is part of the test for indirect discrimination) currently falls on the complainant. The Productivity Commission found that this is neither appropriate nor efficient and recommended that the burden of proof be reversed to require a respondent to show that a requirement or condition is reasonable rather than requiring the complainant to show that it is unreasonable. The Productivity Commission also recommended that the proportionality test should be removed from the definition of indirect discrimination.

These changes would bring the DDA definition of indirect discrimination in line with the definition in the *Sex Discrimination Act*. The recommended amendments to the definition of 'indirect discrimination' would be inconsistent with the State's definition, which could result in complainants electing to use the DDA. This would be in situations where although the cost to the complainant may be higher and there may be delays incurred by using the Federal jurisdiction, the complainant would not have to prove unreasonableness and the higher proportion test.

Reversing the burden of proof that a requirement or condition is unreasonable from the complainant to the respondent is problematic for public transport services where mass solutions must be implemented safely and efficiently in the interests of the whole community. Additional workload would be generated for transport operators in defending policy decisions which may not accommodate individual preferences.

1.5.3 *HREOC and EOCV: The Need for Two Systems*
A significant number of people lodging a complaint regarding disability discrimination choose to do so under the jurisdiction of their State or Territory Act. This may be for a number of reasons, including a preference for accessing information at a local level and that the actual process of conciliation and dispute resolution under the State Equal Opportunity Act can be faster and cheaper for the parties. The Victorian Equal Opportunity Act is administered by the Equal Opportunity Commission Victoria (EOCV). An agreement reached at conciliation under the State legislation can also result in an enforceable agreement without the need for a Tribunal hearing, which both parties often find to be a cheap and effective complaint resolution service. A complainant may not wish to have to take their case to Federal Court or the Federal Magistrate's Court if their complaint cannot be conciliated, and having the alternate process of the *Equal Opportunity Act 1995* is a very important alternative.

The capacity of the State based system to cover multiple grounds of discrimination is also likely to be a factor, although the relevance of this to people with disabilities has not been assessed. Often complainants have multi-attribute or multi-area complaints where one or more of the attributes or areas cannot be addressed under Federal legislation. For example, sexual orientation, gender identity and physical features several attributes that are not fully covered under Federal law.

The Victorian Government strongly supports Draft Finding 13.1, that "there are advantages in retaining both the DDA and State and Territory anti-discrimination legislation. However, this places an obligation on all jurisdictions to work cooperatively to meet the needs of people with disabilities and minimise confusion about the two systems." High-quality, accessible information provision is necessary to ensure that the utility of having two acts is enhanced, rather than leading to duplication and confusion, as currently often occurs. Moreover, it should be noted that this finding is inconsistent with the Draft Review's opinion that Federal Disability Standards override state laws.

1.5.4 *Co-operation between EOCV and HREOC*
In order to minimise confusion for complainants, greater co-operation between HREOC and EOCV is needed throughout the complaints process. One form of this co-operation could be the establishment of a 'shop-front system,' as the Productivity Commission has suggested in Draft Finding 11.1.

The EOCV had such a co-operative arrangement that ceased in early 2003. In consultations with the Victorian Government, EOCV has argued that this co-operative system did not always benefit complainants, and ultimately became more of a referral service in relation to complaints under the Federal Act, rather than a comprehensive complaint handling function. There was limited capacity to give advice and assist people in choosing the appropriate approach for their particular complaint. Given a large majority of people prefer to take their complaints and concerns to the state agency, an improved co-operative approach would be beneficial. EOCV would be willing to further consider a model for co-operative arrangements which would provide a more sophisticated and streamlined service to the community. EOCV is open to considering the concept of a 'shop-front,' envisaging a more proactive co-operative system, in which the State and Territory equal opportunity commissions provide high quality advice and information at the pre-lodgement stage in order to best inform the complainant. That is, the EOCV would provide first stop education and information about the relative benefits and disadvantages of lodging a complaint in a particular jurisdiction.

This evaluation at a pre-lodgement stage would ensure that less people choose a system simply due to misinformation or lack of knowledge, and then risk their complaint being terminated due to lack of jurisdiction. If the complainant then decides to lodge with HREOC, the EOCV would then provide support through this process.

This suggested system is supported by the Victorian Government subject to negotiation on operational details. If complainants get high-quality advice at the beginning of the process, the incidence of confusion and people lodging their complaint in the wrong jurisdiction would be lessened. This form of pro-active shop-front approach could reduce forum shopping and ensure that complainants are also provided with sufficient information to enable them to attempt to resolve their complaints at the local level, the point where the discrimination has occurred. Use of localised complaint handling and improved information dissemination will assist to streamline the equal opportunity complaints system at both State and Federal level.

Improved cooperation between HREOC and State agencies around education and information dissemination is also raised in the report. This is supported in principle and occurs to a certain degree currently. However, this suggestion should be considered in any general discussion on joint arrangements to resolve some of the issues that have arisen in the past. Administrative problems can arise if the education and information dissemination functions are separated from the complaint function. For example, complainants may become disillusioned and be inconvenienced if their rights under Federal law are explained to them but they are then told they must lodge their complaint with HREOC in Sydney, rather than locally. Many complainants prefer to lodge their complaints with the agency disseminating the information as their first point of contact.

Complainants should be encouraged through formal administrative processes to lodge public transport complaints first to the operator providing the service, then to the transport jurisdiction, then to HREOC, and all under the DDA and Transport Standards.

1.6 Action Plans

The development of Voluntary Action Plans is supported as a means of encouraging proactive systemic action to prevent discrimination. We suggest however that such plans have limited usefulness as a defence against individual complainants and that the primary use of plans should not be seen in this light. The lack of consistency in the content and structure of plans, and the absence of a monitoring and quality assurance process further limits this function of plans.

At present, Voluntary Action Plans are being developed at a variety of levels of the system and with a range of different aims. We also note that some jurisdictions have legislated for plans to be mandatory in the public sector. The Victorian Government's current approach is outlined below.

We believe that a more detailed review of Voluntary Action Plans would be useful once there is more of a critical mass of established plans across both the public and private sectors. With regard to the private sector, we support Draft Recommendation 12.6 allowing the lodgement of Voluntary Action Plans by employers with HREOC.

1.6.1 *Victorian Government Plans*

In the *Victorian State Disability Plan 2002-2012* the Victorian Government set out its commitment to support State Government departments to develop and implement action plans.

The framework for achieving this is set out in the *Implementation Plan 2002-2005.* State government programs that have Plans currently registered with HREOC are Arts Victoria and the Department of Infrastructure's Action Plan for Accessible Public Transport. The Victorian Electoral Commission has released a Plan, *Improving Access to Services: a Disability Action Plan.* Victoria Police have developed a draft Disability Discrimination Action Plan. When finalised it will be incorporated into the Victoria Police Strategic Business Plan.

In 2001 the *Local Government Access Action On Line* website was established as a joint project of the Department of Human Services (DHS), the Municipal Association of Victoria (MAV), and Access Audits Australia. Its purpose is to provide information and support to assist Councils in identifying and addressing disability issues in a planned and proactive manner.

An MAV/DHS Disability Access Project was established in 2002 to further facilitate the development of Council policies, planning and practice that promotes access and inclusion of people with disabilities. As part of the project, research was conducted on Victoria's 78 Councils regarding the adoption and implementation of Action Plans. Its key finding was that by July 2003, 86% of Victorian local governments would have developed Disability Action Plans.

The Department of Human Services (DHS) has commenced work to develop a Disability Action Plan for DHS. It is anticipated that the Action Plan will be completed by late 2004.

Concurrently, the Disability Services Division has commenced work on a whole-of-government policy framework to guide the development of Disability Action Plans by all Departments. This will be accompanied by a range of resource materials to assist Departments in the development of their Plans.

In order to enhance the implementation of the strategies outlined in the Victorian State Disability Plan 2002-2012, and to ensure compliance with the Commonwealth Disability Discrimination Act 1992 - now under review) the Department of Justice is developing a Disability Action Plan that covers priority areas in Court Services, Corrections, Consumer Affairs, Human Resources and Building Access Standards. The Disability Action Plan is mainly concerned with progressing the implementation of Goal Three of the State Disability Plan - Leading the way by developing more inclusive and accessible public services, and promoting non-discriminatory practices. The development of the Disability Action Plan is due for completion in July 2004.

Among other things, the whole-of-government policy framework will include common objectives and generic strategies for reducing discrimination and facilitating greater access and participation in State Government policies, programs, services and facilities, for people with disabilities. The policy framework will also provide for a whole-of-government monitoring and reporting mechanism (to be determined).

1.7 Limited Positive Duty on Employers

The Productivity Commission has raised the issue of limited positive duty in the area of employment. Limited positive duty would require employers to take reasonable steps to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities. Employers would have to take 'reasonable steps' to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities in the workplace. The limited positive duty recommended by the Commission appears to be based upon the UK's *Disability Discrimination Act* which provides a clear and specific duty to make adjustments to accommodate disabilities.

The Victorian Government acknowledges that Disability Standards in the area of employment broadly are problematic and supports the examination of alternative mechanisms for addressing this area. We agree with the Productivity Commission that prescriptive measures such as quotas are not appropriate given the diversity of the relevant population group. We note that there is contradictory evidence from overseas on the impact of a positive duty on employers' willingness to take on employees with disabilities. The criteria for introduction of such a measure should be the likelihood of increasing employment opportunities for people with disabilities rather than merely decreasing risk of litigation against employers.

Given the lack of conclusive data on this issue, the Victorian Government does not support a recommendation to introduce a positive duty at this stage. It may be preferable to put effort into the development of voluntary action plans (a key element of the proposed positive duty in any case) and further evaluate the likely added value of a mandated duty. There is also a need to clarify exactly what is meant by a 'limited positive duty', who it will be applied to and in what circumstances. More attention could also be given to employment related aspects of Disability Standards in other areas.

The proposed limited positive duty would potentially increase the cost to business of compliance with the DDA. The threat of litigation by disabled workers and the inclusion of a 'reasonable accommodation' provision in the DDA are each intended to deter firms from shedding their disabled workforce. However, these changes may in fact create 'firing costs' that lead firms to avoid hiring disabled workers in the first place in breach of anti-discrimination legislation. A sector specific approach to compliance might be preferable as it could target necessary adjustments more effectively without compromising competitive neutrality. Limited positive duty could place a greater burden on small business which would find it harder to absorb the costs. An exemption of small business (a business with less than 20 people, as defined by the Australian Bureau of Statistics) from limited positive duty may ensure that small business is not unfairly burdened by this requirement. Such an exemption would bring the DDA in line with similar acts in the United States and United Kingdom, which have exemptions based on the size of the business. However, attempting to protect vulnerable groups such as small businesses from the burden of compliance by providing an exemption from the limited positive duty may well result in competitiveness issues. This is an example of one of the trade-offs that may arise when imposing Disability Standards.

1.8 Unjustifiable hardship

The Victorian Government supports the recommendation that "the DDA should be amended to allow an unjustifiable hardship defence in all

substantive provisions of the Act that make discrimination on the ground of disability unlawful, including education" (Draft Recommendation 10.1). However, it seems appropriate that more work be undertaken to determine exactly what aspects of this defence should be amended and what impact such amendments would have. It is suggested that a delegated sign-off mechanism be established between HREOC and state transport jurisdictions at a level appropriate to reflect state funding and budget provisions.

The unjustifiable hardship defence in general helps to promote adjustments that benefit people with disabilities, whilst ensuring that adjustments do not impose unjustifiable costs to the community. The scope of the mechanism as it stands is not clearly defined, and should be extended in certain areas, particularly education and employment. The gaps in the scope of unjustifiable hardship should be addressed. The following discussion highlights the problems of the unjustifiable hardship defence in the area of education.

Under the DDA, the defence of unjustifiable hardship only applies to schools in relation to the application for admission of a student with a disability. Once a student is admitted, the defence is no longer available. In this respect, the DDA is significantly different from the *Equal Opportunity Act* and other state anti-discrimination law. The defence should be extended to apply after a student has been admitted.

Section 11 of the DDA lists the non-exhaustive criteria to be taken into account in determining unjustifiable hardship. There is no established method of assessing the criteria in section 11(c) of the DDA, which relates to the 'financial circumstances' of the respondent. Generally, any alleged financial burden is assessed relative to the overall financial circumstances of the institution involved. This means that if a school is part of a government school system, the capacity of the whole institution to accommodate the student with any reasonable adjustments will be taken into account. This approach can raise problems for State education Departments where schools are funded through individual school global budgets. Funds in schools are normally committed to areas such as staff salaries and are not available for the provision of additional direct benefits to students.

In respect of 'non-financial' matters, the criteria for unjustifiable hardship should include a reference to the rights and interests of others and give consideration to the detriment or hardship likely to be suffered by others in accommodating the disabled person.

To this end, the Victorian Government supports the draft recommendation that "the criteria for determining unjustifiable hardship in the DDA should be amended to clarify that community wide benefits and costs should be taken into account" (Draft Recommendation 10.2). In the case of schools, the reference to "community wide" should include the whole school community.

PART 2: SPECIFIC AREAS OF APPLICATION OF THE ACT

2.1 Disability Services

2.1.1 *Victorian disability services legislation review*
A review of Victorian disability services legislation is currently in progress. The two Acts being reviewed are the *Intellectually Disabled Persons' Services Act 1986* and the *Disability Services Act 1991*. Together these Acts provide for the planning, funding and delivery of supports and services to people with a disability.

The review represents recognition of the fact that since the current legislation was introduced, there have been many changes and advances in a number of areas. Some of these include changes in community attitudes and expectations; changes to the delivery of supports and services; and the growth of a commitment to ensuring that people with a disability can exercise their rights and responsibilities as citizens.

This review aims to develop a future legislative framework that will:

- support the principles and objectives of the State Disability Plan;
- support the development of a strong and stable disability sector that is sustainable into the future;
- provide a more integrated approach to disability; and,
- provide a fairer and more equitable system of supports for people with a disability.

A number of the issues raised in the Draft Report of the Review of the DDA are currently under consideration as part of the disability services legislation review, including:

- tenancy rights for people with disabilities living in shared supported accommodation settings;
- mechanisms to monitor and improve the quality of disability supports and services, including an independent complaints mechanism for disability services; and
- the role of action plans and the need for any legislative support for action plans.

The fact that the legislation review is still in progress makes it difficult to respond conclusively to some of the issues in the Productivity Commission's Draft Report that relate specifically to the provision of specialist disability services.

2.1.2 *Potential application of the DDA to the administration of disability services*
The Draft Report notes that many inquiry participants criticised arrangements governing the eligibility criteria, adequacy and appropriateness of services provided specifically to people with disabilities. The Draft Report further notes that the exemption provided in section 45 of the DDA for 'special measures' currently appears to prevent disability discrimination complaints against providers of specialist disability services.

Draft Finding 14.3 of the Draft Report is that it is the role of governments to determine the level of funding and eligibility criteria for disability services. The Productivity Commission expresses the view that it is not appropriate to require HREOC or the courts to second-guess government resource allocation decisions by expanding the scope of the DDA to cover the establishment, funding or eligibility

criteria of disability services. However Draft Finding 14.3 also states it is appropriate for the DDA to apply to the administration of disability services.

This submission strongly endorses the views expressed in the Draft Report that it is the role of governments to determine the level of funding and eligibility criteria for concessions, pensions, other forms of income support and disability services. There are many instances where it would be difficult to distinguish between the eligibility and funding and the administration of disability supports. It is therefore difficult to comment on the appropriateness of the application of the DDA to the administration of disability services without more detailed information about how this would be intended to work in practice. The Victorian Government would want to be provided with further opportunity for comment before any proposal to extend the scope of the DDA in this way was made.

2.2 Transport

2.2.1 *Development and Implementation of Standards*

The DDA Disability Standards for Accessible Public Transport 2002 set out requirements to be met with milestones for compliance defined at broadly:

- 25% by 2007
- 55% by 2012
- 90% by 2017 and
- full compliance by 2022 except for trains and trams, which require full compliance by 2032.

All new services coming into operation after October 2002 must meet the Transport Standards in full. Any services undergoing substantial upgrade must also meet the Transport Standards in full. Any services which cannot be upgraded to meet the Standards must be replaced.

The Transport Standards were developed over several years with wide and public consultation nationally, including all state and territory transport jurisdictions, representatives of transport operator for all modes and peak disability groups. The process was coordinated by DoTaRS and the draft Standards were around for several years before being passed by Parliament in 2002. However, the document is very confusing for users and requires an unnecessarily complicated process to be followed to identify what the requirement is, and what it means for a public transport service. There is with heavy cross referencing to various versions of Australian Standards which were written for the building industry, and do not apply or fit well with public transport services. Facilities for public transport services are less perpendicular and rectilinear than buildings and, for much of the network, already heavily adapted to existing physical topographic limitations such as hilly terrain. This points to the need for standards to be developed in specific reference to certain areas, without simply applying what works in other sphere to areas covered in the DDA.

The implementation of standards in the area of public transport raised a number of issues. There were major capital and operational changes to bus, tram, train and taxi services. This involved a significant learning curve for staff, operators, the disability community and general public as to what is required under these standards. Many of these changes required alterations to projects already in progress, which created additional, and unforeseen, funding requirement increases. In addition, there were significant physical design problems with the implementation of Standards which

did/do not suit the application. For example: tram network alterations in the existing road and topographical context where grades required cannot be met.

In general, the Victorian Government experienced escalation in costs for most projects and extensions to timelines due to additional design resolution and public consultation. Operational changes to public transport services were needed and staff training at all levels was required. On the positive side, all users will benefit from new and enhanced services and assets as a result of the implementation of transport standards and most importantly, there will be improved access and safety for people with disabilities.

One of the key issues for the cost of meeting the Transport Standards is that it is generally borne by the Government, and any public funding must undergo the usual pressures of competition with other Government programs and demonstrating high value for money. This puts further pressure on the DDA concept of universal access (100%) to accommodate a minority group in the community (around 20% overall, 10% mobility disability, 0.5% wheelchair users, 1.6% vision impairment).

The Victorian Government is also of the opinion that the implementation of the standards could possibly result in a greater number of complaints once the first milestone of December 2007 in the standards is reached.

A hierarchical approach to compliance of public transport services should reflect patronage levels across the network. This would be supported by further cost benefit analysis of achieving full compliance to the same standard across all services by reflecting minor benefit at high cost for full compliance of marginal services. This could be introduced through the five year review of the Standards anticipated in 2007.

2.2.2 *Costs of Compliance*

There is a need to develop more detailed costing for achieving full compliance across the public transport service. This work is progressing through the refranchising process, but needs to be extended for all the other modes. As outlined in this submission, due to the large costs of compliance in the area of public transport, a hierarchy of compliance should be developed. The object of eliminating discrimination as far as possible is supported. However, when this is translated into universal access the need for a cost-benefit analysis and an understanding of the central issues for disabled travellers is apparent. The concept of universal access is not realistic in the competition for government funding and some compromise is required in achieving access to the public transport service.

The Transport Standards require a 100% level of access across the network for use by 20% of the community, or even as low as 0.5% for some features. For example, wheelchair access to a train is currently provided at the front carriage with a portable ramp deployed by the driver. To achieve universal access to all carriages is unrealistic, even impossible, as it would require rebuilding almost every station platform in the network to achieve a level interface with the train floor. There is no hierarchy of compliance within the Standards, establishing priorities. For example, it would be possible to develop a standard that required meeting Transport Standards in full for 60-80% of the network, and the meeting the balance on demand. Some success has been achieved at a State level by asking peak disability groups to assist in establishing priorities for implementation of particular upgrades to achieve compliance.

In order to achieve a hierarchy of compliance, and an understanding of the needs of disabled travelers, it would be useful to have statistics on user numbers. An understanding of the complex needs of people with disabilities and their mobility requirements and future social trends needs to inform the implementation of standards.

2.3 Accommodation and Housing

The DDA makes it unlawful to discriminate against a person with a disability by refusing their application for accommodation, or in the terms and conditions on which the accommodation is offered. The DDA also makes it unlawful to refuse to permit a tenant with a disability to make reasonable alterations to accommodation, if they undertake to restore that accommodation prior to the end of the tenancy. To this date, standards in the area of accommodation and housing have not been developed.

From the brief discussion of accommodation standards in the draft report, it is not clear:

- whether there is an existing problem about access to accommodation that such standards would be intended to address;
- how broadly such standards would apply (eg existing and new accommodation, public and private);
- how, in a practical sense, such standards would be implemented and enforced.

Hence, in order for standards in this area to be useful, the extent to which people with disabilities are already discriminated against in both the public and private rental markets must be ascertained, as well as the types and frequency of this discrimination. The Department of Justice is currently conducting a survey involving disability groups to help determine the key consumer and tenancy issues for that community.

The OOH [Office of Housing], which is the landlord for public rental accommodation in Victoria and is responsible for around 70,000 properties (comprising 18% of the state's rental accommodation and approximately 40% of low cost rental accommodation in Victoria), has already developed and adopted accommodation standards to cater for tenants with a range of disabilities. The OOH standards are based on part adoption of the Australian Standards to address basic accessibility and living needs of the major types of physical and mental disabilities.

In developing its accommodation standards, the OOH has adopted a three-pronged approach incorporating:

- general housing standards for normal amenity, to meeting the Director of Housing's obligations under Housing, Residential Tenancies and Building legislation. These standards incorporate accessible and visitable requirements for all new housing;
- specific standards for a range of more common disabilities, combined with specific measures of amenity to address the broad requirements generally associated with those types of disabilities; and
- flexibility to tailor responses to meet a tenant's particular needs.

The standards apply to the construction of all new public housing and to disability modifications on existing stock where required to meet a tenant's need.

By incorporating accessible housing elements within its construction standards, the OOH is now Australia's largest single volume builder of accessible housing. The OOH has a greater pool of accessible housing allowing greater flexibility and reduced waiting times for accessible housing.

In Victoria the application of general construction standards is addressed through the Building Code of Australia (BCA). The Building Commission administers the BCA and is currently looking at strategic issues such as standards of access for both public and private dwellings. This issue is being explored through the Accessible Built Environment Working Group (ABEWG), which was established by the Building Commission.

The Building Commission in collaboration with leading government agencies and building industry organisations has published *Welcome – Design Ideas for accessible homes*. This is the most recent comprehensive Australian guide to designing accessible homes, it encourages private investors, home owners and landlords to promote accessible house design.

In Victoria there are no specific building standards that apply to private rental accommodation, except for the provisions of the *Residential Tenancies Act 1997* requiring that accommodation be habitable, and the general provisions of the BCA as they apply to all new buildings and renovations.

2.3.1 *Is there a need for general disability accommodation standards?*
The Productivity Commission has mooted the possible application of disability accommodation standards to all private rental accommodation.

The OOH is concerned that the economy wide costs of imposing standards on a blanket basis to all private rental accommodation could be large compared to the benefit in accessibility likely to be achieved, although this benefit is undoubtedly difficult to quantify. Prior to recommending the widespread adoption of disability standards across all forms of private rental accommodation, a full cost benefit analysis should be undertaken.

As a starting point, there would need to be some analysis of the evidence of discrimination in the private rental market that is not effectively dealt with by the current provisions of the DDA, as well as an understanding of the demand for disabled-modified accommodation in private tenure that is not already being met.

A requirement for the blanket adoption of standards that might only be appropriate for a small proportion of the renting population could be considered to be an inefficient response to the problem of discrimination, by imposing undue costs on landlords as a whole (in turn, likely to be passed on to renters). A more effective response might be to target specialist programs to support landlords and tenants to make disabled modifications when the need arises, and to examine the ways in which the operation of the accommodation provisions of the DDA could be improved.

In short, more evidence of an existing problem with regards to access to suitable private rental accommodation would be needed to enable a full examination of the costs and benefits of such a proposal.

The Building Commission and the Australian Building Codes Board (ABCB) have recognised that current housing construction overlooks economic and social imperatives for the inclusion and participation of all citizens, particularly people with disabilities and older people. Consequently the Building Commission and the ABCB are about to undertake a research project that will provide an authoritative and comprehensive document that can be used by governments and industry to plan for the future supply of accessible housing. The research will evaluate the need for accessible forms of housing and detail options available to stimulate appropriate supply.

The research is planned to commence on 1 July 2004 and a draft report is planned to be available for public comment in mid 2005. The results of this research could provide the basis for the development of housing standards that could be applied throughout Australia.

2.3.2 *Costs of introducing accommodation standards*
From its experience of applying the standards described above, the OOH can make the following comments about possible impacts on construction costs.

Accessible housing has a number of components, some more cost effective than others and as such it is difficult to determine typical cost implications for typical design scenarios.

Many accessible elements are cost neutral - framing for wider entry, location of switches, power points, details to lever handles, painting schemes to assist vision impaired, contrasting materials in kitchens and floor covering to assist wheelchair manoeuvrability

However, some additional site work is required for accessibility. For example:

- In bathrooms, more time is spent getting floor waste and floor gradients correct.
- More detail and preparation time is required for sliding door tracks.
- On certain sites more groundwork is required to get falls correct for stepless entries and provision of recessed entry mats.
- There is some additional cost with the wider doors.
- Additional bracing systems in bathrooms / toilets are required.
- Continuous pathways and detail to driveways.

From its experience, OOH makes the following costs assessments:

- 1-2 bedroom: $4000 or 3.1% increase in construction costs.

- 3 plus bedrooms: $7700 or 4.7% increase in construction costs.

As a comparison, modifying an existing OOH property with similar levels of access costs approximately $35,000, and does not provide the same level of aesthetic and living amenity and flexibility to meet changes in occupancy.

If disability standards of a similar nature were to apply to new private accommodation, it could be expected that the higher construction costs would be

passed on to the tenant in the form of a higher rent. This could impact adversely on the disabled as a population group, as on average they have lower incomes than the non-disabled. The higher construction costs may also impact on the incentive of investors to invest in rental accommodation and on the overall supply of low cost rental accommodation.

A full examination of the operation of the low-income end of the private rental market would be required to model the impact of such a proposal on the supply and cost of affordable accommodation for tenants on low incomes.

The practicality of implementing such standards also requires further examination. It is easiest to apply additional standards to newly constructed or renovated properties that are already required to be inspected under the Building Code. Existing accommodation offered for private rental is not currently subject to any requirement for an inspection as to building quality. To impose such a requirement would significantly change the way in which the rental market operates and impose additional costs on landlords.

2.4 Education and Training

The comments below draw on the Victorian Government's experience in the development of the Education Standards.

In hindsight, the development of Education Standards would have benefited from establishing principles to achieve greater clarity and increased certainty for all parties. In contrast to Draft Finding 12.2 of the Draft Report, the Education Standards development process highlights that cross-jurisdiction collaboration in the development of a Regulatory Impact Statement does not necessarily guarantee an optimal regulatory outcome.

As an example, the Australian Government has continued to maintain that the Education Standards are "within power" of the DDA in relation to the extension of the defence of unjustifiable hardship. The Victorian Government position is that this is not the case, and would support Draft Finding 12.1 and Draft Recommendation 12.1 contained in the Report, that the scope of the DDA should be altered via amendment of the DDA, not via disability standards. This matter must be resolved or all parties are likely to face increased legal risks.

In the absence of regulatory clarity, legal risks remain unknown, particularly when precedent is yet to be established in relation to:

- how tribunals and courts will interpret new obligations and responsibilities for education providers in cases where there is dispute;
- whether the Standards are "within power" in relation to the DDA; and
- whether the Standards will promote an adversarial culture in place of negotiated local dispute resolution and decision making.

The Commonwealth maintains that the compliance measures contained in the Standards are not mandatory. Legal opinion in Victorian Government and non-government sectors reinforces that it is uncertain how tribunals, commissions and courts will interpret compliance measures and accountability requirements.

In Victoria, if the Standards come into effect, it may be possible to manage dispute resolution with current mechanisms including:

- dispute resolution managed by disability support professionals and administrators at schools or institutions and regional and central offices;
- dispute resolution in tribunal and commission settings, including the Victorian Civil and Administrative Tribunal, the Equal Opportunity Commission Victoria or the Federal Human Rights and Equal Opportunity Commission; and
- litigation, including test cases, only actioned as a last resort.

Even so, it is likely that the Education Standards will have a differentiated impact on Government versus non-government schools and public versus private training providers. The differential impact results from significant system variations and sector resource capabilities, including:

- different allocation mechanisms and funding levels for disability support – this Report acknowledges that non-government schools have a low budget base for disability services (predominantly funded by the Commonwealth) compared to the government school system (predominantly funded by the State);
- different approaches to school-based arrangements particularly professional planning, assessment and case management services; and
- as identified in the Report (Appendix B – Education), there is wide variation in the distribution of the disability population across provider sectors, with the majority of disabled students enrolled in the government sector.

It is anticipated that the Education Standards will require all education providers and sectors to implement actions to meet compliance obligations and minimise financial pressure, and at minimum:

- implement professional development to accommodate new obligations;
- consider the recognition of new responsibilities in industrial negotiations;
- increase monitoring and undertake regular system-wide reviews;
- develop new curriculum; and
- re-develop and implement victimisation and harassment policies.

The Draft Report includes a summary of the Allen Consulting Cost Benefit Analysis Report (Appendix B – Education), however it does not appear to reflect the extent to which the Allen Consulting Report is contested, nor does it assess contradictions between findings contained in that report and evidence presented in the Productivity Commission Report.

On its own evidence, the Productivity Commission Report could be strengthened by:

- acknowledging that there remains contradictory evidence about the potential growth in the disability population in education and training settings;
- correcting the reference (page B5) to reflect that the Allen Consulting Report was commissioned by the Commonwealth;
- noting that, as the Allen Consulting Report concludes (pg 58), a reasonable case can be made that the impact of the Standards, and costs and benefits, are due to the 'demonstration' or advertising effects of the Standards, and not their regulatory nature *per se*. The report concludes that the impact would be broadly the same if Standards did not have the force of regulation, ie, if they were issued as guidelines; and
- noting that, on the basis of the Education Standards process, cost-benefit analysis remains a subjective, complex and often contested policy instrument with potential to undermine cross-jurisdictional regulatory development.

The example of the process of the development of education standards highlights many important lessons for the overall development and implementation of standards, including the need to ensure that standards do not widen the scope of the DDA, the need to recognize alternative policy instruments for achieving change and the need for a well developed cost-benefit analysis to inform policy decisions.

2.5 Sport

The Victorian Government notes the Productivity Commission's view that standards might not always be the most appropriate form of regulation in some areas and that co-regulatory approaches that draw on greater industry involvement may be more appropriate in some circumstances.

2.5.1 *Standards for clubs and sport*

From the brief discussion of standards in the draft report, it is not clear:

- whether there is an existing problem about access to clubs and sport that such standards would be intended to address; and
- how, in a practical sense, such standards would be implemented and monitored.

2.5.2 *Development of standards*

The lengthy time taken to develop Disability Standards in the areas provided for in the DDA has been noted in the Draft Report. Comment or analysis on the effectiveness of Disability Standards as a means of eliminating discrimination in sport is difficult to make at this time as this approach is yet to be proven.

The sport and recreation portfolio of the Victorian Government has used an educative approach with clubs and incorporated associations and the playing of sport to promote the elimination of discrimination against Victorians with a disability. A move toward a legislative approach aimed at a higher level of compliance may run counter to the good practice that is currently characteristic of Victorian clubs and sports when dealing with discriminatory behaviour and practices in these areas.

2.5.3 *Implementation and monitoring of standards*

Standards require implementation and monitoring. With many clubs and sports generally supported through a high level of volunteerism, compliance and monitoring activities may outweigh community benefit. Supporting the development of the capacity of clubs and sports to respond to and support the participation of people with a disability in these areas appears to have been a beneficial approach taken by the sport and recreation portfolio of the Victorian Government in promoting the elimination of discrimination.

Continuing to encourage the good practice of clubs and sport through an educative approach appears to be a proven and effective means for supporting participation by people with a disability in the areas of community life related to club activities and the playing of sport.

2.5.4 *Co-regulatory approach*

The opportunity to explore how a co-regulatory approach with industry might be developed and implemented is considered useful. The Productivity Commission states it is seeking views on how such an approach may be implemented. The Victorian Government considers an industry developed code of conduct to be an important first step. The scoping of the development of an industry based code is anticipated to have a two-fold effect; firstly it would recognise the good practice to date of industry in supporting the elimination of discrimination in

clubs and sport and, secondly, build on the educative approach taken by the Victorian Government that has been proven thus far.

The sport and recreation portfolio of the Victorian Government has supported the elimination of discrimination and acceptance of the rights of people with a disability through an educative approach.

This approach covers:

- **community sporting and recreational infrastructure** managed by local government authorities;

- **state facilities, venues and events** managed by state government or statutory authorities;

- **capacity development** of clubs, associations and peak bodies ranging from community- to state-based;

- **resources and research** in the areas of:

    - **sport and recreational facility design**

Sport and Recreation Access for All; a guide to design of accessible indoor and outdoor recreation and sporting facilities (guidelines based on the DDA, Equality Opportunity Legislation, Building Code of Australia and Australian Disability Standards AS1428.1993).

    - **Behavioural and attitudinal change of participants** (as coaches, officials, administrators, players, etc)

Playing Fair; guidelines for tackling discrimination in sport (1998); *User Friendly Sport: an ideas book to help sport and recreation clubs grow* (2002); *Access Indicator: a step by step system to gauge and facilitate access to community based sport and recreation options for people with disabilities* (2001).

- **initiatives/schemes** such as the development of the Companion Card program; a card issued to people with a disability who require the assistance of a companion to access community activities and venues. Participating organisations issue the cardholder with a second ticket for their companion at no charge.

  The initiative was launched in November 2003 and is managed by the Victorian Government's Department of Human Services. The sport and recreation portfolio assisted with the preliminary development of the concept throughout 2001 and 2002 with a grant of $100,000.

2.6 Parks

Parks Victoria provides visitor services on public lands and waterways under its control. These services include an existing level of service and a strategy of increasing equity of access at suitable sites over time. Parks Victoria's management of parklands also reflects a broad community view that it is not appropriate or feasible, for a range of reasons, to provide equitable access at every site within the natural estate. These reasons may include environmental and landscape protection, provision of a diversity or recreational experiences, difficulty of access, public safety and costs.

While park management on public land is founded on the principle of open access, sound management of parks and reserves also requires that public access and uses may be controlled or regulated in certain localities and in certain situations. For example, the National Parks Act allows areas to be 'set-aside' to regulate access and use, and the References Area Act prohibits access to Reference Areas except for research purposes. Park management plans, which are usually developed with extensive public consultation, are the means where an appropriate, sustainable and publicly acceptable level of access and use is determined for each park.

The review of the DDA should recognise the need in some circumstances to control and regulate public access on public lands, and should support the measures in state laws and procedures such as management plans which permit the reasonable regulation of public access.

Due to the inaccessible nature of the terrain, equitable access is not possible in vast areas of the public estate without the provision of improvements such as roads, trails, lookouts and other structures. Parks Victoria applies a strategic, targeted and consultative approach to providing these services to maximise public access from the available resources.

A recommendation in the amended act that equitable access may not be possible or desirable for some natural settings would be a preferred outcome

2.7 Draft Disability Standard on Access to Premises

The proposed Disability Standard on Access to Premises (Premises Standard) and a revised BCA were released for public comment in January 2004. The Victorian Government through the Building Commission has participated in the development of the Premises Standard. The Premises Standard and revised BCA are an attempt to codify the intent and objectives of the DDA and hence pre-existing obligations.

This project was commenced as the legal environment of uncertainty provided less than optimal outcomes for the beneficiaries of the DDA and for building developers and owners.

The effect of a Premises Standard would be that owners and developers of buildings used by the public would be able to meet the objectives of the DDA (as they apply to buildings) by meeting the requirements of the Premises Standard. In the absence of a Premises Standard, people with a disability, building owners and developers would continue having to rely on the individual complaints mechanism of the DDA as the only means of defining compliance.

The need to review the relationship between the DDA and the BCA stemmed from the following:

- The DDA contains intent and objectives but not the technical details of how to provide access for people with a disability;
- The current technical requirements of the BCA are not considered to meet the intent and objectives of the DDA; and
- The existence of two legislative requirements in relation to access for people with a disability to buildings, being the BCA and DDA, clearly gives rise to potential inconsistencies.

Bringing the two requirements into line makes compliance easier, as well as enhancing access for people with disabilities.

The development of the Premises Standard aims to enhance the consistency and transparency of legislation by aligning the DDA and BCA requirements. The Premises Standard will apply to all new buildings and existing buildings undergoing new work, or change of use which triggers a requirement for building approval.

The costs of comply with the proposed changes have been estimated at between $27 to $30 billion dollars over 15 years. The benefits have been estimated at $15.6 billion however it is difficult to quantify many of the benefits such as basic human rights.

The cost impacts of the proposed Premises Standard vary substantially between building types and significantly between the construction of new and existing buildings. The cost impacts for large horizontal shopping centers are estimated to be 0.1%. In contrast cost impacts for smaller buildings could be significant depending on design options and topographical conditions. It has been estimated that a new two-storey restaurant may have increased construction costs of 41%, while a renovated single storey shop could experience increased construction costs of more than 60%.

PART 3: Other Victorian Government Initiatives

3.1 Overrepresentation of people with disabilities in the criminal justice system

The Productivity Commission recognises there is an apparent overrepresentation of people with disabilities in the criminal justice system which the Productivity Commission says indicates systemic discrimination against people with disabilities (PC 129).

The Productivity Commission Draft Recommendation 6.1 is that the Federal Attorney General conduct an enquiry into access to justice for people with disabilities, particularly in the criminal justice system. It might be useful for the Commission to note that there are already a number of initiatives being implemented by the Government to address this issue.

In partnership with the Department of Human Services, Corrections Victoria currently provides a range of services to offenders with an intellectual disability. As part of the Reducing Re-offending Framework, a range of initiatives are being introduced to build on this service provision. These include:

- the introduction of service specifications to underpin the delivery of offending behaviour programs (to reduce recidivism) for prisoners and offenders with cognitive disabilities;
- the adaptation of generic offending behaviour programs for prisoners and offenders with cognitive disabilities;
- the introduction of a screening tool to assist in the identification of prisoners and offenders with an acquired brain injury;
- enhancing the existing prison pathway including formalising the inclusion of prisoners with cognitive disabilities other than intellectual disability in the pre-release program; and
- the redevelopment of the protocol with the Department of Human Services to address a range of issues including services to offenders with an acquired brain injury.

The Enforcement Review Program is a program that is aimed towards identifying members of the community with 'special circumstances' such as mental illness, acquired brain injury, intellectual disability or physical disability who are incurring multiple infringements. Registrars of the Perin Court (a division of the Magistrates' Court) are guided by a 'special circumstances' guideline, a Court-developed guideline which broadly indicates the cases where defendants who have a disability are more appropriately dealt with in open court. The Magistrates can then dispose of the matter in a number of ways; there is also a broad range of orders available under the *Sentencing Act*, including undertakings to the court not to re-offend.

3.2 Disability and the Electoral System

At the 2002 State election, 51% of all voting centres had full wheelchair access, and a further 34% were accessible with assistance. The Victorian Electoral Commission (VEC) does not own any of the 1,655 buildings used as election day voting centres and therefore cannot direct modifications to the physical environment of the buildings or grounds.

Nonetheless, the VEC makes every effort to maximise the number of voting centres with disabled access at State elections. A recent change to the *Election Act 2002* provides for fixed date elections, and this is expected to enable the VEC to increase the proportion of voting centres with disabled access. The VEC will review all options for voting centres prior to the next State election and will be able to make firm bookings for the most suitable venues.

There remain a number of options available under the *Electoral Act 2002* to enable voters who are unable to vote at a voting centre to vote. Voters with disabilities can request polling officials take ballot papers and the ballot box outside the voting centre, so that they can cast their vote from their motor vehicle. Voters with disability can vote before election day by post. Voters with disability can register as a General Postal Voter (GPV). GPVs automatically receive the ballot material by post once nominations close, so that they can vote by post prior to election day.

At the 2002 State election, mobile polling teams visited voters at 878 mobile voting centres (typically hospitals, aged care facilities and retirement villages) in the week prior to the election to enable less mobile voters to vote.

Electronic voting is not yet an option for general voters under Victoria's *Electoral Act 2002*, although the Government might consider legislative change to enable voters with disability to vote electronically (eg via the Internet).

At the 2002 State election, the VEC trialled a Braille ballot paper template to enable voters with visual impairment to vote without assistance. The trial enabled voting in this way at four voting centres (Vision Australia centres) in the week leading to election day. The trial was considered a success by those using the service, and the VEC will consider making this option available to voters at future State elections.

3.3 Companion Card

The Victorian Companion Card was developed and launched in November 2003, as a way to assist people who have a severe or profound disability or mental illness who require a companion to assist in accessing community venues and events.

The right to equality of access for people with a disability who require a companion is protected under section 42 of the *Equal Opportunity Act 1995* (Vic) and section 8 of the DDA. Both these acts make it unlawful to discriminate against a person who requires the assistance of a companion. The practice of charging this companion an admission fee has the effect of doubling the admission fee for the person requiring a companion, and is discriminatory.

The card is one easy way for people to demonstrate their requirement for a companion, and will assist industry to comply with this legislation. Approved cardholders should be charged for one admission only, when it is necessary for the person to be assisted by a companion (unpaid or paid) in order to access venues and events.

Venues and events are asked to 'affiliate' to formalise their organisations recognition of the Companion Card.

The Companion Card program is a Victorian based initiative and has been developed with an initial focus on Victorian recreation, leisure, social and cultural

venues/events. The program is funded by the Victorian Government through the Community Support Fund, Strategic Initiatives fund, and is currently managed by the Disability Services Division of the Department of Human Services.

3.4 Building Commission Initiatives

In Victoria, the Building Commission has established the Accessible Built Environment Working Group (ABEWG) to provide a consultative forum between government, community groups and industry. The ABEWG provides independent information and advice on methods of improving access to the built environment for the whole community.

The Building Commission is in the process of undertaking market research to develop an effective marketing strategy to better inform people about accessibility issues including their obligations under the DDA.

To raise awareness about people's rights in relation to the public built environment the Building Commission has released a brochure titled *'Making a complaint about access to public buildings'*.