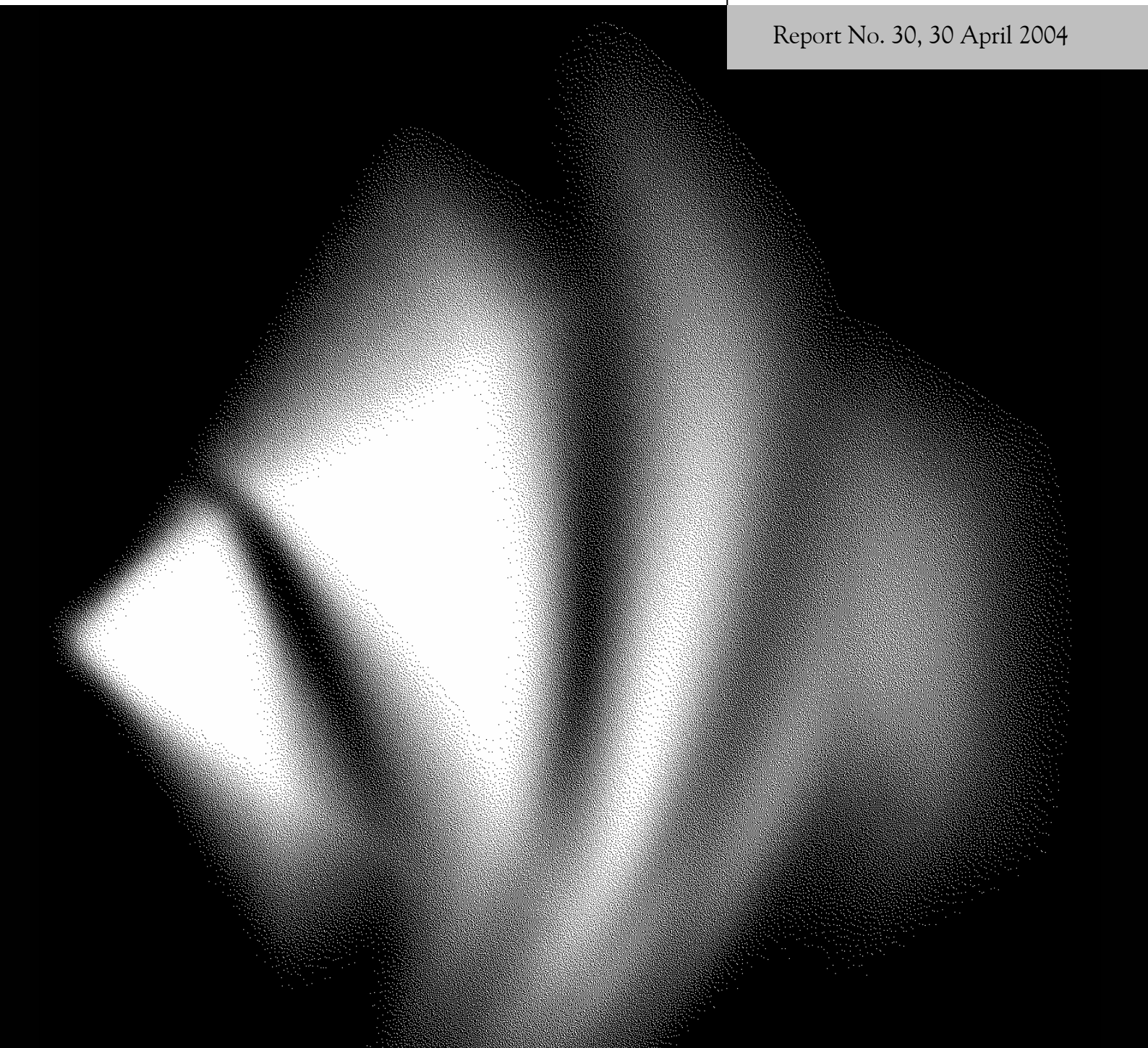
Australian Government
Productivity Commission

Review of the *Disability Discrimination Act 1992*

Productivity Commission Inquiry Report

Volume 1: Chapters

Report No. 30, 30 April 2004



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

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

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

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The Productivity Commission

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

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

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

Australian Government
Productivity Commission

Melbourne Office
Level 28, 35 Collins Street
Melbourne VIC 3000
Locked Bag 2 Collins Street East
Melbourne VIC 8003
Telephone 03 9653 2100
Facsimile 03 9653 2199
Canberra Office
Telephone 02 6240 3200
www.pc.gov.au

30 April 2004

The Honourable Peter Costello MP
Treasurer
Parliament House
CANBERRA ACT 2600

Dear Treasurer

In accordance with Section 11 of the *Productivity Commission Act 1998*, we have pleasure in submitting to you the Commission's final report into *Review of the* Disability Discrimination Act 1992.

Yours sincerely

Helen Owens
Presiding Commissioner

Cate McKenzie
Commissioner

Terms of reference

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

PRODUCTIVITY COMMISSION ACT 1998

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

2. The Productivity Commission is to report on the appropriate arrangements for regulation, taking into account the following:

   a) the social impacts in terms of costs and benefits that the legislation has had upon the community as a whole and people with disabilities, in particular its effectiveness in eliminating, as far as possible, discrimination on the ground of disability, ensuring equality between people with disabilities and others in the community, and promoting recognition and acceptance of the rights of people with disabilities;

   b) any parts of the legislation which restrict competition should be retained only if the benefits to the community as a whole outweigh the costs and if the objectives of the legislation can be achieved only through restricting competition;

   c) without limiting the matters that may be taken into account, in assessing the matters in (a) and (b), regard should be had, where relevant, to:

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

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

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

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

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

vi) the efficient allocation of resources; and

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

d) the need to promote consistency between regulatory regimes and efficient regulatory administration, through improved coordination to eliminate unnecessary duplication;

e) compliance costs and the paper work burden on small business should be reduced where feasible.

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

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

b) ascertain whether the objectives of the DDA are being met, including through analysis and, as far as reasonably practical, quantification of the benefits, costs and overall effects of the legislation upon people with disabilities, in particular its effectiveness in eliminating, as far as possible, discrimination on the ground of disability, ensuring equality between people with disabilities and others in the community, and promoting recognition and acceptance of the rights of people with disabilities;

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

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

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

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

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

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

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

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

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

IAN CAMPBELL
5 February 2003

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Acronyms

ABA	Australian Bankers' Association
ACROD	National Industry Association for Disability Services
ADA	Americans with Disabilities Act 1990
AHRC	Australian Human Rights Commission
AIHW	Australian Institute of Health and Welfare
ANAO	Australian National Audit Office
APS	Australian Public Service
ATO	Australian Tax Office
ATSIC	Aboriginal and Torres Strait Islander Commission
BAS	Business Activity Statement
BCA	Building Code of Australia
CAL	Copyright Agency Limited
CPA	Competition Principles Agreement
CRS	Commonwealth Rehabilitation Service
CSDA	Commonwealth State Disability Agreement
CSTDA	Commonwealth State and Territory Disability Agreement
DDA	*Disability Discrimination Act 1992* (Cth)
DDLS	Disability Discrimination Legal Service
DEST	Department of Education, Science and Technology
DSA	*Disability Services Act 1986*

DSP	Disability Support Pension
FAQs	Frequently Asked Questions
FCA	Federal Court of Australia
FMS	Federal Magistrates Service
FTE	Full time equivalent
GBE	Government Business Enterprise
HILDA	Household, Income and Labour Dynamics in Australia
HREOC	Human Rights and Equal Opportunity Commission
HREOC Act	*Human Rights and Equal Opportunity Commission Act 1986* (Cth)
ILO	International Labour Organisation
MCEETYA	Ministerial Council on Employment, Education, Training and Youth Affairs
MCS	Multiple Chemical Sensitivity
MOU	Memorandum of Understanding
NESB	non-English speaking background
NILS	National Information and Library Service
NCVER	National Centre for Vocational Education Research
NCYLC	National Children's and Youth Law Centre
NRS	National Relay Service
OH&S	Occupational Health and Safety
RDA	*Racial Discrimination Act 1975* (Cth)
RIS	Regulation Impact Statement
SAISO	Strategic Assistance for Improving Student Outcomes
SDA	*Sex Discrimination Act 1984* (Cth)

SOCOG	Sydney Organising Committee for the Olympic Games
TAFE	Technical and Further Education
TTY	Telephone Typewriter
UNCHR	United Nations Commission on Human Rights
UNCSD	United Nations Commission for Social Development
VET	Vocational Education and Training
WHO	World Health Organisation

Glossary

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

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

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

EXECUTIVE SUMMARIES

Key points

- The *Disability Discrimination Act 1992* (DDA) aims to provide a fair go for Australians with disabilities—it gives them the right to substantive equality of opportunity in areas like employment, education and the provision of goods and services.
- Overall, the DDA has been reasonably effective in reducing discrimination. But its report card is mixed and there is some way to go before its objectives are achieved.
  - Access to public transport and education has improved more than employment opportunities.
  - People with physical disabilities have been helped more than those with mental illness or intellectual disabilities—but other factors might be relevant.
  - People with disabilities in regional areas, from non-English speaking backgrounds and Indigenous Australians still face particular disadvantages—but race discrimination, language, socioeconomic background and remoteness also play a part.
  - The nature of the challenge facing the DDA will change as the focus shifts from removing physical barriers to addressing attitudinal barriers.
- The DDA meets the Competition Principles Agreement legislation review requirements.
  - Many benefits are intangible but widespread.
  - Costs of compliance are likely to be quite small for many organisations.
  - In-built safeguards help ensure a net benefit to the Australian community.
  - Its impact on competition appears to have been limited.
  - No satisfactory alternatives for achieving its objectives exist.
- Care needs to be taken in the way the DDA is implemented through disability standards if it is to continue to produce net benefits. While the DDA should be amended to allow standards to be developed for all areas of the Act, they should not be able to alter the fundamental scope of the Act.
- The unjustifiable hardship defence should be strengthened and extended to all areas of the Act. It should also apply to all standards.
- An explicit duty to make 'reasonable adjustments' should be included in the DDA.
  - It should cover all areas of the Act.
  - It should exclude adjustments that would cause unjustifiable hardship.
  - Its costs should be shared between affected organisations and government.
- Other changes would make the DDA more effective.
  - Amendments to the Act to clarify definitions and refine the scope of exemptions.
  - Changes to complaints processes to require that parties bear their own costs in most cases and allow organisations to initiate complaints in their own right.
- These recommendations would promote the objectives of the DDA and enhance its net benefits to the Australian community.

Overview

The *Disability Discrimination Act 1992* (DDA) is about providing a fair go for Australians with disabilities. Its focus is on addressing the physical and attitudinal barriers that prevent people with disabilities from making the most of their abilities and participating more fully in the community. This benefits both people with disabilities and the Australian community.

There is broad agreement that the rights of people with disabilities should be protected. The Australian Government is a signatory to several international agreements that oblige it to address disability discrimination.

This inquiry examines the DDA's progress over the past decade and explores ways to improve its efficiency and effectiveness. It has its origins in the Competition Principles Agreement (CPA) between Australian governments to review legislation that affects competition. Since 1996, some 1800 Acts have been reviewed under this agreement. The Productivity Commission's terms of reference require it to consider a range of economic and social factors in making its assessment.

In practice, large numbers of Australians with disabilities are disadvantaged in many areas of life (box 1). The DDA seeks to eliminate disadvantage caused by discrimination.

Box 1 **Disability and disadvantage**

A person with a disability is less likely to:

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

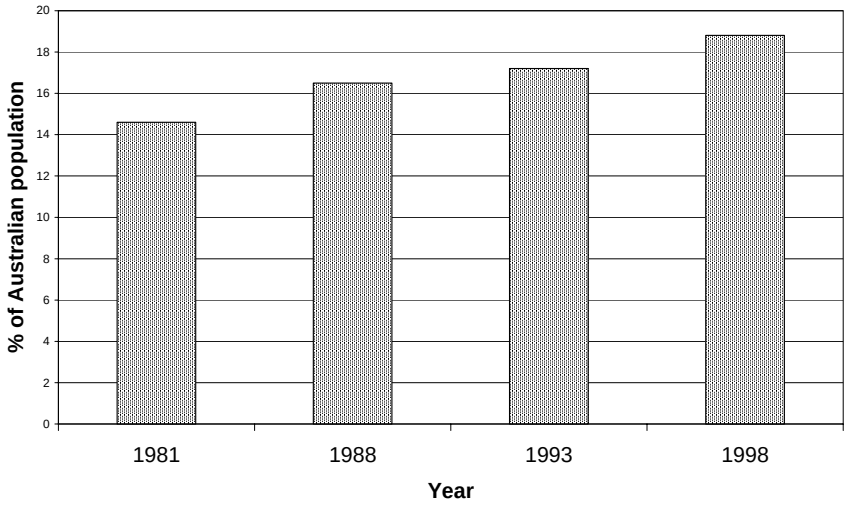
and is more likely to:

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

People with disabilities are a diverse group with different degrees of disability, and make up a large share of the Australian population. Latest available data from the Australian Bureau of Statistics (ABS) estimate that 3.6 million people had a disability in 1998, almost one-fifth of the total population.

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

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



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

The DDA at a glance

The DDA makes it generally unlawful to discriminate against people because of disability. It has three objectives, which in summary are:

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

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

The definition of disability in the DDA is broader than that used by the ABS. It includes physical disabilities, intellectual disabilities, mental illness and many other

forms of disability. It covers people who have had a disability in the past, currently have a disability, or might have a disability in the future. The broad definition helps avoid genuine complaints of discrimination falling at the first hurdle—determining whether or not the person concerned is covered by the DDA. This helps focus attention on the discriminatory action rather than the person concerned. As well as covering people with disabilities, the DDA covers their families and carers.

The DDA makes it unlawful to discriminate in specific areas of activity because of disability (box 2). Taken together, these activities cover nearly all areas of community life. However, it also allows some partial exemptions, such as for the defence forces, and superannuation and insurance. An exemption also applies to 'special measures' for people with disabilities, on the ground that it should not be unlawful to discriminate in their favour when supplying disability-specific services.

Box 2 **Areas of activity covered by the DDA**

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

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

A number of statutory exemptions limits the DDA's coverage. Aspects of private life are not covered.

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

Under the DDA, discrimination can be either *direct* or *indirect*.

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

The DDA relies largely on individual complaints for enforcement. But it also promotes systemic change through public inquiries and disability standards, and encourages private initiatives through voluntary action plans.

The DDA is one of a suite of federal human rights acts. Others are the *Human Rights and Equal Opportunity Commission Act 1986, Racial Discrimination Act 1975, Sex Discrimination Act 1984* and *Age Discrimination Act 2004*. The Human Rights and Equal Opportunity Commission (HREOC) administers all of this legislation. The DDA also operates along-side 'omnibus' equal opportunity legislation in each State and Territory that addresses discrimination on a variety of grounds, including disability.

Achieving equality

The DDA is based on a 'social' model of disability that focuses on the disabling nature of the environment in which people with disabilities live. It aims to remove physical and attitudinal barriers that prevent people with disabilities from enjoying equal opportunities to participate in the life of the community. The DDA covers both 'formal' and 'substantive' concepts of equality. Substantive equality goes beyond formal equality to recognise that differences are important and that some people with disabilities can require adjustments (or 'accommodations') to reach the same notional starting line as others (box 3).

People and organisations covered by the Act may risk complaints of discrimination if they do not make adjustments to ensure equality of opportunity for people with disabilities. But they do not have to do so if it would impose an 'unjustifiable hardship'. Unjustifiable hardship has two main elements. First, 'all relevant circumstances' must be considered when deciding if there is 'unjustifiable hardship'. These include the benefits and detriments to all persons concerned, implying that a net social benefit approach should be taken. Second, the financial impact on the person or organisation that may need to make adjustments must also be taken into account.

It is important to note that the DDA does not require equality of *outcomes* for people with disabilities. For example, in employment they must be able to meet the inherent requirements of the job, and employers are able to choose the best applicant on merit. In the Commission's view, improved outcomes for people with disabilities are important, and should ultimately flow from the improved opportunities made possible by the DDA. But attempts to influence outcomes directly should be pursued through other mechanisms, such as improved disability services. The DDA should not cover the establishment, funding or eligibility criteria

of disability services—these are properly the responsibility of governments. But the DDA should apply to the administration of those services.

Box 3 **Equality can have different meanings**

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

Formal equality is the right to be treated the same as everyone else, for example, by considering job applicants based on merit. But sometimes treating a person with a disability exactly the same as a person without a disability will not remove the barriers to participation. Receiving the same printed information as everyone else is no help if you are blind.

Equality of outcomes aims to ensure that people with disabilities achieve similar outcomes as other people. This is regarded by some people with disabilities as a right and by others as an objective. It can be hard to agree on how to bring this objective into a rights-based framework. For example, what role should merit play? Often the only way to achieve similar outcomes is to provide disability services. This goes beyond the scope of anti-discrimination legislation.

Substantive equality does not go as far as requiring equality of outcomes. It refers to a middle course—the right to have the same opportunities as others. It is then up to individuals to turn equal opportunities into outcomes, based on individual merit. This goes further than just equality of treatment, and may require that people with disabilities be treated differently. For example, it recognises that a person with a disability might be able to perform a job just as well as another person without a disability, but to be given the opportunity might first require some workplace assistance be provided, such as a different work station.

Impact of the DDA

It is difficult to measure how well the DDA has met its objectives. First, it is hard to untangle the effects of the DDA from State and Territory anti-discrimination legislation and other influences such as:

- the availability of disability services and the Disability Support Pension
- de-institutionalisation and 'mainstreaming' of many people with disabilities
- technological developments, such as new information technologies, that have reduced barriers faced by people with disabilities.

Second, discrimination is difficult to measure. The Commission looked at many sources of information including:

- DDA complaints and HREOC inquiries

- outcomes for people with disabilities (such as employment rates and educational achievement)
- indicators of accessibility (such as access to public transport).

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

Eliminating discrimination

The first objective of the DDA is to eliminate discrimination 'as far as possible'.

The Commission notes that the number of DDA complaints fell from 1994-95 to 1998-99, but has been relatively stable since (figure 2). Taking account of the increase in the number of people with disabilities, the 'complaints rate' has fallen significantly.

This 'improvement' in the complaints rate is welcome, but in itself does not necessarily indicate declining levels of discrimination. Only small numbers of complaints are made each year, and they might not reflect the experiences of people who do not formally complain. Other factors, such as the accessibility of HREOC's complaints process, and the availability of alternative State and Territory complaints processes, might also affect the number and types of complaints that come forward under the DDA. The impact of complaints on lessening discrimination can also vary. Where some complaints might only address particular instances of discrimination, others can have systemic effects.

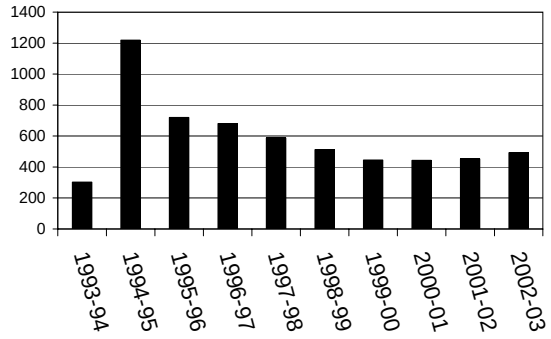
In 2002-03, as in most years, over half of all DDA complaints were in the area of employment. The second largest area of complaints was the provision of goods, services and facilities (nearly one quarter of all complaints).

After allowing for other influences, the DDA appears to have achieved mixed results in different areas of activity. The DDA appears to have been:

- relatively ineffective in reducing discrimination in employment. However, employer peak bodies are working with their members to develop policies in this area
- of only limited effectiveness in improving access to premises due to inconsistencies with the Building Code of Australia (BCA). The recently released draft disability standards on access to premises, if implemented, would help to create consistency by linking the DDA to the BCA, but as discussed later would introduce problems of their own

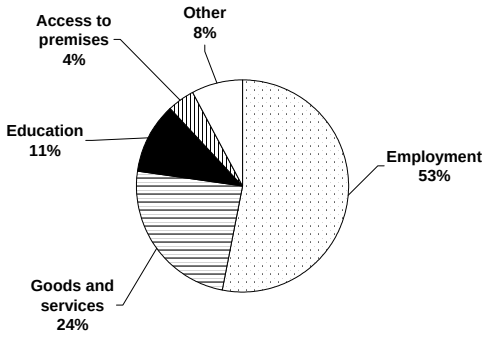
Figure 2 **DDA complaints**

Complaints have fallen[a] …



[a] DDA complaints to HREOC, 1993-94 to 2002-03.

… and they are dominated by employment[a]



[a] DDA complaints to HREOC, 2002-03.

- somewhat effective in making public transport more accessible. The public transport disability standards were introduced in 2002 and many providers are already well ahead of agreed targets. However, most improvements have been in cities, with many regional areas still suffering significant problems
- effective in reducing discrimination in the provision of certain services such as telecommunications and electronic banking. Concerns remain about discrimination in other areas, such as insurance
- reasonably effective in improving educational opportunities for tertiary students with disabilities, with mixed results in school education. Educational attainment has improved modestly and the number of students in mainstream schools identified as having disabilities has grown substantially. But this has strained the resources of many schools, especially in the non-government sector
- ineffective in improving employment opportunities in the Australian Public Service through the Australian Government's Commonwealth Disability Strategy.

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

- more effective for people with mobility, sight or hearing impairments than for people with mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome
- less effective for people with dual or multiple disabilities and people living in institutions.

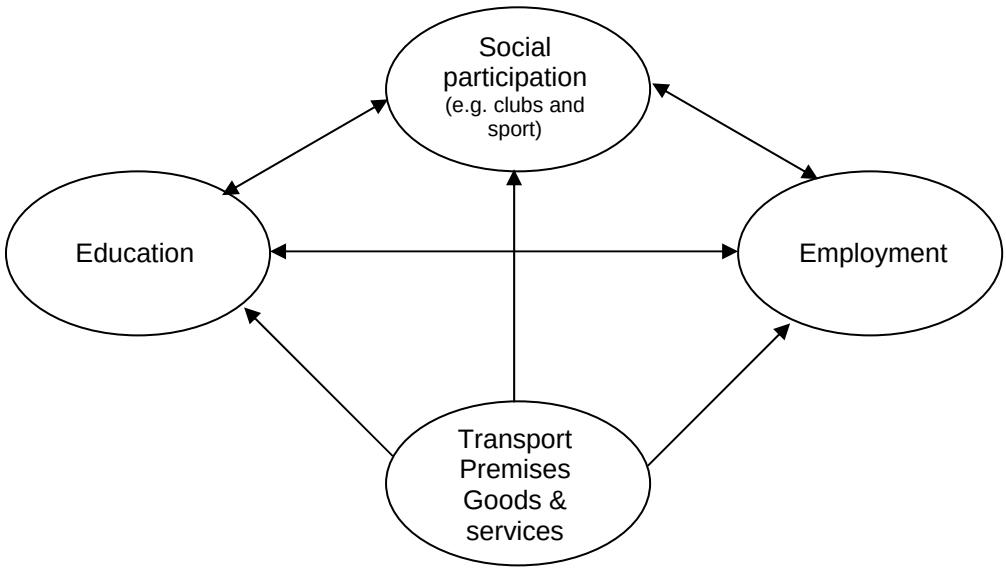
Many groups may benefit from improvements to the DDA, but there is a limit to how far it can address the disadvantages that some face. The nature of some people's disabilities may be such that they cannot take advantage of the

opportunities created by the DDA, without additional disability services. Anti-discrimination legislation benefits most those against whom discrimination is most unreasonable; that is, where the disability is least relevant (in degree or kind) to the circumstances.

The DDA also appears to have been less effective for people living in rural and remote regions, those from non-English speaking backgrounds and many Indigenous Australians with disabilities. However, these results might reflect disadvantages other than disability, associated with race, language barriers, socioeconomic background and remoteness.

Although this is a somewhat mixed report card, eleven years is not a long time in which to achieve the fundamental changes sought by the DDA. Strong network effects mean that reducing discrimination in one area of society can have flow-on benefits in many others (figure 3).

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



Accessible public transport can yield most benefit only when destinations become accessible. Discrimination in education feeds into limited employment opportunities—and access to both requires accessible transport and buildings. Limited employment opportunities, in turn, affect income levels and opportunities for social participation. 'Vicious cycles' of disadvantage can easily emerge. But by removing barriers, the DDA can promote 'virtuous cycles' based on improved access and full participation.

The future is likely to pose fresh challenges. Although they will take some time to flow through, significant reforms have been initiated to dismantle physical barriers in areas such as transport and public premises. The challenge will be to make the DDA effective in addressing discrimination in areas that rely more on changing people's attitudes than on removing physical barriers.

Equality before the law

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

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

The DDA has few provisions that deal directly with this objective, and there are practical limits to the DDA's potential impact in these areas. The States and Territories have primary responsibility for institutional accommodation, legal guardianship and many areas of justice. Even so, the DDA plays an important role in reinforcing the legal rights of people with disabilities.

Promoting community acceptance

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

However, knowledge of the DDA among many people with disabilities, employers, service providers and the general community still appears to be limited. A large scale media campaign may not be the most cost-effective way to promote lasting awareness. There is nevertheless significant scope to introduce more targeted programs, including through cooperative efforts with the States and Territories and employers. The Australian Industry Group, for example, indicated a willingness to work with HREOC to develop and deliver awareness programs.

Is the DDA necessary?

A threshold question that the Commission must answer is whether the DDA is necessary. In making its assessment, the Commission must have regard to the requirements of regulation assessment set out in the CPA and the Australian Government's Regulation Impact Statement process. Combining these, the Commission has addressed the following questions:

- Does the DDA restrict competition?
- Do the benefits to the community of the DDA outweigh the costs?
- Are there alternative, less restrictive, ways of achieving the objectives of the DDA?

Does the DDA restrict competition?

The first issue to resolve is how the DDA might restrict competition. This is important because restricting competition can impose costs on the whole community—including people with disabilities.

By regulating the inputs used by organisations (such as labour) and what they produce, the DDA has the potential to affect the competitive environment. Impacts on competition would be important if the DDA, for example:

- created barriers to entry
- imposed disproportionate costs on a large enough group of organisations to reduce competitive pressures on others.

It could be said that the DDA creates barriers to entry because, in some circumstances, it prevents organisations from providing non-accessible goods and services. This might be considered an acceptable price to pay for achieving an important social objective. But it would be an issue if people without disabilities were denied consumer choices or costs were increased significantly. To date, this restriction on competition has not been significant, but it may become so in the future, depending on how the DDA is applied.

The DDA could also influence competitive pressures by imposing obligations on some organisations and not on their competitors. But if only a small number of organisations is affected, the overall effect on competition might be negligible. This seems to be the case with the complaints-based enforcement of the general provisions of the DDA. The number of complaints is small relative to the size of the economy; and they seem to fall in a relatively *ad hoc* way.

On the other hand, mandatory disability standards have the potential to affect whole sectors. If standards had the same effect on all organisations within a sector, they would be competitively neutral. For example, if all bus operators are required to make the same adjustments to their buses, competition between them should be unaffected.

However, standards may not always apply uniformly, as the proposed access to premises standards illustrate. The relative cost impacts of those standards would vary depending on whether the premises are new or existing, large or small. For example, because of the requirement to install lifts in two storey premises, strip shopping centres could be placed at a relative cost disadvantage to large shopping centres. In such cases, where one group of organisations is affected differently to another, disability standards have the potential to restrict competition. Any restriction on competition would be exacerbated if disadvantaged organisations offered more innovative services than their counterparts.

Whether compliance is enforced through complaints or standards, competition might also be affected where organisations are subject to costs that overseas competitors are not. However, many other countries also have anti-discrimination legislation, evening up this influence to some extent.

The Commission concludes that the DDA can potentially restrict competition. In practice, this will depend on how the costs of compliance are borne. Restrictions on competition can be minimised by making the DDA apply as uniformly as possible across and within sectors.

Do the benefits outweigh the costs?

The many ways in which the DDA affects the community mean that its costs and benefits must be considered in a broad framework that takes into account equity and social welfare, among other considerations.

The Commission considers that, by reducing discrimination, the DDA can generate widespread benefits. First and foremost, such legislation can improve the material, social and psychological situation of people with disabilities. It can reduce the costs of their disability and improve their capabilities. People without a disability can also benefit. For example, older Australians or parents with prams can benefit from improved physical access.

The DDA also has the potential to increase the productive capacity of the economy. Reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. And it can allow students with disabilities to

improve their educational outcomes, making them more productive members of the community.

The benefits of the DDA are compounded where discrimination is reduced in several areas simultaneously. For example, the effects of reductions in discrimination affecting education and employment would be self-reinforcing, as would the effects of greater physical accessibility and employment.

Less tangibly, to the extent that the DDA improves the social acceptance and integration of people with disabilities, it would benefit the wider community through greater trust, mutual cooperation and an enhanced sense of fairness.

The DDA could nevertheless create significant costs. These include the tangible costs of removing physical barriers and the less tangible but sometimes significant costs of changing processes and procedures. Some adjustments can be very expensive (for example, converting public transport infrastructure). But many are not—evidence suggests that many workplace modifications are relatively inexpensive.

The DDA might also create indirect costs for the community by diverting resources from their best uses. This could occur where one sector bears costs that others do not—for example, where public transport (which is subject to the DDA) competes with substitutes, such as private cars (which are not).

The DDA has several in-built 'safeguards' that try to balance benefits and costs:

- an unjustifiable hardship defence is included in most areas of the DDA requiring, among other things, that the benefits and detriments to all persons concerned be considered
- disability standards are subject to the Regulation Impact Statement process, which helps assess whether they provide net benefits to the community
- HREOC can grant temporary exemptions from the DDA in cases of short term hardship
- employers can choose not to hire or retain employees who cannot meet the inherent requirements of a job, including minimum productivity requirements.

The Commission is nevertheless concerned that the existing safeguards do not apply sufficiently widely and may be overridden by standards in the future. The draft standards on access to premises are a case in point. The absence of an unjustifiable hardship defence for new buildings in those standards may substantially reduce the net benefits of the DDA and cause distortions in resource allocation across the economy.

The Commission considers that the DDA appears likely to have produced net benefits for the Australian community to date. But care needs to be taken in the way the DDA is implemented through standards in the future if it is to continue to produce net benefits. This will require that an appropriate balance be kept between requirements and safeguards.

Are there alternatives to the DDA?

The final step in a legislation review is to consider alternative approaches for achieving the same results.

Relying on non-regulatory alternatives such as, 'moral suasion', education or self-regulation is unlikely to be as effective as anti-discrimination legislation. Whether at the State and Territory or Australian Government level, laws which prohibit socially unacceptable behaviour can be powerful instruments for achieving attitudinal change. There are some signs that those changes are occurring, albeit slowly. Although many organisations might voluntarily adopt the basic concepts of formal equality, in the absence of legislation some may be unwilling to incur the costs necessary to achieve substantive equality.

In the absence of federal legislation, State and Territory anti-discrimination legislation would provide some protections (box 4). But despite some convergence, those Acts provide different levels of protection and do not cover Australian Government agencies. They are also ineffective at dealing with discrimination issues that cross State and Territory borders. Federal legislation is also necessary to meet Australia's international obligations.

Another alternative could be to spend more on disability services. Although this might address some of the disadvantages faced by people with disabilities, and improve outcomes, it would not address discriminatory behaviour or attitudes. Disability services are crucial, but constitute a complementary approach, not a substitute for anti-discrimination legislation.

In conclusion, the Commission considers that the objectives of the DDA cannot be achieved without federal legislation. There are no satisfactory alternatives to a DDA, and there are good social and economic reasons for its retention. The DDA underpins the rights of a vulnerable group in society. It establishes a right to substantive equality that gives people with disabilities a better chance of enjoying similar opportunities to others. Although the Commission is concerned about the potential cost and competition impacts of the DDA, these can be contained through the extension of existing safeguards.

Box 4 **The DDA and State and Territory anti-discrimination laws**

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

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

The Commission is satisfied that the DDA has met the CPA tests to date and, with appropriate amendments, will provide net community benefits into the future.

The way forward

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

A reasonable adjustment duty

Until recently, it had been presumed that the DDA obliged affected organisations to make 'reasonable adjustments' to accommodate the needs of people with disabilities. Although the term 'reasonable adjustment' does not appear in the DDA, various features of the Act seemed to imply such an obligation. However, a recent High Court decision questioned this presumption and appears to have narrowed significantly the protection that the Act was previously thought to provide.

The Commission considers that substantive equality is a sound basis for disability discrimination legislation. It therefore endorses the concept of reasonable adjustment as a means to this end, and recommends that it be included explicitly in the Act as a stand alone duty. This would mean that failure to provide reasonable adjustment could itself be unlawful discrimination and the subject of a complaint.

The Commission makes this recommendation provided that the duty is always subject to the unjustifiable hardship defence. 'Reasonable adjustment' should be

defined to exclude adjustments that would cause unjustifiable hardship. This safeguard is necessary to ensure that adjustments are likely to produce net benefits for the community, and do not impose undue financial hardships on the organisations required to make them.

Even in the absence of an explicit reasonable adjustment duty, there are strong grounds for ensuring that the unjustifiable hardship defence applies to all areas of the Act, including: education after enrolment; employment between hiring and firing; and administration of Commonwealth laws and programs. Some people are opposed to the Australian Government having recourse to this defence, presuming that it has greater resources at its disposal. But any government expenditure has an opportunity cost, and to devote resources to making adjustments that do not have net community benefits is just as wasteful as it is in any other area covered by the DDA.

The DDA should also require that unjustifiable hardship be included in all disability standards introduced under the Act, including current draft standards.

Who pays?

Any obligation to make adjustments raises the vexed question of who should pay for those adjustments: the organisations concerned, or the community more broadly. There are good arguments for both to be involved (box 5). In some cases, the costs can be spread across different groups. For example, the costs of accessible public transport might be met partly by transport providers (through lower earnings), their customers (through higher fares) and by taxpayers (through subsidies). But in other cases organisations might not be able to pass on the costs.

Two approaches could be adopted to help broaden the obligation to fund adjustments. The Commission is recommending that:

- the unjustifiable hardship test also require that consideration be given to efforts taken by the organisation to access financial and other assistance. This would mean that the organisation could not use ignorance of existing programs as a defence.
- the Australian Government review existing arrangements for funding adjustments and consider portable access grants to support participation in employment and education.

Box 5 **Sharing the costs**

Where the benefits of the DDA outweigh the costs, the question still arises as to who should bear the costs of pursuing social objectives: the organisations affected, or the community more generally. There are two different approaches to this issue.

The first approach argues that, if the government (on behalf of the community) has a particular social objective which imposes costs on organisations, the costs should be funded out of general government revenue. This implies that government should pay for adjustments mandated by the DDA. However, it need not imply that government should pay the full cost.

- Many service providers and employers are willing to pay some of the costs, so the government need only fund the balance.
- Making organisations pay part of the cost encourages them to identify low cost solutions and maximise the benefits of adjustments. It also limits any incentives they might have to ask the government to pay for unnecessary adjustments.

The second approach argues that the costs of social objectives should form part of the cost of producing related goods and services. These costs may then be reflected in prices; for example, the cost of better access to public transport might be passed on through higher fares. But in some cases, the government might share part of the cost, to:

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

Both approaches lead to a similar broad conclusion—that government and the organisations affected should share the costs of adjustments. A contribution from government is particularly important where, otherwise, the burden on the organisations affected would lead to an unfair distribution of costs.

People with disabilities might also be involved in funding adjustments. In practice, they already pay for many of the costs associated with their disability. While they should not have to fund adjustments mandated by the DDA, occasions may arise where they might wish to contribute to an upgrade in the specifications of those adjustments (for example, a better quality screen reader). This would be most likely to occur in areas such as education or employment.

Improving definitions and exemptions in the DDA

Although the broad thrust of the DDA remains appropriate, the Commission has recommended improvements to definitions and exemptions in the Act. Amendments include:

- clarifying that the current broad definition of disability covers medically recognised symptoms, and genetic predisposition to a disability that is otherwise covered by the DDA
- clarifying the definition of 'direct discrimination' through the use of examples
- amending the definition of 'indirect discrimination' to include proposed discrimination and to place the onus on organisations subject to a complaint to prove that discriminatory conditions they impose are reasonable.

The Commission has also recommended improvements to the DDA exemptions that protect some actions from complaints. These exemptions have some advantages, such as cutting short legal processes. But administrative convenience should not override the rights of people with disabilities. Exemptions should be socially and economically justifiable and should continue to focus on areas of activity and not on particular groups of people with disabilities. The scope of exemptions should be limited by:

- tightening the partial exemption for superannuation and insurance by:
  - clarifying 'other relevant factors' that may be considered
  - requiring insurers (when requested) to provide reasons for unfavourable decisions, including an explanation of the information on which they relied
- clarifying the 'special measures' exemption so it applies only to the establishment, funding and eligibility criteria of disability services, not their administration
- requiring that the list of prescribed Acts be reviewed every five years to ensure that the reasons for their prescription remain valid and that the current list be reviewed as soon as possible.

Improving the complaints process

Compliance with the DDA is driven mainly by a system of individual complaints, through which people with disabilities enforce their rights. Often just the threat of a complaint can be a powerful force for change.

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

Some people with disabilities face significant barriers or disincentives to using the complaints process, including:

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

These barriers would be reduced by the Commission's recommendations to:

- make the courts cost neutral for discrimination cases (each party would bear their own costs) except where there are extenuating circumstances
- allow disability organisations to make representative complaints in their own right
- give federal courts jurisdiction to enforce conciliation agreements.

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

Improving other DDA provisions

Disability standards spell out in detail how the DDA applies to particular areas of activity. Only the public transport standards have been introduced so far, although drafts of the education and access to premises standards have been released. Although the process of developing standards can raise community awareness, standards only begin to have real effects when they become law. The drawn-out consultation process has limited their impact.

- Disability standards can provide certainty for people with disabilities and for organisations. This certainty is reduced if State and Territory requirements differ from the standards. The DDA should be amended to clarify that disability standards displace State and Territory legislation where they address the same specific matter. The alternative approach would be for the States and Territories to adopt the DDA standards under their own laws, but this could create inconsistencies in enforcement and interpretation.

- Disability standards should not be used to alter fundamentally the scope or balance of the DDA. Amendments should be made in the Act itself, not in subordinate legislation. Furthermore, the standards should be required to reflect the safeguards and exemptions contained in the Act.
- The Attorney General should have the power to make disability standards to cover any area of activity and the operation of any statutory exemption in the DDA. This does not imply that standards should be made in all areas.

Voluntary action plans are useful tools, but their impact has been limited by the small number that have been lodged by business. Government agencies have lodged more plans than private organisations, but coverage is still limited. The Commission's suggested reforms in other areas would encourage voluntary action plans. For example, the reasonable adjustments duty might prompt organisations to adopt an action plan spelling out in advance how they might comply.

Promoting equality before the law

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

- A separate inquiry should be held into access to the justice system for people with disabilities, with a focus on ways to protect their rights in both criminal and civil jurisdictions.
- The right to vote is one of the most important expressions of equality before the law. The Australian Government should ensure that federal voting processes are accessible and encourage the States and Territories to follow suit.
- It should be made clear that there is no general exemption for actions done in compliance with laws that have discriminatory effects. If governments want to exempt specific laws from challenge, they should use the existing mechanisms in the DDA to prescribe such laws.

In addition, the Commission considers that HREOC could make greater use of its power to examine federal legislation for consistency with the DDA.

'Mainstreaming' the DDA

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

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

The draft standards on access to premises, for example, are being developed by the Australian Building Codes Board. If implemented, compliance with the standards will be monitored largely through mainstream planning processes. A similar approach should be adopted for other disability standards wherever practical.

Cooperative arrangements between HREOC and State and Territory anti-discrimination bodies should be improved. Together, they should establish a 'shopfront' presence in each jurisdiction. HREOC would remain responsible for managing DDA complaints. Cooperative efforts in awareness raising and policy development should also be enhanced. Links between HREOC and State and Territory Commissioners could be enhanced by expanding the membership and focus of the Australian Council Of Human Rights Agencies.

A co-regulatory approach should be introduced to encourage the private sector to take a greater role in tackling discrimination. Industries could develop codes of conduct, and those that meet minimum criteria could be registered with HREOC. Organisations applying a code could be given some degree of protection from complaints under the DDA, for example by requiring that relevant complaints are first addressed under the code before permitting them to be heard by HREOC.

Resources

The effectiveness of the DDA is influenced by the resources devoted to its administration and implementation.

Many people with disabilities need legal assistance to enforce their rights through the complaints system. Disability Discrimination Legal Services are the main source of this assistance, with advocacy bodies playing an important supporting role. If such organisations are not given enough resources to match their responsibilities, the effectiveness of the DDA will be undermined.

Similarly, HREOC needs sufficient resources to perform its statutory functions. Recommendations in this report could lead to changes to HREOC's responsibilities and hence its resource requirements (for example, conciliating cases involving reasonable adjustment, conducting reviews of legislation that conflicts with the DDA, and general awareness raising). To the extent that discrimination declines, HREOC might expect to receive fewer complaints, but added pressure may arise if the effect of standards were to divert complaints from State and Territory

anti-discrimination bodies to HREOC. It is important that its conciliation function is not compromised to fund new initiatives.

The Commission's recommendation that the unjustifiable hardship defence include consideration of efforts taken to access financial and other assistance could increase awareness of and demand for government assistance.

The Commission is not in a position to comment on the ideal budget that should be devoted to addressing disability discrimination. But this inquiry has emphasised that the level of discrimination that society continues to bear will be influenced by the resources that governments expend. The DDA cannot work without adequate financial underpinning.

In conclusion

The DDA has been reasonably effective in addressing disability discrimination. But its effectiveness has been patchy and there is still a long way to go. Furthermore, the nature of the challenge facing the DDA is changing as the focus shifts from addressing physical barriers to attitudinal barriers. The Commission is especially concerned about discrimination in employment, because having a job is a key to people participating more fully in the community.

The Commission is satisfied that the DDA has met the CPA tests to date and, with appropriate amendments, will provide net community benefits into the future. No alternative approach would better achieve the objectives of the Act, in particular eliminating (as far as possible) discrimination on the ground of disability. Having a DDA is also consistent with Australia's international obligations.

The Commission has made a number of recommendations for improving the operation of the DDA, including the introduction of an explicit duty to make reasonable adjustments. This goes to the heart of the DDA, and would complement other features such as the prohibitions on direct and indirect discrimination. Such a duty would be consistent with the Australian Government's original intentions for the Act, and would promote awareness among organisations and people with disabilities. Balanced by an clearer and broader unjustifiable hardship defence, the duty would reassert the role of the DDA as a vehicle for achieving real change for people with disabilities.

Other recommended changes clarify the way the Act works, refine the application of exemptions, make the complaints process more accessible, ensure that HREOC and State and Territory anti-discrimination bodies work cooperatively, and provide

additional impetus to organisations to develop their own approaches to addressing disability discrimination.

The Commission considers that these suggested improvements would promote the objectives of the Act, and enhance its net benefits to the Australian community.

Recommendations

Chapter 8 Eliminating discrimination

RECOMMENDATION 8.1

The* Disability Discrimination Act 1992 *should be amended to include a general duty to make reasonable adjustments.

- ***Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.***
- ***The person or persons on whom the duty would fall should be identified.***
- ***Examples of how the duty might apply should be included in each area of the Act.***

RECOMMENDATION 8.2

The* Disability Discrimination Act 1992 *should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

RECOMMENDATION 8.3

The criteria for determining unjustifiable hardship in the* Disability Discrimination Act 1992 *(s.11) should be expanded to:

- ***require consideration of the costs and benefits to* all *persons and an assessment of the net benefit to the community***
- ***include as a relevant circumstance, the availability of financial and other assistance***
- ***clarify that any respondent to a complaint (not just 'service providers') can expect to have their action plan considered.***

RECOMMENDATION 8.4

The defence of inherent requirements should be available to employers in all employment situations.

Chapter 9 Equality before the law

RECOMMENDATION 9.1

The Attorney General, in consultation with State and Territory governments, should commission an inquiry into access to justice for people with disabilities, with a focus on practical strategies for protecting their rights in the criminal and civil justice systems.

RECOMMENDATION 9.2

The* Commonwealth Electoral Act 1918 *should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.

RECOMMENDATION 9.3

The Disability Discrimination Act 1992 ***should apply to actions done in compliance with laws that have not been prescribed under section 47 of the Act.***

Chapter 10 Promoting community recognition and acceptance

RECOMMENDATION 10.1

The Human Rights and Equal Opportunity Commission should work with employers and employer groups to develop and deliver targeted education campaigns.

RECOMMENDATION 10.2

The cooperative arrangements between the Human Rights and Equal Opportunity Commission and State and Territory anti-discrimination bodies should be formalised and extended. This would be facilitated by:

- ***including HREOC in the membership of the Australian Council of Human Rights Agencies***
- ***broadening the Council's focus to cover disability issues, especially the development of education programs, information provision, research priorities and programs, and a 'shop front' presence in each jurisdiction.***

Chapter 11 Definitions

RECOMMENDATION 11.1

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

- ***medically recognised symptoms where the underlying cause is unknown***
- ***genetic predisposition to a disability that is otherwise covered by the Act.***

A note should be added to the Act to explain that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Act.

RECOMMENDATION 11.2

The definition of direct discrimination in the* Disability Discrimination Act 1992 *(s.5(1)) should be supplemented with examples (either included in the Act or guidelines) to clarify the 'circumstances that are the same or not materially different' for the purposes of making a comparison.

RECOMMENDATION 11.3

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

- ***remove the proportionality test***
- ***include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances'***
- ***require the respondent to prove that a requirement or condition is reasonable***
- ***cover incidences of proposed indirect discrimination.***

Chapter 12 Exemptions

RECOMMENDATION 12.1

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

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

RECOMMENDATION 12.2

The* Disability Discrimination Act 1992 *should be amended to limit the application of the insurance and superannuation exemption (s.46). It should only apply if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied).

Applicants should be advised of their entitlement to request these reasons.

RECOMMENDATION 12.3

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

- ***exempts only those provisions which deal with issuing entry and migration visas to Australia***
- ***does not exempt administrative processes under the Act and its regulations.***

RECOMMENDATION 12.4

The exemption in the* Disability Discrimination Act 1992 *for 'special measures' that are reasonably intended to benefit people with disabilities (s.45) should be amended to clarify that it:

- ***exempts the establishment, eligibility criteria and funding of these measures***
- ***does not exempt general actions done in their administration.***

RECOMMENDATION 12.5

The* Disability Discrimination Act 1992 *should be amended to clarify that the general exemption for 'special measures' (s.45) does not apply to wages paid to people with disabilities. Wages should be subject to the specific provisions for capacity-based wages in the Act (s.47(1)(c)).

RECOMMENDATION 12.6

The laws prescribed under section 47 of the* Disability Discrimination Act 1992 *should be reviewed every five years to ensure that the reasons for their prescription remain current. The laws that are currently prescribed should be reviewed as soon as possible and delisted if necessary.

Chapter 13 Complaints

RECOMMENDATION 13.1

***The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction but retain responsibility for managing complaints under the* Disability Discrimination Act 1992.**

RECOMMENDATION 13.2

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

RECOMMENDATION 13.3

The Australian Government should legislate to ensure that, where it is the clear intent of the parties, conciliation agreements should become legally binding agreements. The legislation should grant Federal Court or Federal Magistrates Court jurisdiction over such agreements. The legislation should also set out the remedies that may be granted by those courts in respect of a breach of such an agreement.

RECOMMENDATION 13.4

***The* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the* Family Law Act 1975.**

RECOMMENDATION 13.5

The* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required.

RECOMMENDATION 13.6

The Attorney-General's Department should investigate the implications of this inquiry's recommendations about the disability discrimination complaints process for other federal anti-discrimination legislation.

Chapter 14 Regulation

RECOMMENDATION 14.1

Section 31 of the* Disability Discrimination Act 1992 *should be amended to clarify that disability standards cannot alter in a fundamental way the scope of the Act. The scope should only be altered via amendment of the Act, not via disability standards.

RECOMMENDATION 14.2

The* Disability Discrimination Act 1992 *(s.13) should be amended to clarify that where disability standards and State and Territory legislation address the same specific matter, the disability standards should prevail.

RECOMMENDATION 14.3

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

RECOMMENDATION 14.4

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

RECOMMENDATION 14.5

The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.

RECOMMENDATION 14.6

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

RECOMMENDATION 14.7

The* Disability Discrimination Act 1992 *(Part 3) should be amended to clarify that action plans can be developed and registered by any organisation or person covered by the Act.

Chapter 15 Other issues

RECOMMENDATION 15.1

The Australian Government should review the effectiveness of the various schemes it uses to subsidise the costs to organisations of adjustments needed by people with disabilities. This review should consider the merits of portable access grants that would contribute to the costs of adjustments required for participation in employment and education.

Findings

Chapter 5 Effectiveness in eliminating discrimination

FINDING 5.1

Complaints under the Disability Discrimination Act 1992*, combined with participants' views and labour market statistics, indicate that disability discrimination in employment remains a significant issue.*

FINDING 5.2

The Disability Discrimination Act 1992 *appears to have had some beneficial effects in education, although it has not been wholly successful in eliminating discrimination for students with disabilities. It appears to have been reasonably effective in improving educational opportunities for tertiary students with disabilities, with mixed results in schools.*

FINDING 5.3

The Disability Discrimination Act 1992 *appears to have had some impact on making new buildings more accessible. However, inconsistencies between the Building Code of Australia and the Act limit the effectiveness of the Act. Proposals for formal links between the building code and disability standards on access to premises would help to address these inconsistencies.*

The Disability Discrimination Act 1992 *has been less effective in improving the accessibility of existing buildings, and the proposed disability standards will only address this issue for refurbished buildings.*

FINDING 5.4

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

FINDING 5.5

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

FINDING 5.6

The Australian Government has implemented its own Commonwealth Disability Strategy in response to the Disability Discrimination Act 1992. *This strategy has been ineffective in improving employment opportunities for people with disabilities in the Australian Public Service.*

FINDING 5.7

The Disability Discrimination Act 1992 *appears to have been more effective for people with mobility and sensory impairments than those with a mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation. However, reasons for these differences often relate to factors other than disability discrimination, such as the severity of disability.*

FINDING 5.8

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

FINDING 5.9

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

Chapter 6 Benefits and costs of the DDA

FINDING 6.1

By regulating inputs used by organisations and their outputs, the Disability Discrimination Act 1992 *has the potential to impose costs on business and other organisations, and to restrict competition in the Australian economy.*

FINDING 6.2

A reduction in disability discrimination arising from the Disability Discrimination Act 1992 *has the potential to confer important tangible and intangible benefits on people with disabilities; to contribute to beneficial 'social capital'; and to generate widespread community benefits.*

FINDING 6.3

Under the general provisions of the Disability Discrimination Act 1992*, the costs of adjustments incurred by organisations are mainly low. However, in some cases, they can be very high. These, and other compliance costs, can be unpredictable, especially where complaints are made.*

FINDING 6.4

The introduction of disability standards under the Disability Discrimination Act 1992 *can reduce the costs of complaints and uncertainty for individual organisations, but has the potential to raise compliance costs across all organisations covered by standards.*

FINDING 6.5

The general provisions of the Disability Discrimination Act 1992 *impose an uneven and inequitable regulatory burden on organisations. This could lead to the competitiveness of individual organisations being affected. However, the restrictions on competition appear to be negligible.*

FINDING 6.6

Disability standards introduced to date appear to have had a relatively even impact on the costs of affected organisations and hence to have been competitively neutral.

FINDING 6.7

The Disability Discrimination Act 1992*, as it has been implemented to date, is likely to have generated a net community benefit.*

FINDING 6.8

The future balance of costs and benefits generated by the operation of the Disability Discrimination Act 1992 *will depend on the way in which the Act is implemented and enforced. Net benefits could be reduced if disability standards are not subject to appropriate safeguards.*

Chapter 7 Necessity and focus of the DDA

FINDING 7.1

Both social and economic arguments provide support for government intervention to address disability discrimination.

FINDING 7.2

The objectives of the Disability Discrimination Act 1992 *can only be met by legislation that potentially could restrict competition. Non-regulatory approaches can complement the operation of anti-discrimination legislation, but cannot substitute for it.*

FINDING 7.3

State and Territory anti-discrimination legislation can complement the operation of the Disability Discrimination Act 1992, *but cannot substitute for it.*

FINDING 7.4

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

FINDING 7.5

The Disability Discrimination Act 1992 *meets the Competition Principles Agreement legislative review requirements.*

Chapter 8 Eliminating discrimination

FINDING 8.1

Various sections of the Disability Discrimination Act 1992 *imply that reasonable adjustments must be made in order to avoid discriminating against people with disabilities. However, a recent High Court decision has questioned this presumption and appears to have narrowed significantly the protection that the Act was thought to provide.*

FINDING 8.2

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

FINDING 8.3

The unjustifiable hardship defence does not cover all areas of the Disability Discrimination Act 1992. *Major areas not covered include education post-enrolment, employment between hiring and firing, and administration of Commonwealth laws and programs. If the draft disability standards for access to premises were adopted, the unjustifiable hardship defence would be denied to developers or owners of new buildings.*

FINDING 8.4

There is a lack of guidance as to how unjustifiable hardship might apply to particular areas of the Disability Discrimination Act 1992. *This could be addressed through disability standards or guidelines.*

FINDING 8.5

Unjustifiable hardship is best determined through broad criteria that can be applied flexibly to individual cases.

FINDING 8.6

The inherent requirements defence does not currently apply to within-employment situations. This might discourage employers from employing people with disabilities because it limits their ability to train, transfer and promote whom they choose.

FINDING 8.7

It is generally appropriate for the costs borne under the Disability Discrimination Act 1992 *to be shared between the organisations required to make adjustments and governments.*

Chapter 9 Equality before the law

FINDING 9.1

There appears to be potential for the Human Rights and Equal Opportunity Commission to make greater use of its power to examine Commonwealth legislation and report to the Minister on its consistency with the Disability Discrimination Act 1992.

FINDING 9.2

Current provisions in the Human Rights and Equal Opportunity Act 1986 *(Part IIC) dealing with discriminatory acts done in accordance with Awards are appropriate.*

FINDING 9.3

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

FINDING 9.4

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

FINDING 9.5

There are practical limitations to achieving equality before the law for people with cognitive disabilities. However, there are major limitations on the use of the Disability Discrimination Act 1992 *in this area.*

FINDING 9.6

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are overrepresented in the criminal justice system (as victims of crime, alleged offenders and in corrective services).

FINDING 9.7

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

FINDING 9.8

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

Chapter 10 Promoting community recognition and acceptance

FINDING 10.1

In general, community awareness of disability issues and attitudes towards people with disabilities appear to have improved in the past decade. Significant scope for further improvement remains, particularly in areas such as employment, and for certain disabilities, such as mental illness.

FINDING 10.2

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

FINDING 10.3

Public inquiries appear to have had positive impacts on promoting community recognition and acceptance in specific areas. Their overall impact has, however, been limited by the small number that have been conducted.

FINDING 10.4

Some complaints, particularly high profile cases proceeding beyond conciliation, appear to have helped promote community recognition and acceptance across a range of areas. However, the educative impact of complaints is limited by the confidentiality of many conciliated agreements.

FINDING 10.5

The process of developing disability standards appears to have had a positive impact on promoting recognition and awareness in some sectors, largely due to the consultation involved. Their overall educative impact has been limited because only one has been introduced.

FINDING 10.6

Action plans have raised awareness among those 'service providers' that have introduced them but their overall educative impact has been limited by the relatively small number that have been lodged.

FINDING 10.7

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

FINDING 10.8

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

FINDING 10.9

Significant benefits would derive from the Human Rights and Equal Opportunity Commission targeting education and information provision to employers.

FINDING 10.10

Actively involving employer groups in the development and delivery of education strategies would provide a double benefit—educating both employers and their employees.

FINDING 10.11

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

Chapter 11 Definitions

FINDING 11.1

The Disability Discrimination Act 1992 *is based on a 'social model' of disability discrimination, but it uses a medically-based definition of disability. This integrated approach is appropriate. However, the current definition of disability in the Act (s.4) is unclear in certain areas.*

FINDING 11.2

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

FINDING 11.3

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

FINDING 11.4

The proportionality test in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(a)) is unnecessarily complex and places an unwarranted burden of proof on complainants.*

FINDING 11.5

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

FINDING 11.6

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

FINDING 11.7

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6) does not include proposed acts of indirect discrimination. This is neither appropriate nor efficient. It is inconsistent with the definition of direct discrimination and with other anti-discrimination Acts.*

FINDING 11.8

There are constitutional limitations on the Australian Government's power to make vilification of people with disabilities unlawful. There may be scope for the States and Territories to extend their anti-discrimination Acts in this area.

Chapter 12 Exemptions

FINDING 12.1

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

FINDING 12.2

An exemption for the Migration Act 1958 *and its regulations in the* Disability Discrimination Act 1992 *(s.52) is appropriate, but its current scope may be wider than necessary.*

FINDING 12.3

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

FINDING 12.4

An exemption for 'special measures' that are reasonably intended to benefit people with disabilities in the Disability Discrimination Act 1992 *(s.45) is appropriate, but its current scope is unclear.*

FINDING 12.5

The current provisions of the Disability Discrimination Act 1992 *dealing with capacity-based wages are appropriate (s.47(1)(c)). However, there is some uncertainty about the interaction between provisions dealing with capacity-based wages and the exemption for 'special measures' (s.45).*

FINDING 12.6

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

FINDING 12.7

Potential exists for conflict between the Disability Discrimination Act 1992 *and health and safety laws and other requirements. A range of options is available for addressing this issue.*

Chapter 13 Complaints

FINDING 13.1

The main strength of the complaints process is its ability to address individual instances of discrimination on the ground of disability. While individual complaints can sometimes lead to systemic change, there are limits to the extent they can do so.

FINDING 13.2

People with disabilities can face significant barriers to using the complaints process, including:

- *financial and non-financial costs of making a complaint*
- *complexity and potential formality of the process*
- *evidentiary burden on complainants*
- *inequality between the negotiating positions of complainants and respondents*
- *fear of victimisation if a complaint is made.*

FINDING 13.3

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

FINDING 13.4

Most complainants and respondents appear reasonably satisfied with the Human Rights and Equal Opportunity Commission's complaint handling process.

FINDING 13.5

Uncertain case loads and investigation requirements make it inappropriate to impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

FINDING 13.6

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

FINDING 13.7

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

FINDING 13.8

Reintroduction of the Human Rights and Equal Opportunity Commission's power to initiate complaints or introduction of a new power to commence court actions do not appear to be warranted. Such powers have the potential to undermine its impartiality.

FINDING 13.9

The existence of separate federal and State and Territory complaints handling processes can create confusion for people wishing to make a complaint. Improved cooperation has the potential to minimise this confusion.

FINDING 13.10

Transfer of the determination-making power to the Federal Court and Federal Magistrates Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission, but reluctance to proceed to court might have made parties more willing to conciliate.

FINDING 13.11

The 28 day limit to lodge an application with the Federal Court or Federal Magistrates Court following a terminated complaint is too short and has caused problems for complainants that outweigh the benefits of greater certainty to respondents.

FINDING 13.12

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

FINDING 13.13

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

Chapter 14 Regulation

FINDING 14.1

The draft disability standards for education and access to premises have the effect of altering, in a fundamental way, the scope of the Disability Discrimination Act 1992 *provisions concerning discrimination in education and access to premises.*

FINDING 14.2

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints made under the general provisions of the Disability Discrimination Act 1992.

FINDING 14.3

There is some uncertainty about the relationship between State and Territory legislation and disability standards that deal with the same matter.

FINDING 14.4

Those affected by disability standards have had sufficient opportunity to consult and comment during their development. The Disability Discrimination Act Standards Project is an important way of engaging people with disabilities in the consultation process and is not their only means for providing input.

FINDING 14.5

The development of disability standards has been very slow and only one—the Disability Standards for Accessible Public Transport 2002—has been introduced to date. However, imposing deadlines as a way of expediting formulation of standards could constrain the consultation process and result in inferior standards.

FINDING 14.6

Co-regulatory arrangements—including codes of conduct—between organisations and government could increase awareness of, and willingness to comply with, the Disability Discrimination Act 1992.

FINDING 14.7

Action plans can be an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of private organisations have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

FINDING 14.8

Making action plans mandatory would not be a cost-effective way to eliminate the discrimination experienced by people with disabilities.

FINDING 14.9

Limiting action plans to 'service providers' unnecessarily restricts their usefulness in eliminating discrimination.

Chapter 15 Other issues

FINDING 15.1

The Disability Discrimination Legal Services make an important contribution to the effectiveness of the disability discrimination complaints process, and to ensuring equality before the law for people with disabilities. Inadequate funding of these

services could undermine the effectiveness of the Disability Discrimination Act 1992.

FINDING 15.2

Adopting a public interest criterion for granting legal aid is likely to be efficient given funding limitations. However, the 'public interest' should be broad enough to include circumstances where discrimination is serious and individual complainants lack the resources or capability to mount a case.

FINDING 15.3

The Human Rights and Equal Opportunity Commission needs sufficient resources to match its responsibilities if it is to undertake its functions effectively. Insufficient funding could undermine the overall effectiveness of the Disability Discrimination Act 1992.

FINDING 15.4

To the extent that insufficient resources limit their ability to make adjustments for students with disabilities, schools could be exposed to claims of disability discrimination. Insufficient resources could also contribute indirectly to disability discrimination by leading some schools to claim unjustifiable hardship under the Disability Discrimination Act 1992.

FINDING 15.5

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

FINDING 15.6

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

CHAPTERS

1 This inquiry

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

1.1 Background

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

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

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

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

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

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

Development of the Disability Discrimination Act

The DDA has developed over the past 11 years, and continues to evolve. The most obvious changes have been Parliamentary amendments to the DDA and related legislation such as the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The most significant of these changes was the removal in 2000 of the Human Rights and Equal Opportunity Commission's (HREOC's) powers to initiate complaints and make determinations (legally binding decisions).

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

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

Changes in the environment

The environment in which the DDA operates has also changed over the past 11 years. 'De-institutionalisation'[2] and 'mainstreaming'[3] have exposed many people with disabilities to new opportunities and challenges; they have also exposed many parts of the general community to people with disabilities. Significantly, a generation of children with disabilities is moving through the mainstream education system and soon will be seeking higher education and employment. At the same

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

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

time, their peers are having a greater experience of interacting with people with disabilities.

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

Technological developments over the last decade have helped reduce the barriers faced by many people with disabilities. For example, the Internet and screen readers have greatly improved access to information, and 'kneeling' buses have improved access to public transport. But technology can also create new barriers; for example, the move from analogue to GSM mobile phone networks deprived people who wear a hearing aid from using a mobile phone. And by improving the ability of people with disabilities to participate in community activities, new assistive technologies reveal barriers that previously might not have been apparent.

1.2 Scope of the inquiry

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

Box 1.1 **Glossary of DDA terms**

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

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

Areas where discrimination is unlawful are widespread and include: employment; education; access to premises used by the public (including public transport); the provision of goods, services and facilities; accommodation; the purchase of land; activities of clubs and associations; sport; and the administration of Commonwealth laws and programs.

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

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

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

Source: *Disability Discrimination Act 1992.*

The terms of reference for this inquiry (box 1.2) reflect the analytical requirements of regulation assessment generally. These draw on the frameworks of the Competition Principles Agreement (CPA) and Regulation Impact Statement (RIS) reviews. As a result, the Productivity Commission is required to undertake a broad assessment.

Thus the Productivity Commission is required to identify the nature and magnitude of the social, environmental and/or other economic problems that the legislation seeks to address, and to determine whether the objectives of the DDA are being met. The objectives of the DDA can be summarised as:

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

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

The *Productivity Commission Act 1998* (s.8(1)) also requires the Commission to have regard to the need: to improve the overall economic performance of the economy; to reduce regulation of industry; to facilitate structural adjustment; to recognise the interests of those affected by Commission recommendations; to increase employment; and for Australia to meet its international obligations and commitments.

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

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

- the social impacts of the *Disability Discrimination Act 1992* and the Disability Discrimination Regulations 1996 on:
  - people with disabilities
  - the wider community
- the effectiveness of the DDA in meeting its objectives of:
  - eliminating discrimination
  - ensuring equality before the law
  - promoting community recognition and acceptance
- any impacts on competition but must consider:
  - costs and benefits to the community as a whole
- social welfare, access and equity considerations
- the nature and extent of disability discrimination
- the relationship of the DDA to other legislation
- improvements and 'alternatives' to the DDA.

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

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

What is covered?

This review examines the regulatory framework associated with the Act under review. Under the DDA, for example, the Attorney General can promulgate disability standards, which are subordinate legislation with the force of law.

HREOC can produce guidelines than can influence the way in which people comply with the DDA.

This inquiry does not cover the content of disability standards in great detail. It does however comment on the process for developing standards, and on key features of existing and proposed standards insofar as they amend the way the DDA applies to the areas concerned. Changing the scope of the DDA in this way will have efficiency and effectiveness implications.

The inquiry also includes some parts of the HREOC Act. Part IIB of the HREOC Act sets out the generic complaints process that applies to all federal anti-discrimination Acts and hence also gives effect to the DDA. Part IIC of the HREOC Act gives HREOC powers to refer discriminatory awards to the Australian Industrial Relations Commission and hence is an important instrument in creating links between the *Workplace Relations Act 1996* and the suite of federal anti-discrimination Acts.

Effectiveness and efficiency of the DDA

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

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

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

Effectiveness should be distinguished from 'cost-effectiveness' or 'technical efficiency', which are concerned with producing a given level of output (or certain

outcomes) at the least possible cost. Although technical efficiency is important, this inquiry is concerned mostly with another form of efficiency: allocative efficiency. Allocative efficiency is achieved when an economy's scarce resources are used to produce the combination of goods and services that society values most. Using resources in one way (for example, making adjustments to improve access for people with disabilities) means they are not available for other uses. Thus, compliance with the DDA can affect the distribution of resources in the economy, and can have economic efficiency implications.

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

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

Similarly, many groups might benefit from improved access. The welfare gains for people with disabilities could be substantial. But people without disabilities, such as the elderly and parents with prams, might benefit too. Further, there are less tangible, but no less real, benefits in the greater inclusion of people with disabilities in the Australian community.

Competition Principles Agreement

An important aspect of reviewing the effect of the DDA is to assess the extent to which competition may be restricted. The terms of reference refer to the CPA, which was an agreement between the State, Territory and Australian Governments in 1995 to review legislation that might restrict competition. A fundamental principle of the CPA is that legislation should not restrict competition unless the benefits to society of the restriction outweigh the costs and the objectives of the legislation can be achieved only by restricting competition.

The DDA might not appear to restrict competition, but virtually all legislation has competitive and economic effects. To the extent that the DDA places different obligations on different organisations, it could influence competition and resource allocation.

What is not covered?

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

Although the Productivity Commission has not reviewed the actual provision of disability services, the interaction between disability services and the DDA can be important. The nature, level and resourcing of services available to people with disabilities can influence the effectiveness of the DDA, and the DDA might apply to the *manner* in which services are delivered to people with disabilities. The DDA also contains an exemption for 'special measures' that are reasonably intended to meet the special needs of people with disabilities.

This inquiry has not reviewed the State and Territory anti-discrimination Acts or federal legislation that addresses discrimination on other grounds (such as the *Sex Discrimination Act 1984*, the *Racial Discrimination Act 1975* and the *Age Discrimination Act 2004*).[4] However, the influence of other anti-discrimination legislation on the effectiveness and efficiency of the DDA is considered. Some recommendations in this inquiry have the potential to affect other federal anti-discrimination legislation, because they would change the way the common complaints process under the HREOC Act would work. It will therefore be necessary for the Australian Government to review the implications of those recommendations in that broader context.

The Australian Human Rights Legislation Bill 2003 is also not subject to review. Nor has the Commission reviewed the Disability Discrimination Act Amendment Bill 2003, which would have the effect of excluding people who are addicted to prohibited drugs from claiming disability discrimination. The Commission has reviewed the DDA as it was (and still is) at the time the terms of reference were

4 The Age Discrimination Bill 2003 has been passed by both houses of Parliament but has yet to receive royal assent.

received. Nevertheless, in reviewing the definition of disability and the role of exemptions, related issues are considered.

In the course of the inquiry, some participants raised issues that were outside the scope of this inquiry. These issues, such as funding arrangements for school students with disabilities and government procurement policies, are discussed briefly.

1.3 Conduct of the inquiry

The Productivity Commission received the terms of reference for this inquiry on 5 February 2003. The inquiry was originally scheduled to be completed within 12 months. Following the death of the Associate Commissioner, Dr John Paterson, a new Associate Commissioner, Cate McKenzie, was appointed and the timetable was extended. As required by the terms of reference, and in line with normal inquiry procedures, the Commission encouraged public participation in this inquiry. The Commission:

- advertised the inquiry widely and sent a circular to individuals and organisations thought likely to be interested
- released an issues paper in March 2003 to assist participants to prepare submissions to the inquiry
- held informal discussions with a wide range of organisations and individuals, including HREOC, State and Territory anti-discrimination bodies, people with disabilities and their representatives, members of the Indigenous community, and business and employer groups
- attended five forums in regional Victoria and one in Perth
- encouraged written submissions—248 submissions were received before the draft report was released and a further 125 submissions were received in response to the draft report
- held a first round of public hearings between May and August 2003 in all capital cities and by teleconference—128 participants took part
- released a draft report on 31 October 2003 and invited further comment
- held a second round of public hearings between January and March 2004 in Canberra, Hobart, Sydney, Melbourne and Brisbane and by teleconference—62 participants took part.

The high level of public participation allowed the Productivity Commission to draw on contributions from people with disabilities, their associates and representatives,

service providers, and businesses, organisations and individuals charged with overcoming disability discrimination. The Commission thanks all participants for their contributions to this inquiry. Those who attended informal discussions, made submissions and participated in hearings are listed in appendix G.

1.4 Report structure

Volume 1 of this report is based on four broad themes.

- Theme I—background and context—comprises background on the inquiry (chapter 1), a discussion of the relationship between disability and human rights (chapter 2), a description of the number and characteristics of people with disabilities in Australia (chapter 3) and a summary of the essential features of the DDA and associated legislation (chapter 4).
- Theme II—effectiveness in achieving the Act's objects—comprises an examination of the effectiveness of the DDA in eliminating discrimination against people on the ground of disability (chapter 5), in ensuring equality before the law (chapter 9) and in promoting community acceptance (chapter 10).
- Theme III—competition and economic effects—addresses the benefits and costs of the DDA and general questions required of a CPA legislation review (chapters 6 and 7).
- Theme IV—improvements to the DDA and related issues—examines the measures required to improve the operation of the DDA. Chapter 8 examines the need for an explicit reasonable adjustment duty and who should pay for such adjustments. The definitions and exemptions contained in the DDA are discussed in chapters 11 and 12. Other reforms to the HREOC Act complaints process and regulatory arrangements are outlined in chapters 13 and 14 respectively. Some other options for reform are contained in chapters 9 and 10. Other issues, including questions of resourcing, are covered in chapter 15.

Volume 2 contains a number of descriptive appendices, which support the analytical chapters of the report. Appendices include employment (appendix A), education (appendix B), physical access (appendix C), goods, services and social participation (appendix D), Commonwealth laws and programs (appendix E), technical material supporting the inquiry's econometric work (appendix F), and conduct of the inquiry (appendix G).

2 Disability and human rights

This chapter examines different approaches to disability, and the relationship between disability and human rights. It discusses alternative views of 'equality', and different approaches to assessing human rights outcomes and social welfare. Many of the issues raised in this chapter are relevant to discussions throughout this report.

2.1 Approaches to disability

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

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

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

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

Box 2.1 Glossary of terms

Impairment is commonly used in a medical sense to refer to problems in body function (physiological and psychological functions of body systems) and body structure (anatomical parts of the body such as organs, limbs and their components), such as significant deviation or loss.

Activity limitations refer to difficulties an individual with an impairment may have in executing activities (tasks or actions).

Participation restrictions refer to problems an individual with an impairment may experience in involvement in 'life situations'.

Disability is sometimes used as a synonym for impairment. However, under the social model of disability it refers to interactions between impairment and personal and environmental factors that create activity limitations or participation restrictions.

Environmental factors make up the physical, social and attitudinal environment in which people live and conduct their lives. These can create barriers to participation, or facilitate participation.

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

The social model views disability as resulting from attitudinal and physical barriers to participation erected by society.

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

Disability rights refer to the human rights of people with disabilities. The term recognises that people with disabilities may require differential treatment in order to enjoy the same rights as other persons.

Equality of opportunity is a widely used term with different meanings in different contexts. Broadly, it requires that individuals should be treated on merit and that characteristics that are not relevant to merit should not be taken into account when making decisions. However, users of this term disagree on whether it requires formal equality or substantive equality.

Formal equality requires strict attention to merit. It rules out any favourable treatment for a disadvantaged group because this discriminates against those who do not receive preferential treatment.

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

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

Source: adapted from WHO 2002.

Impairment and disability

The term 'impairment' is commonly used in a medical sense. In May 2001, the World Health Assembly endorsed the International Classification of Functioning, Disability and Health (ICF) (WHO 2002). It defines impairment as 'problems in body function or body structure, such as significant deviation or loss' (p. 10).

Although it is sometimes used as a synonym for impairment, the term 'disability' has a broader focus. Disability can be a function of impairment, environmental and personal factors. The ICF, for example, views 'disability and functioning' as:

> … outcomes of interactions between *health conditions* diseases, disorders and injuries) and contextual factors. Among *contextual factors* are external *environmental factors* (for example, social attitudes, architectural characteristics, legal and social structures, as well as climate, terrain and so forth); and internal *personal factors*, which include gender, age, coping styles, social background, education, profession, past and current experience, overall behaviour pattern, character and other factors that influence how disability is experienced by the individual. (WHO 2002, p. 10)

A number of inquiry participants emphasised the distinctions between impairment, activity limitations/participation restrictions and disability. Jack Frisch, for example, stated:

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

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

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

It could be argued that anti-discrimination legislation, being based on a social approach to disability, should refer to discrimination on the ground of impairment rather than disability. This would reflect the social model's view that disability is a social construct, not a feature of the person with an impairment. The ACT anti-

discrimination Act adopts this approach. However, there seems to be general acceptance of the term 'disability', as exemplified by proposals to amend the ACT Act to increase its consistency with legislation in other jurisdictions. The ACT Discrimination Commissioner, Rosemary Follett, stated:

> I have recently put to our legislation program that we should drop the word 'impairment' in favour of the word 'disability'. … I think disability is the common term. It's well understood, and that's the word we should use. (trans., p. 718)

The Productivity Commission recognises the distinction between impairment and disability (see chapter 11). However, unless otherwise noted, this report uses the term 'person with a disability' in the commonly accepted sense of a person covered by the *Disability Discrimination Act 1992* (DDA).

Medical and social approaches to disability

Traditional concepts of disability were derived from the medical approach. This approach viewed disability in terms of impairments, which were to be managed medically. Degener and Quinn (2002a) argue that this focus on impairment contributed to the segregation and marginalisation of people with impairments. Further, because the medical approach focused on the impact of impairments, improving access for people with disabilities was often viewed as welfare or charity, rather than recognition of the rights of people with disabilities.

In contrast, the social approach is based on a view of human rights that assumes all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community (see chapter 7). The social approach shifts the focus from the 'problem' of disability, to the 'problem' of discrimination:

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

Rather than focusing on the disabling effect of an impairment, the social approach views disability as arising from physical and attitudinal barriers erected by society that exclude people with disabilities from participation. The social model argues that people with disabilities are part of society and have the same rights to

participation as other citizens. Therefore, society must change by dismantling these barriers.

Although many commentators speak of the social approach having superseded the medical approach, the two approaches are complementary. As noted by the World Health Organisation:

> Disability is a complex phenomena that is both a problem at the level of a person's body, and a complex and primarily social phenomena. Disability is always an interaction between features of the person and features of the overall context in which the person lives, but some aspects of disability are almost entirely internal to the person, while another aspect is almost entirely external. In other words, both medical and social responses are appropriate to the problems associated with disability; we cannot wholly reject either kind of intervention. (WHO 2002, p. 9)

In relation to discrimination law, a medical approach has a role in defining impairments and identifying people with disabilities, while the social approach has a role in describing how discrimination takes place and how it should be addressed. The scope of the DDA and definitional issues are discussed in chapter 11.

2.2 Human rights

The social approach to disability discrimination emphasises that people with disabilities have the right to enjoy the same rights as other members of the community.

There is broad agreement about the importance of human rights, as reflected in the following statement by Dr Ozdowski, the Australian Human Rights Commissioner and Acting Disability Discrimination Commissioner:

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

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

- civil and political rights—such as rights to life, liberty, free speech, movement, political thought and religious practice, a fair trial and privacy, the right to found a family and the right to vote

- economic, social and cultural rights—such as rights to adequate food and water, health care, education, a clean environment, respect for cultural practices and welfare assistance
- humanitarian rights, which are the rights of those who are involved in, or affected by, armed conflict—such as the treatment of prisoners of war, the wounded or sick, those shipwrecked, civilians, and women and children in particular
- rights that are defined by the special nature or circumstances of particular groups—such as the rights of workers, women, children, minority groups, refugees, Indigenous peoples and people with a disability (HREOC 2001b, section 3, p. 1).

However, as with many generally agreed terms, 'human rights' can have different meanings to different people. There is ongoing debate about which rights constitute human rights of 'ubiquitous validity' (that is, equally valid to all communities) and which are 'social rights' (that is, dependent on a community's traditional culture, level of development, etc.) (Kis-Katos and Schulze 2002, p. 102). Different arguments are put forward to explain the underlying bases and significance of human rights (box 2.2).

Box 2.2 **Bases of human rights**

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

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

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

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

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

Many conceptions of human rights extend well beyond the right to freedom from discrimination. For example, Val Pawagi argued that 'human rights' include the right to assistance to enable people with disabilities to enjoy 'equal' rights:

> The term implies that people with disabilities are accorded the full range of rights as other persons. To ensure that people with disabilities enjoy the same rights as other persons, they are entitled to additional rights, including measures that enable them to become as self-reliant as possible. (sub. DR251, p. 2)

Stephanie Mortimer made a similar point:

> … human rights are more than equal opportunity and discrimination … The right to shelter, clothing and food, they're basic human rights. (trans., p. 2693)

This inquiry does not address the foundations of these broader conceptions of human rights—its focus is on the right to freedom from discrimination. However, it does grapple with important rights-related issues, including valuing human rights, resolving conflicts between different rights and between the rights of different groups, and defining human rights outcomes.

Rights-related issues

Merely talking about valuing human rights is controversial. Many human rights advocates argue that human rights are of incalculable value and should be pursued regardless of cost. However, this is not always possible in practice.

Some human rights can be enjoyed equally by all without creating potential conflicts. These include many fundamental civil and political rights, such as the right to personal liberty, the right to vote and the right to equal protection before the law. However, even where rights do not conflict, sometimes decisions must be made about how far they will be pursued. Society has limited resources and many competing demands. Depending on how social welfare is measured (section 2.4), pursuing some rights beyond a certain point might impose unacceptable costs on the community. For example, under the DDA the right to freedom from discrimination is not absolute. In many circumstances, discrimination is not unlawful if preventing it would create 'unjustifiable hardship'. The defence of unjustifiable hardship is discussed in chapter 8.

In some situations, different rights come into conflict—for example, the right not to be discriminated against conflicts with the right of employers to employ whom they like, or the right of service providers to provide whichever services they choose. Some extreme approaches argue that there should be no restrictions on the freedom of individuals to make voluntary contracts, even if they are discriminatory (box 2.3 and chapter 6). On the other hand, advocates of equal opportunity argue that the

rights of disadvantaged groups should take precedence over individual preferences (or prejudices).

Box 2.3 **Libertarian approach to rights**

According to a libertarian (or 'contractarian') view of the world, the socially optimal distribution of income and goods would result from voluntary contracts among unconstrained adults, with each person trying to satisfy their own preferences. Government action that constrained free choices would reduce social welfare.

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

This approach also argues that the government should not forbid voluntary contracts from being made. The role of anti-discrimination law should be limited, therefore, to ensuring the government does not mandate discriminatory practices.

According to libertarian theory, market pressures to maximise profits would prevent entrepreneurs from acting on prejudice. Discrimination would persist only where the government mandates it.

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

In some cases, conflicting rights might be reconciled informally, through generally accepted social norms—for example, the implied right to free speech is tempered by the generally accepted use of language. However, these informal mechanisms can come under pressure during times of social change, as different views of 'acceptable' conduct come into conflict.

In other cases, society (through Parliament) clarifies how conflicts between rights should be resolved, through legislation such as the DDA. But some potential conflicts are difficult to resolve, even with legislation. Anti-discrimination law can interact with occupational health and safety law, for example. How should potential conflicts between non-discrimination and the right to a safe workplace be resolved, where particular individuals are themselves at a greater risk than others, or impose risks on others? Other examples arise where governments (at State or federal level) pass laws that might have discriminatory effects. To what extent should anti-discrimination law over-ride these other laws? What criteria should be used to determine precedence? These issues are discussed in chapters 9 and 12.

Defining human rights outcomes

The social approach to disability emphasises the human rights of people with disabilities. Under this approach, the term 'disability rights' recognises an entitlement to enjoy the same rights as those of the rest of society (even where people with disabilities might require special arrangements to allow them to enjoy those rights). As stated by Degener and Quinn:

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

There is little disagreement that enabling people with disabilities to participate in the life of the community is a desirable outcome. However, there is more disagreement about how this outcome should be achieved.

To many disability advocates, *how* things are achieved can be as important as *what* is achieved. They argue, for example, that people with disabilities are entitled access to 'mainstream' services (such as public transport). Separate 'parallel' services for people with disabilities (such as subsidised accessible taxis) are regarded as discriminatory, because they restrict freedom of choice and lead to segregation of people with disabilities.

On the other hand, a focus on efficiency might suggest that outcomes should be defined in terms of what services are meant to achieve (such as mobility). It could be argued that this approach would allow better consideration of different ways of achieving the outcomes. A focus on efficiency might argue that the most cost-effective way of providing mobility should be adopted, as this frees up resources that could be used elsewhere (for example, improving other areas of access).

Defining the outcomes to be achieved by the DDA is an important issue for this inquiry. The way in which outcomes are defined affects the assessment of the DDA's effectiveness in eliminating discrimination (see chapter 5).

2.3 Equality

The social approach to disability, based on equal enjoyment of rights, is generally accepted. But there is less agreement on how this should be reflected in disability policy. One of the most fundamental issues is the very notion of 'equality'. This section discusses different forms of equality, including 'equality of opportunity', 'formal equality', 'substantive equality' and 'equality of outcome'.

Some forms of equality call for 'positive measures' to assist people with disabilities. Colker (1998) identified a spectrum of positive measures (box 2.4). He emphasised that the distinctions among these categories can be subtle, and the same set of circumstances can be characterised in different terms depending on the perspective of the viewer.

Box 2.4 **Colker's hierarchy of positive measures**

Colker identified a spectrum of positive measures ranging from ensuring formal equality to mandating equality of outcomes.

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

Source: Colker 1998, pp. 35–36.

Equality of opportunity

Many commentators refer to 'equality of opportunity' as the aim of anti-discrimination policy. There is general agreement that equality of opportunity requires that individuals should be treated on merit, and that anti-discrimination legislation should prohibit decision makers from taking irrelevant characteristics into account. The reverse also holds true—decision makers should be allowed to take account of relevant characteristics that indicate merit. An employer would not be permitted to discriminate on the basis of disability, but would be permitted to take relevant qualifications and experience into account.

However, commentators disagree on the extent to which special services or adjustments are required to enable members of disadvantaged groups to take advantage of equality of opportunity. This disagreement is illustrated by the difference between formal equality and substantive equality.

Formal equality

Formal equality requires that individuals be treated solely on merit. This is based on the principle that procedural fairness requires consistency of treatment. This approach appears straightforward and desirable. It requires that 'formal exclusionary laws are dismantled and overtly prejudicial behaviour prohibited' (Fredman 2002, p. 7).

There is general agreement that formal equality has a role to play, particularly in eradicating prejudice or stereotyping. But many commentators argue that it does not go far enough, because its focus on individual merit does not address systemic or structural barriers to participation. Colker (box 2.4) characterises legislation requiring formal equality as a positive measure, because it requires people to act differently than they would in the absence of the legislation. Many commentators argue that it does not amount to a positive measure, as it does not require differential treatment.

Fredman (2002, pp. 7–10) identified four 'problems' with formal equality. First, there are problems identifying when two individuals are sufficiently 'similar' to be protected by formal equality. Not all distinctions are discriminatory, and different groups of people are treated differently in many legitimate circumstances, such as through the application of progressive income tax brackets or means testing of benefits. It can be difficult deciding what sort of distinctions should be regarded as undesirable. At different points in history, distinctions based on race, gender, disability and sexual orientation have been regarded as 'legitimate' grounds for differential treatment (both positive and negative).

Second, requiring that people be treated the same does not require that they be treated well. If all groups are treated equally badly, formal equality is not compromised. Complaints about inequality could be avoided by removing benefits from 'advantaged' groups, rather than extending benefits to all groups.

Third, formal equality requires a 'neutral comparator' in order to assess relative treatment. In practice, such a comparator tends to be the traditional white, able-bodied, male 'norm', which to many commentators is a far from neutral reference point.

Fourth, and importantly for disability discrimination, formal equality is symmetrical—all individuals must be treated the same, regardless of whether they are members of advantaged or disadvantaged groups. Formal equality is premised on equal treatment, and does not require any allowance be made for the impact of difference (such as a disability). This is the case even if the differential treatment (such as providing Braille materials) merely places the person with a disability on

an ‘equal footing’ with a person without the disability (who receives printed materials).

Substantive equality

In contrast to formal equality, substantive equality is based on the view that equal treatment against a background of social and structural barriers can perpetuate disadvantage. Differential treatment or ‘reasonable adjustment’ can be warranted to overcome barriers and provide disadvantaged individuals with equal access to opportunities. Implementing the social model of disability discrimination, with its focus on dismantling social barriers to participation, relies strongly on the concept of substantive equality (see chapter 7).

Substantive equality requires that, once equality of opportunity is achieved, the outcome achieved by each individual depends on merit. This has been described as ensuring all individuals compete from the same starting line. But this can be difficult to achieve in practice, if past discrimination means that disadvantaged groups have little chance of meeting ‘legitimate’ merit criteria (Fredman 2002, p. 14). Apparently neutral criteria (such as work experience requirements) might reinforce existing disadvantage if people with disabilities have been deprived of the opportunity to acquire merit.

Substantive equality addresses disadvantage—it does not go so far as to give preferential treatment to a person with a disability. However, it might impose a cost on the organisation that has to provide the differential treatment.

Equality of outcome

As a social policy objective, equality of outcome goes beyond equality of opportunity to require that results be ‘equal’, even if this involves preferential treatment for individuals with certain characteristics. Equality of outcome requires ‘affirmative action’ or ‘reverse discrimination’ to achieve equivalent outcomes for disadvantaged groups (box 2.4).

The equality of outcome approach is based on what appears to be a logical argument. If talents and skills are distributed uniformly throughout the population, equality of opportunity should result in the proportional representation of different groups (for example, in employment and education). Any large disparities in outcome must be due, therefore, to some form of discrimination. If the precise source of that discrimination cannot be identified and removed, an equal outcome

can still be achieved through positive measures such as affirmative action or reverse discrimination (adapted from Moens (1985)).

The pursuit of equality of outcome raises difficult issues. If no actual barriers or overt discrimination can be identified, is it logical to assume that under-representation is due to discrimination? Under-representation might be due to discrimination elsewhere (for example, in education) or to the genuine preferences of the different groups. Given this, can preferential treatment for members of one group be justified if it imposes a disadvantage on others?

In addition, introducing affirmative action or reverse discrimination might lead to increased participation, but by encouraging 'assimilation' rather than addressing underlying discrimination. That is, only those members of the disadvantaged groups who can conform to existing arrangements benefit. While still having some positive effects, such 'assimilation' does little to improve the situation of those not capable or willing to overcome any discriminatory barriers.

Conclusion

The form of equality which should be pursued by anti-discrimination legislation is a recurring issue for this inquiry. There is general agreement that, at a minimum, formal equality is a desirable objective of anti-discrimination legislation. There is some controversy about the pursuit of substantive equality, and significant disagreement about mandating equality of outcome.

These are crucial issues. Sometimes, the nature of disability requires more than formal equality to achieve equality of opportunity. This implies that differential treatment can be justified to achieve substantive equality. But going beyond substantive equality to require equality of outcome appears to go beyond removing barriers to giving preferential treatment to people with disabilities—arguably beyond the scope of anti-discrimination legislation.

2.4 Measuring social welfare

The primary goal of any public policy is to make society as a whole better off—in economic terms, to 'maximise social welfare'. Various philosophers, economists and social scientists have proposed different approaches to measuring social welfare (box 2.5).

Box 2.5 **Measuring social welfare**

Utilitarians (such as Jeremy Bentham) argue for the maximisation of total utility (that is, 'happiness' or 'welfare') in society. Policies should aim to maximise the sum of all individual utilities. This approach implies that redistributing resources is justified if it leads to an increase in total utility. Taxing the rich to assist the poor, for example, is justified if the loss in utility felt by the rich is more than offset by the increase in utility felt by the poor. A problem with this approach is that it is impossible to measure or compare individual utilities without relying on imperfect proxies such as monetary income.

The Pareto principle (named after Vilfredo Pareto) holds that society can be regarded as better off only if one member is made better off without taking anything away from others. This principle has very limited application: it makes no comment on the initial distribution of resources, and cannot be used to assess any policy that would lead to a redistribution of resources.

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

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

The capability approach (developed by Amartya Sen) rejects theories that rely exclusively on utility (particularly when utility is measured in terms of income or gross domestic product), because they exclude non-utility information from what are 'moral' judgements. It argues that social arrangements should be primarily evaluated according to the extent of freedom people have to promote or achieve 'functionings' they value. Progress, development or poverty reduction occur when people have greater freedoms (that is, greater 'capabilities').

Sources: adapted from Gupta 2001; Robeyns 2003.

Discrimination is largely viewed as a social issue, and the main impetus for the DDA was to protect human rights and create a more inclusive society. However, as discussed above, giving effect to human rights can involve difficult tradeoffs. These tradeoffs require an assessment of the benefits and costs of different approaches. Sometimes, these different approaches lead to very different assessments of whether particular actions enhance or detract from social welfare.

Several commentators, particularly Amartya Sen and Martha Nussbaum, have criticised the application of 'traditional' measures of social welfare to the area of human rights, and argue that policies should be evaluated according to their impact on people's capabilities (box 2.6). Rather than aiming at equalising resources or welfare, Sen argues that equality should be defined and aimed at in terms of the capability each individual has to pursue and achieve wellbeing.

Box 2.6 **The capability approach**

The capability approach rejects other welfarist theories because they rely *exclusively* on utility and thus exclude non-utility information from moral judgements. Sen (1979) argues that utilitarian and libertarian approaches are both special cases based on limited information and arbitrary weightings and that the capabilities approach is more general than either.

The core characteristic of the capability approach is its focus on what people are effectively able to do and to be, that is, on their capabilities. This contrasts with philosophical approaches that concentrate on people's happiness or desire-fulfilment, or on theoretical and practical approaches that concentrate on income, expenditures, consumption or basic needs fulfilment.

The capability approach to wellbeing and development thus evaluates policies according to their impact on people's capabilities to function, that is, on their effective opportunities to undertake the actions and activities that they want to engage in, and be whom they want to be. These 'beings' and 'doings', called 'functionings', together constitute what makes a life valuable. Functionings include working, resting, being literate, being healthy, being part of a community, being respected, and so forth.

For some of these capabilities, the main input will be financial resources and economic production, but for others it can also be political practices, such as the effective guaranteeing and protection of freedom of thought, religion or political participation, or social or cultural practices, social structures, social institutions, public goods, social norms, traditions and habits.

Sen does not endorse a set of capabilities, but argues they should be identified through political and democratic processes. Nussbaum, on the other hand, proposes a list of ten central human capabilities that should underpin a 'just constitution'.

Sources: Robeyns 2003.

Some inquiry participants strongly endorsed the capability approach. Jack Frisch argued that the capability approach provides the intellectual foundations for applying a human rights perspective to measuring social welfare. He argued that, by requiring consideration of information about individual capabilities (including disabilities), it explicitly overcomes the limitations of other approaches (which ignore disability or treat it as irrelevant). Although he recognises the 'messiness' of having to identify relevant capabilities through political or democratic processes, he argues that this better reflects the 'messiness' of all policy formulation (sub. DR331, p. 2).

The capability approach provides a valuable perspective from which to examine social policy. It is a reminder that measures based on 'utility' can miss important aspects of human experience. However, the capability approach provides little guidance on some of the difficult tradeoffs that must be made in the area of anti-discrimination. How should the rights and capabilities of different individuals be balanced? What proportion of society's resources should be devoted to improving the capabilities of different groups or individuals?

The DDA recognises that the objective of eliminating discrimination involves tradeoffs. The object includes the words 'as far as possible' (s.3(a)), recognising that no Act can completely eliminate discrimination. The need to balance benefits and costs is reflected in other provisions of the DDA. The unjustifiable hardship provision (which applies to both complaints and disability standards), for example, requires an assessment of the benefits or detriments to any persons concerned.

However, the DDA does not make it clear how the benefits or detriments of eliminating discrimination are to be measured or weighted, and what view of 'social welfare' should be pursued. The benefits and costs of the DDA and its impact on social welfare are discussed in chapter 6.

2.5 Summing up

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

- integrating the medical approach (defining impairments and identifying people with disabilities) with the social approach (describing how discrimination takes place and how it should be addressed)
- defining discrimination on the ground of disability in terms of formal or substantive equality of opportunity, or equality of outcome

- valuing human rights and dealing with conflicts and tradeoffs among different rights.

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

3 Disability in Australia

This chapter presents a picture of people with disabilities in Australia, and the barriers that they face in their everyday lives. It draws heavily on survey data. The most recent substantial survey about people with disabilities, the Survey of Disability, Ageing and Carers (SDAC), was conducted by the ABS in 1998. A survey was conducted in 2003, but the results will not be available until July 2004. One of the main objectives of the 1998 survey was to measure the prevalence of disability in Australia and subsequent need for assistance (Australian Institute of Health and Welfare (AIHW), sub. DR272). A more recent source of information is the survey of Household, Income and Labour Dynamics in Australia (HILDA), which was run in 2001 and 2002. HILDA identifies people with disabilities, but it contains only limited information about the nature of their disabilities and their implications. Although providing more recent observations, it is an imperfect match to the SDAC, and is not used in this chapter. It is, however, used in other parts of this report to provide more recent insight into outcomes for people with disabilities.

3.1 Disability

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

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

The World Health Organization's International Classification of Impairments, Disabilities and Handicaps (ICIDH) is the framework in which the presence of disability and level of restriction have been identified in ABS disability surveys to date. This classification has, however, been superseded by the International Classification of Functioning, Disability and Health (ICF). This defines functioning and disability as relating to body structures and functions of people, activities and areas of life in which they participate, and environmental and personal factors that affect their experiences, with each of these defined in the context of health

conditions (AIHW, sub. DR272; see also chapter 2). In other words, the ICF defines disability as the interaction between health conditions, and environmental (physical, social and attitudinal) and personal factors (NCSDC 2004). The ABS (pers. comm., 14 April 2004) has indicated that it will process, categorise and present data for the next SDAC in a format consistent with the ICF, although the screening questions have not changed. Applying the 1998 SDAC data to the ICF framework, 3.6 million Australians had an impairment (that is, problems in body function and structure), 3.1 million had activity limitations, and 1.8 million had participation restrictions (that is, problems with involvement in life situations) (AIHW, sub. DR272).

Box 3.1 **Different definitions of disability**

The definition of disability used by the ABS in the 1998 Survey of Disability, Ageing and Carers (SDAC) was narrower than that in the *Disability Discrimination Act 1992* (DDA) (see chapter 4), which means the survey underestimated the number of people to whom the DDA might apply.

In the SDAC, a person was deemed to have a disability if they answered 'yes' to a screening question about whether they had one of a number of specific impairments or restrictions, or 'any other long-term condition resulting in a restriction in everyday activities'. Although the last criterion was relatively broad, the screening question also required the disability to be current, last for six months or more and affect everyday activities. The DDA has no duration or effect requirements and states that the disability can occur in the past, the present or the future.

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

Types of disability

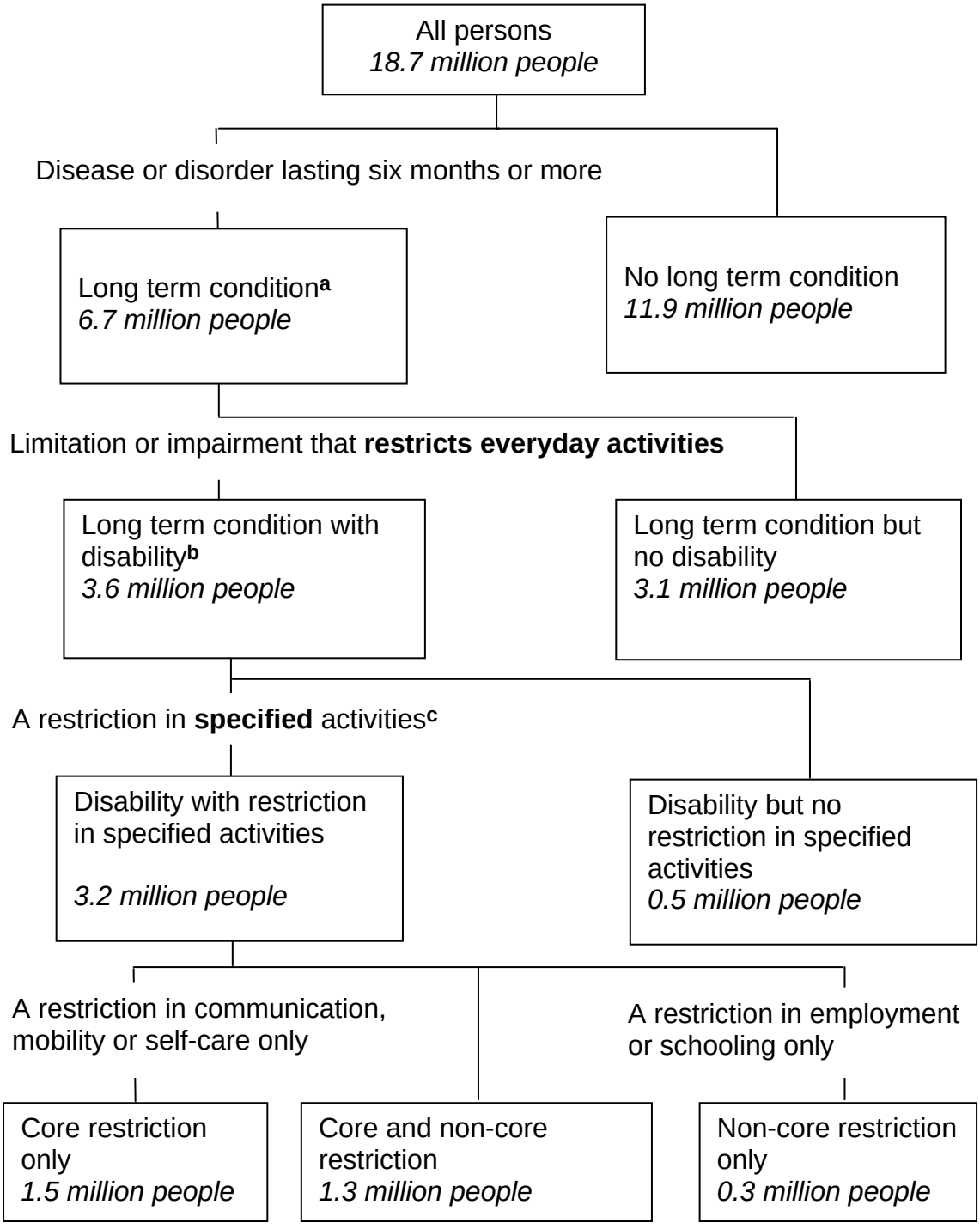
People with disabilities differ in the type of their disability, the manner in which it affects them and its implications for their everyday lives. The following views from inquiry participants reflect this diversity of experiences:

> … people with disabilities are living in the same world as the rest of us, however, the nature of this world can be a vastly different one. The most obvious reason for this is the disability itself—its type, severity, implications and so on. But there is also a wide range of other influences impacting on the experience of disability. (Disability Services Victoria, quoted in Andrew Van Diesen, sub. 93, pp. 9–10).

> People with disabilities are not a homogenous group. They are people of different ages, languages, races and cultures; different genders, experiences, lifestyles and choices. They have a diverse range of incomes, histories, and political and social commitments.

They may understand, describe and identify with disability in different ways. (Joe Harrison, sub. 55, p. 2)

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

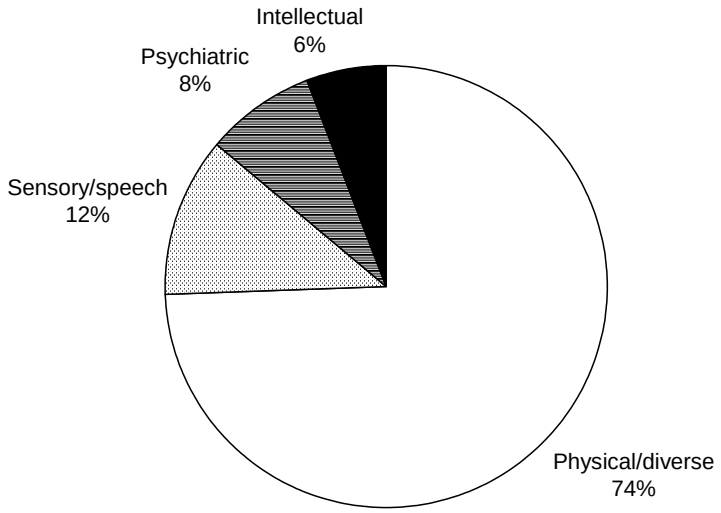


a For example, diabetes or arthritis. **b** For example, loss of sight or incomplete use of legs. **c** The specified activities are: communication, mobility and self-care ('core' activities), as well as employment and schooling ('non-core' activities).

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

The definition of disability in the DDA includes a broad range of impairments, diseases and disorders (see chapter 4). Even though a person's experience of disability will vary depending on the exact nature of their impairment, it can be useful to classify disabilities into a small number of broad groupings. One way to classify disability types, as suggested by the AIHW (sub. DR272), is by using the disability grouping of the National Community Services Data Dictionary (NCSDD), which is consistent with the ICF and can be constructed from the SDAC (NCSDC 2004). The 'higher level' grouping of the NCSDD is represented by four terms: 'physical/diverse',[1] 'sensory/speech', 'psychiatric', and 'intellectual'. The prevalence of these broad types of disability is shown in figure 3.2.

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



[a] **Physical/diverse**: infectious and parasitic diseases; neoplasms (cancers and tumours); diseases of the blood and blood forming organs; endocrine, nutritional and metabolic disorders; diseases of: the nervous, circulatory, respiratory, and digestive system, skin and subcutaneous tissue, musculoskeletal system and connective tissue, and genitourinary system; congenital malformations, deformations and chromosomal abnormalities (spina bifida, deformities of joints/limbs—congenital; other congenital/chromosomal/ abnormalities); breathing difficulties/shortness of breath; pain nfd; blackouts, fainting, convulsions nec; other symptoms and signs nec; injury, poisoning and certain other consequences of external causes; limited use of arms or fingers; difficulty gripping or holding things; limited use of feet or legs; restriction in physical activity or physical work; all other conditions. **Sensory/speech**: diseases of the eye and adnexa; diseases of the ear and mastoid process; speech impediment, unspecified speech difficulties. **Psychiatric**: mental and behavioural disorders; neurotic, stress-related and somatoform disorders; other mental and behavioural disorders. **Intellectual**: intellectual and developmental disorders; (other) developmental disorders including autism and related disorders; ADD/hyperactivity; Down's syndrome. **nec** not elsewhere classified. **nfd** not further defined.

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

1 NCSDC (2004, p. 70) defines physical/diverse disability as being 'associated with the presence of an impairment, which may have diverse effects within and among individuals, including effects on physical activities such as mobility'.

In 1998, the most common of the broad types of disability was physical/diverse. Physical/diverse conditions affected almost 2.7 million people—that is 74.0 per cent of people with disabilities (figure 3.2).

Under this approach, disabilities are grouped according to medical diagnosis (or main long term condition), instead of symptoms (or disabilities). This creates clear-cut distinctions between types and removes the possibility of double-counting in estimating prevalence. Depending on the purpose for grouping disabilities, however, other approaches are possible using the SDAC data—for example, grouping disabilities according to whether they are multiple or whether they affect communication (Wilkins 2003).

Types of restrictions and their severity

In 1998, almost 3.2 million people with disabilities were restricted in one or more specific activities (table 3.1), representing 16.9 per cent of the Australian population and 87.4 per cent of people with disabilities. Of this total, over 2.8 million people were restricted in communication, mobility and/or self-care (known as core restrictions). The most common type of core restriction related to mobility, which affected 2.5 million people, or 13.6 per cent of the Australian population. Almost 1.7 million people were restricted in schooling or employment (known as non-core restrictions)—of these, 1.5 million were restricted in employment (11.8 per cent of Australia's working-age population in 1998), and 0.2 million were restricted in schooling (5.8 per cent of the school-age population). Over 1.3 million people were restricted in both core and non-core activities. Thus, 0.3 million were restricted in non-core activities only.[2]

As noted by the Disability Services Commission, Western Australia (sub. DR360), people with disabilities may also face restrictions in areas of life other than those specified in the ABS survey—such as social participation, coping with emotions or managing behaviour, and independent living. Thus, this estimate of restriction may underestimate the proportion of people with disabilities who face restrictions in everyday life.

The relationship between different disability types and the nature of restriction experienced is illustrated in table 3.1. People with intellectual disabilities are particularly restricted in the activities (core and non-core) included in the ABS survey. According to the Disability Services Commission, , Western Australia, this group is also significantly restricted in other areas of activity, such as social interaction (sub. DR360). The high degree of difficulty faced by people with

2 Rounding errors create a discrepancy between these subtotals and the total.

intellectual disabilities in their everyday lives prompted some inquiry participants to argue that a different approach is needed for these people. Robert and Pauline Atkins said:

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

Table 3.1 **Types of disability,[a] by restriction, 1998**

	Disability					
Restrictions	*Physical/ diverse*	*Sensory/ speech*	*Psychiatric*	*Intellectual*	*All people with disabilities*	
	%	%	%	%	%	'000
Core[b]						
Profound	13.1	8.2	30.2	30.0	14.9	537.8
Severe	17.3	11.6	15.9	18.4	16.6	598.7
Moderate	21.4	7.9	11.7	7.9	18.3	659.4
Mild	28.4	41.5	19.9	15.4	28.5	1030.6
Total core	*80.3*	*69.2*	*77.7*	*71.7*	*78.3*	*2826.5*
Total non-core[c]	*46.1*	*24.9*	*51.2*	*81.1*	*46.0*	*1661.6*
Core and non-core[d]	*38.1*	*17.4*	*38.7*	*58.8*	*36.9*	*1333.2*
One or more restrictions[e]	88.3	76.6	90.2	94.0	87.4	3154.9
No restrictions	11.7	23.4	9.8	6.0	12.6	455.1
Total	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**3610.0**

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

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

Ninety-four per cent of people with an intellectual disability had a specific restriction of some kind, which was a greater percentage than for any other type of disability. People with an intellectual disability also had the greatest amount of overlap between the two broad types of restriction, with 58.8 per cent having restrictions in schooling or employment as well as in communication, mobility and/or self-care. People with an intellectual disability had the greatest proportion with restrictions in schooling or employment (81.1 per cent), while people with a physical/diverse disability had the greatest proportion with core restrictions (80.3 per cent).

Core restrictions are also measured by their severity—that is, the degree of difficulty experienced, or assistance required, by a person to perform activities. A far greater proportion of people with a psychiatric or intellectual disability required constant help (profound restriction) or frequent help (severe restriction) to carry out communication, mobility and/or self-care activities, compared with people with a

physical/diverse disability. That is, 46.1 per cent of people with a psychiatric disability and 48.4 per cent of people with an intellectual disability had a profound or severe core restriction,[3] compared with 30.4 per cent of people with physical/diverse disability.

In contrast, people with sensory/speech disabilities seemed the least restricted group in the activities surveyed by the ABS. This group had the largest proportion with either no restrictions (23.4 per cent) or only mild core restrictions (41.5 per cent). People with sensory/speech disabilities also tended to be far less restricted in schooling and employment alone (24.9 per cent), relative to people with other types of disability.

Prevalence of disability

The prevalence of disability refers to the proportion of people in a group—say an age group or Australia-wide—who have a disability. The prevalence of disability varies with age, gender and State or Territory of residence.

Age and gender

The prevalence of disability increases with age. In 1998, it ranged from 6.7 per cent of people aged 0–9 years, to 73.6 per cent of people aged 80 or more years (table 3.2).

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

State or Territory of residence

In 1998, the disability rate varied by 9 percentage points across the States and Territories, from 13.3 per cent in the Northern Territory to 22.4 per cent in South Australia (table 3.3). However, the disability rate for the Northern Territory is probably underestimated because the SDAC did not survey people living in remote

[3] Using a broader definition of intellectual disability—'intellectual restricting impairment', as used in another ABS publication—results in a significantly higher proportion having profound core activity restrictions than reported here (Disability Services Commission, Western Australia, sub. DR360, p. 2).

areas of Australia. (The largely Indigenous population in remote areas accounts for 20 per cent of the Northern Territory population.) Although nationally comparable data on the prevalence of disability in the Indigenous population are not available, some research has found it has higher rates of disability than those of the rest of the population (SCRGSP 2003).

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

Age	*Male*		*Female*		*All people with disabilities*	
	’000	%	’000	%	’000	%
0–9	108.3	8.1	65.0	5.1	173.3	6.7
10–19	146.7	10.9	84.0	6.6	230.7	8.8
20–29	144.4	10.1	121.2	8.7	265.6	9.4
30–39	196.7	13.6	170.3	11.7	366.9	12.7
40–49	238.2	17.7	247.2	18.4	485.3	18.0
50–59	295.5	28.8	283.6	28.7	579.1	28.7
60–69	299.0	42.8	260.7	36.4	559.7	39.6
70–79	264.7	55.0	305.8	51.5	570.5	53.0
80+	127.6	71.5	251.1	74.8	378.8	73.6
Total	**1821.1**	**19.6**	**1788.9**	**19.1**	**3610.0**	**19.3**

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

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

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

[a] Restriction in communication, mobility, self-care, education and/or employment. [b] Age distributions in the different States and Territories standardised to that of the Australian population. [c] The SDAC did not survey people living in remote areas of Australia. This exclusion is likely to affect the disability rate for the Northern Territory, as 20 per cent of its population lives in remote areas.

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

The variation in disability rates is partly attributable to the differences in the age structure of the people living in different States and Territories. If the same age distribution as that of the Australian population were to apply in all States and Territories, then the variation in the disability rate would fall to 3.9 percentage points, with the lowest rate in Victoria (17.8 per cent) and the highest rate in Tasmania (21.7 per cent). A similar contraction would occur for restriction rates. Standardisation to the average Australian age structure would reduce the difference in the restriction rate across the States and Territories from 8.7 percentage points to 3.2 percentage points. (South Australia would have the highest in both actual and standardised rates, while the actual rate would be lowest in the Northern Territory, and the standardised rate lowest in Victoria.)

Characteristics of people with disabilities

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

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

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

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

Relative to people without a disability, people with disabilities are:

- less likely to be in the labour force and, if in the labour force, more likely to be unemployed (see chapter 5 and appendix A)
- less likely to be in the top 40 per cent of the income distribution (see chapter 5)

- more likely to have a government pension or allowance as a principal source of cash income
- less likely to have a post-school qualification or to have completed year 12, and more likely to have left school before 15 years of age or to have never attended school (see chapter 5 and appendix B)
- more likely to live in a non-private dwelling (which, in this context, is mainly institutional accommodation) and, if in private accommodation, more likely to rent public housing.

3.2 Trends in the prevalence of disability

The number of people with disabilities in Australia has increased over time, as has the proportion of the Australian population with disabilities.

Information about the prevalence of disability over time is available from successive SDACs for 1981, 1988, 1993 and 1998. These surveys suggest that the disability rate rose by 6.1 percentage points, from 13.2 per cent in 1981 to 19.3 per cent in 1998 (table 3.5). The growth remains significant even when the data are adjusted for age and other factors—up 4.2 percentage points, from 14.6 per cent in 1981 to 18.8 per cent in 1998.

Table 3.5 **Prevalence of disability, 1981–98**

	1981		*1988*		*1993*		*1998*	
	'000	%[a]	'000	%	'000	%	'000	%
Original	1942.2	13.2	2543.1	15.6	3176.7	18	3610.3	19.3
Criteria adjusted[b]	..	..	..	..	2930.5	16.6	3503.8	18.8
Age adjusted[c]	2140.9	14.6	2695.9	16.5	3283.6	18.6	..	..
Total adjusted	**2140.9**	**14.6**	**2695.9**	**16.5**	**3031.9**	**17.2**	**3503.8**	**18.8**

[a] Percentage of the Australian population. [b] 1993 and 1998 figures have been adjusted to match the disability definition used in the 1981 and 1988 SDACs. [c] The 1981, 1988 and 1993 figures have been adjusted to mirror the age profile found in the 1998 SDAC. **..** Not applicable.

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

This increase could reflect a change in the likelihood both of disabilities being detected (due, for example, to better diagnosis and awareness of them), as well as of a person actually having a disability. A number of factors might have contributed to a rise in the likelihood of a person having a disability, including:

- better healthcare and treatment, meaning that events that were likely to result in death in the past are now more likely to result in disability

- an ageing Australian population.

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

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

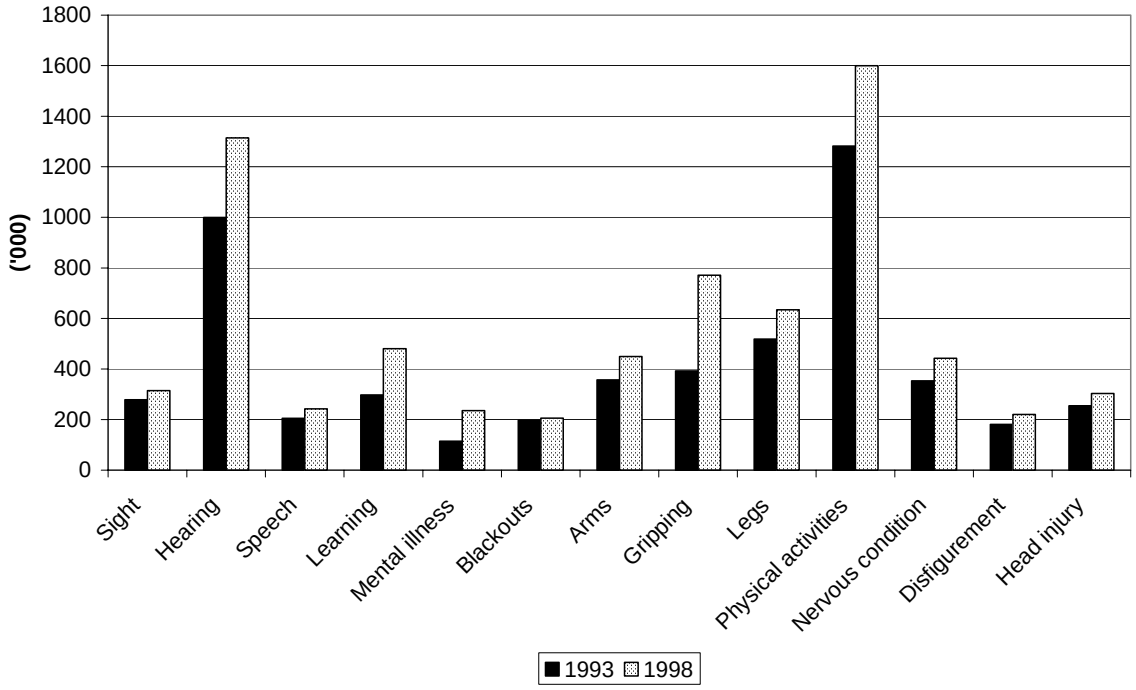
In terms of particular types of disability, increases have been reported across a range of the disability types identified in the SDAC screening question (figure 3.3). This may in part reflect the increase in the overall number of people with disabilities. It also may partly reflect an increase in the number of people having more than one type of disability. There were particularly large increases in the number of people with:

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

Given that Australians are living longer than ever before and, on average, older people tend to have a higher rate of disability than that of younger people (table 3.2), the overall disability rate is likely to continue to rise. The rate at which the overall disability rate is likely to change is, however, difficult to estimate. Disability rates within age categories may change in the future. Disability rates have fallen in older age categories in some OECD countries (AIHW 2003a), with factors such as improved medical interventions and behavioural change possibly contributing to these trends (Cutler 2001; Manton and Gu 2001). These factors are likely to have benefited Australia also. As people live longer, the number of disability years might remain constant but be shifted to later years. In this

scenario—which is the basis of the so-called 'compression of morbidity' approach to projecting disability rates—age-specific disability rates would fall over time, so estimated increases in *overall* disability rates are likely to be relatively conservative. Past modelling work by the Productivity Commission (Madge 2000; PC 2003a) has assumed declining age-specific disability rates for Australia. Nonetheless, the ageing population tends to suggest that, overall, an increasing proportion of the Australian population will have disabilities in the future. But the rate of increase may be mitigated by the factors highlighted above. In addition, the proportion of the population with imputed/future disabilities might increase as a result of advances in genetic testing. These two factors might, in turn, suggest that more Australians will become vulnerable to disability discrimination (as defined in the DDA) in the future. On the other hand, the increased prevalence of disability might, to an extent, have the opposite effect. That is, as people with disabilities become a more significant and, therefore, visible proportion of the population, they may feel more able to be vocal in making demands for access, with their needs met more readily.

Figure 3.3 **People with disabilities, by disability, 1993 and 1998[a,b]**



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

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

4 Disability discrimination legislation

The enactment of the *Disability Discrimination Act 1992* (DDA) reflected growing awareness of disability rights in Australia and internationally (section 4.1). The DDA makes disability discrimination unlawful in almost all areas of public activity. Harassment is also unlawful in selected areas (section 4.2). It is a largely reactive Act that relies on complaints and conciliation (section 4.4). It includes proactive measures, such as disability standards, voluntary action plans and public inquiries (sections 4.3 and 4.5). The effectiveness and appropriateness of the DDA's provisions and functions are discussed in later chapters.

4.1 Enactment of the Disability Discrimination Act

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

Reasons for enacting the Disability Discrimination Act

By 1992, anti-discrimination legislation for people with disabilities in Australia was patchy. Even in the jurisdictions that had such legislation in place (in 1992, all except Tasmania and the Northern Territory), not all disabilities were covered (table 4.1). Further, for constitutional reasons, State and Territory legislation could not address alleged discrimination by Australian Government agencies. The Australian Government intended the DDA to go further than the States and Territories' Acts in other ways too, with positive features such as action plans and disability standards to encourage systemic change and reduce reliance on individual complaints. The DDA complemented existing trends towards integrating the social model of disability into government policy (see chapter 2), as demonstrated earlier in the *Disability Services Act 1986* and existing State and Territory legislation.

Box 4.1 **International conventions and declarations**

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

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

The external affairs power in the Australian Constitution (s.51(29)) gives authority to the Australian Government to legislate with reference to international declarations, including those on human rights and discrimination listed above. Several of these Declarations and Conventions are attached to the *Human Rights and Equal Opportunity Commission Act 1986*.

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

Public consultation and debate on the Disability Discrimination Bill

In the early 1990s, several reports were commissioned to examine options for national disability discrimination legislation (Ronalds 1990; Ronalds 1991; Shelley 1991).[1] Ronalds (1991, p. 29) found that 95 per cent of people with disabilities who were surveyed supported national disability discrimination legislation. Many people without disabilities also expressed enthusiasm for a national Act (Shelley 1991). Shelley concluded that the existing State and Territory Acts were popular in those States and Territories that had them, but were:

> … not considered to have been sufficient, by themselves, to eliminate discrimination, nor [were] they seen to provide complainants with complete redress. (Shelley 1991 quoted in Tyler 1993, p. 217)

Ronalds (1990 and 1991) recommended that the future DDA cover discrimination in employment, education, transport and public mobility, rather than only in employment, as had been proposed in the original draft Disability Discrimination Bill (Tyler 1993). These and other recommendations by Ronalds were taken on board in subsequent drafts of the DDA.

[1] The two Ronalds reports (1990 and 1991) were commissioned by the then Minister for Health, Housing and Community Services, the Hon. B. Howe. The Shelley report (1991) was commissioned by the Disability Advisory Council of Australia.

Table 4.1 **Discrimination legislation in Australia, by year**

Year [a]	*Jurisdiction*	*Legislation*
1966	South Australia	*Prohibition of Discrimination Act 1966*
1975	Australia	*Racial Discrimination Act 1975*
1975	South Australia	*Sex Discrimination Act 1975*
1976	South Australia	*Racial Discrimination Act 1976* (replaced 1966 Act)
1977	New South Wales	*Anti-Discrimination Act 1977*
1977	Victoria	*Equal Opportunity Act 1977*
1981	Australia	*Human Rights Commission Act 1981*
1981	South Australia	*Handicapped Persons Equal Opportunity Act 1981*
1982	Victoria	*Equal Opportunity (Discrimination Against Disabled Persons) Act 1982*
1984	Australia	*Sex Discrimination Act 1984*
1984	South Australia	*Equal Opportunity Act 1984* (replaced all South Australian Acts)
1984	Victoria	*Equal Opportunity Act 1984* (replaced all Victorian Acts)
1985	Western Australia	*Equal Opportunity Act 1984*
1986	Australia	*Human Rights and Equal Opportunity Commission Act 1986* (replaced the *Human Rights Commission Act 1981*)
1991	Queensland	*Anti-Discrimination Act 1991*
1991	Australian Capital Territory	*ACT Discrimination Act 1991*
1993	**Australia**	***Disability Discrimination Act 1992***
1993	Northern Territory	*Anti-Discrimination Act 1993*
1994	Tasmania	*Sex Discrimination Act 1994*
1995	Australia	*Racial Hatred Act 1995*
1995	Victoria	*Equal Opportunity Act 1995* (replaced 1984 Act)
1998	Tasmania	*Anti-Discrimination Act 1998* (replaced 1994 Act)
2000	Australia	*Human Rights Legislation Amendment Act 1999*
2004	Australia	*Age Discrimination Act 2004*

a Year of first enactment or establishment. Later amendments and additions are not included.

Sources: HREOC 2003d; Tyler 1993.

However, public support for the Bill was not unanimous. Employer groups and others expressed doubts about the areas of activity and the disabilities it included. Medical professionals raised concerns about the broad definition of 'disability' and about the potential application of the DDA in a medical context. Margaret Kilcullen recalled of this period that community attitudes were only slowly shifting from a 'charity' model of disability to one based on human rights and equality. She said:

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

Further concerns were raised that the main objective of the Bill—to eliminate, rather than simply reduce, discrimination—was unachievable (Conway 1992; Tyler 1993), and that the DDA would be 'extremely unlikely in itself to meet the great

expectations placed upon it by its drafters' (Tyler 1993, p. 212). The effectiveness of the DDA in eliminating discrimination and addressing its other objectives since its enactment is discussed in later chapters of this report.

Parliamentary debate on the Disability Discrimination Bill

In the second reading speech for the Disability Discrimination Bill, the then Minister for Health, Housing and Community Services, the Hon. B. Howe, emphasised the DDA's importance in the wider context of the Australian Government's commitment to human rights and social justice reform, which already included sex and racial discrimination legislation and the *Disability Services Act 1986*. He also promoted the DDA as an overdue and 'significant step in fulfilling Australia's international obligations' (Australia 1992a, p. 2751) (box 4.1).

In lengthy Parliamentary debates on the Bill, all speakers agreed it was 'highly commendable' and 'worthwhile', but some questioned its scope, potential effectiveness and possible implementation costs. Concerns raised included: the Bill's definition of disability (and especially its inclusion of communicable diseases such as HIV and AIDS); its potential effects on medical practice; exemptions for the Australian Defence Force; a temporary exemption for the telecommunications industry; and the meaning of 'unjustifiable hardship' (Australia 1992a; Australia 1992b; Australia 1992c).

On the other hand, some Parliamentarians perceived the Bill as too weak. Senator M. Lees, for example, said it did 'not go far enough' in advancing the rights of people with disabilities but was 'better than nothing' (Australia 1992c, p. 1316) Nevertheless, the resulting DDA was hailed at the time of its enactment as a significant step and an important commitment in furthering disability rights.

Amendments to the Disability Discrimination Act, 1992–2003

The DDA, as introduced in 1993, gave the Human Rights and Equal Opportunity Commission (HREOC) the power to conduct hearings and make determinations (in the same manner as the sex and racial discrimination legislation that it already administered. Determinations were required to be registered with the Federal Court of Australia, at which stage they became an order of the Court.

However, in 1995, the High Court found that the equivalent section of the *Racial Discrimination Act 1975* was inconsistent with the requirement under chapter III of the Australian Constitution that the administrative and judicial arms of Government be separate (*Brandy v HREOC* (1995) 127 ALR1). The provisions to make determinations in all three federal anti-discrimination Acts (the sex, racial and

disability discrimination Acts) were hence deemed unconstitutional, because they attempted to vest in HREOC (an administrative government agency) judicial powers that could be exercised only by the courts.[2]

The Australian Government first attempted to address this ruling by repealing the registration and enforcement provisions of the three Acts. This meant that, in order to enforce a HREOC determination, the case had to be reheard by the Federal Court. This process proved cumbersome and was subsequently amended in the *Human Rights Legislation Amendment Act 1999*, which came into force in April 2000 (HREOC 2002f). From that time, HREOC could only conciliate complaints, and determinations could be made only by the Federal Court or, from 2000, the Federal Magistrates Court of Australia[3] (section 4.5).

The *Human Rights Legislation Amendment Act 1999* also made changes to the procedures to be followed by HREOC for complaints made under the DDA and the sex and racial discrimination Acts (HREOC 2002f, p. 4):

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

Prior to these amendments, the Disability Commissioner also had the power to initiate inquiries about individual disability discrimination incidents without first receiving a complaint from an 'aggrieved person' (section 4.5). HREOC said this independent inquiries power 'as originally drafted had some technical defects which meant that in practice it went unused' (sub. 143, p. 54). It was removed by the 1999 amendment Act.

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

[3] The Federal Magistrates Court of Australia has been known at various times as the Federal Magistrates Service. It is referred to as the Federal Magistrates Court in this report.

4.2 Key features of the Disability Discrimination Act

The DDA is broad in its scope and application. It makes direct and indirect discrimination unlawful in most areas of public (but not personal) life, including economic, academic, political and community participation. Harassment is also unlawful in certain areas. Although largely a reactive, complaints-based Act, the DDA also includes some important proactive measures.

Objects of the Disability Discrimination Act

The DDA has three stated objects. In summary, these are:

a. to eliminate, as far as possible, disability discrimination in the areas of activity to which the DDA applies

b. to ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community and

c. to promote community recognition and acceptance of the rights of people with disabilities (s.3).

These objects seek to address discrimination in both behaviour and attitudes within the Australian community. The first and second objects address acts of disability discrimination (that is, behaviour) in key areas of public life, including employment, education, transport and the law. The third object complements these objects by targeting community attitudes. The DDA's effectiveness in meeting these three objects is examined in later chapters.

Definition of disability in the Disability Discrimination Act

The definition of disability in the DDA is deliberately broad. In summary, it covers:

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

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

This definition was intended to ensure that the DDA covers all types of disability, thus placing the focus of the DDA (and of DDA complaints) on the alleged act of discrimination, rather than on the nature of a person's disability (see chapter 11).

Areas of activity covered by the Disability Discrimination Act

The DDA contains no blanket prohibition on disability discrimination and harassment. However, it makes disability discrimination unlawful in virtually all areas of public life, including:

- employment (including employment as commission agents (s.16), as contract workers (s.17), in partnerships (s.18), by qualifying bodies (s.19), by registered organisations under the *Workplace Relations Act 1996* (s.20), and by employment agencies (s.21))
- education (including all types and levels, from pre-school to post-graduate)
- access to premises used by the public (including public transport)
- the provision of goods, services and facilities
- accommodation—including all business accommodation, public and private residential rentals and holiday accommodation (s.4(1)), but excluding privately owned and occupied residential accommodation (see appendix D)
- the purchase of land
- the activities of clubs and associations
- sport
- the administration of Commonwealth Government laws and programs.

Exempted areas of activity

Within these areas of activity, the DDA exempts a few situations from discrimination complaints. In employment, for example, the DDA makes discrimination against all employees unlawful, except against employees performing domestic duties in an employer's residence (s.15(3)) and partners in very small partnerships.

A small range of activities that would otherwise be covered by the above list are exempt. These include: membership and the terms and conditions of superannuation and insurance products, where the decision is based on actuarial or statistical data of other relevant factors; actions taken under prescribed Acts; infectious diseases; charities; eligibility and payment conditions for pensions and allowances; all actions under the *Migration Act 1958*; combat duties by the defence forces; and peace keeping services by the Australian Federal Police (see chapter 12).

The DDA also exempts 'special measures' for people with disabilities. This means it is not 'unlawful to do an act that is reasonably intended' to provide people with disabilities with 'goods or access to facilities, services or opportunities' or 'grants, benefits or programs, whether direct or indirect, to meet their special needs' (s.45). In a related vein, in education, accommodation and clubs, the DDA allow providers that cater wholly or partly for people with particular types of disability to discriminate against people who do not have that disability (ss.22(3), 25(3), 27(4)). For example, a school for students with hearing impairments may enrol only students with hearing impairments. Similarly, an accommodation service for people with intellectual disabilities may deny services to people without an intellectual disability. The effects of these statutory exemptions are discussed in chapter 12.

Discretionary exemptions

Under section 55 of the DDA, HREOC may grant temporary exemptions from the DDA for up to five years. A temporary exemption means that any discrimination that occurs is considered lawful, without the need to demonstrate 'unjustifiable hardship'. Temporary exemptions can specify particular terms and conditions.

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

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

Actions made unlawful by the Disability Discrimination Act

In the areas of activity to which it applies, the DDA makes direct and indirect discrimination unlawful. In some circumstances, harassment and some requests for information are also unlawful.[4]

Direct discrimination

In the DDA, direct discrimination means treating a person with a disability less favourably than a person without the disability would have been treated in similar circumstances. Direct discrimination is determined by comparing the treatment of the person with a disability to that of someone without that particular disability (known as 'the comparator'), in 'circumstances that are the same or are not materially different' (s.5(1)). These circumstances will not be regarded as being materially different because of any adjustments that might need to be made for the person with the disability (s.5(2)). That is, direct discrimination requires that the person with the disability is treated less favourably because of their disability, and not because of other causes or factors, including the fact of any adjustments the person might need.

Indirect discrimination

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

a. with which a substantially higher proportion of people without the disability can comply

b. that is not reasonable, having regard to the circumstances of the case, and

c. with which the person with a disability does not or is not able to comply. (s.6)

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

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

Harassment

The term 'harassment' is not defined in the DDA, but is generally considered to consist of humiliating comments, actions or insults about a person's disability that create a hostile environment. There is no general harassment provision. It is unlawful for a person to harass another person with a disability (or an associate of a person with a disability) in limited circumstances in employment, education (by education staff only) or the provision of goods and services. The Productivity Commission discusses extending harassment provisions to all areas covered by the DDA in chapter 11.

Harassment is closely related to vilification. Vilification is 'offensive, insulting, humiliating or intimidating behaviour' in public, directed as a particular group or class of people (as defined in, for example, the *Racial Hatred Act 1995*). Unlike harassment, vilification is not necessarily directed at a particular individual. Vilification is not itself unlawful under the DDA, although behaviour that amounts to vilification might constitute part of an action that is discrimination or harassment.

Requests for information

In the areas of activity specified by the DDA, it is unlawful to ask a person with a disability for information that would not be requested of a person without a disability in the same situation (s.30). HREOC advises that discussion, questions and examinations regarding a person's disability and its effects are lawful if they are needed to help to determine whether a person can perform the inherent requirements of a job or meet education enrolment criteria, or to determine whether they require any adjustments or assistance (see below). The lawfulness of such questions depends on whether they are being asked for a legitimate purpose and whether they are a reasonable means of meeting that purpose (HREOC 2003f). It is unlawful, for example, to ask job applicants about any history of mental illness or physical limitations if they are not relevant to the ability of the person to do the job or undertake the course of study.

Inherent requirements in employment

The DDA makes disability discrimination unlawful in employment decisions about who should be employed, trained, promoted, transferred or dismissed, and how much an employee should be paid (s.15). However, in recruitment and dismissal situations, employees must be able to carry out the 'inherent requirements of the particular employment' (s.15(4)(a)). Similar clauses exist for commission agents (s.16(3)), contract workers (s.17(2)), partnerships (s.18(4)) and employment

agencies (s.21(2)). The inherent requirements test does not apply to employment decisions relating to training, promotions or transfers.

'Inherent requirements' in employment are not defined in the DDA, but they are taken to include only those activities that are essential to the completion of a particular task (see chapter 8). When it is applicable, the inherent requirements test must be carried out in conjunction with the 'unjustifiable hardship' test for making adjustments for people with disabilities (see below). In practice, this means that where an inherent requirements test is relevant, the employer can only reject a candidate (or dismiss an employee) for (1) being unable to fulfil the inherent requirements of a position, or (2) being able to fulfil the inherent requirements only if the employer makes adjustments to the workplace or the job that would not be required by a person without a disability, and that would cause the employer an 'unjustifiable hardship' (s.15(4)(b)). The Productivity Commission discusses extending the inherent requirements and unjustifiable hardship tests to within employment situations in chapter 8.

Inherent requirements in other areas of activity

In sports activities, the DDA applies a concept similar to that of 'inherent requirements'. It is not discriminatory to exclude a person with a disability from a sport 'if the person is not reasonably capable of performing actions reasonably required in relation to the sporting activity', or to apply 'reasonable' selection methods on the basis of a person's skills and abilities (s.28(3)). This section allows sports clubs to select team members for their athletic ability and sporting prowess, for example, without discriminating unlawfully against those who cannot compete.

There is no equivalent 'inherent requirements' clause in relation to education in the DDA. However, academic entry and assessment criteria are regarded as an essential part of the 'reasonable requirements' that all students must meet in their studies (HREOC 2002c, pp. 8-9). HREOC confirmed this approach in *W v Flinders University South Australia* (1998) HREOCA 19. The current draft of the disability standards in education clarify that inherent academic requirements must be maintained equally for all students in enrolment and assessment.

Making adjustments for people with disabilities

HREOC and others have interpreted s.5(2) of the DDA to mean that employers and others must provide 'different accommodation or services' (including premises, facilities, equipment or procedures) to enable a person with a disability to meet the inherent requirements of a job, participate in a course of study, or to gain access to

particular goods, services or facilities. Failure to respond adequately to a request for an adjustment might result in a formal complaint of discrimination to HREOC by the person with a disability. The provision of these different accommodations or services for people with disabilities is sometimes referred to as making 'reasonable adjustment' (for example, in HREOC advisory materials).

This interpretation of the DDA is somewhat contentious. The term 'reasonable adjustment' does not appear anywhere in the DDA, and the obligation to make 'reasonable adjustments' has been questioned in several court decisions, most recently and notably by members of the High Court of Australia in the Purvis case (*Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62) (see chapter 8).

Unjustifiable hardship

Even though it does not explicitly require reasonable adjustments to be made, the DDA limits the different accommodation or services that must be taken into account to the level at which they would impose an 'unjustifiable hardship' on the provider. The 'unjustifiable hardship' limit on adjustments applies in some—but not all—areas of activity in the DDA. Like inherent requirements, unjustifiable hardship applies in recruitment and dismissal in employment (s.15(4)), but not to training, promotion, transfers or other aspects of the employment relationship.

Similarly, in education, unjustifiable hardship applies to initial enrolment situations, but not to adjustments required after enrolment (s.22(4)) (see chapter 8). It also applies in access to premises (s.23(2)), goods, services and facilities (s.24(2)), accommodation (s.25(3)) and clubs (s.27(3)). It does not apply to sport or to the administration of Commonwealth laws and programs.

The DDA does not define unjustifiable hardship, but it provides guidance on the factors to be considered in determining unjustifiable hardship (see chapter 8). The disability standards for public transport list further, detailed criteria for assessing 'unjustifiable hardship' for transport operators. The draft standards on access to premises also provide guidance on determining unjustifiable hardship.

4.3 Disability discrimination regulations

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

- regulations that are 'required or permitted by the Act' or 'necessary or convenient to be prescribed' (s.132)

- compulsory disability standards in some (but not all) areas of the DDA (s.31)
- guidelines by HREOC (s.67(k))
- voluntary action plans that are registered with HREOC (Part 3).

The DDA is silent on co-regulation. HREOC has used its inquiry and temporary exemption functions to encourage industries such as banking, telecommunications and insurance to adopt codes of conduct. The effects of these regulations and possible alternatives to them are discussed in chapter 14.

Disability Discrimination Regulations 1996

To date, only the Disability Discrimination Regulations 1996 have been made under section 132 of the DDA. These Regulations list the 'prescribed laws' referred to in section 47(2) of the DDA, which states that it is not unlawful under the DDA for persons to do something in compliance with a prescribed law. The current prescribed laws are all from South Australia and New South Wales, and were prescribed in 1999. They mainly relate to mental health, vehicles and firearms (see chapter 12). The Regulations also define combat duties for the purpose of exempting these duties from complaints made under the DDA (s.53(2)).

Disability standards

The DDA allows the Attorney General to formulate standards in employment, education, public transport, accommodation, access to premises and the administration of Commonwealth laws and programs (s.31). Although it is also unlawful to discriminate in the purchase of land, access to clubs, sport, and the provision of goods and services, disability standards cannot be made in these areas (see chapter 14).

Disability standards can provide greater detail on how compliance can be achieved in the areas covered by the DDA, although they can also vary the application of the DDA in relation to that area of activity (see chapter 14).

Compliance with standards protects a person from any action under the relevant areas of the part of the DDA that relates to discrimination (s.34). HREOC says disability standards have two other purposes:

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

Once enacted, it is unlawful to contravene disability standards (s.32). Only one set of disability standards—that for public transport—has become law. Drafts for two others—concerning access to premises and education—are well advanced. In the area of Commonwealth laws and programs, the Australian Government implemented the Commonwealth Disability Strategy in 1994 (revised in 2000), which operates as *de facto* standards for Australian Government departments and agencies. The Strategy is administered by the Office of Disability within the Department of Family and Community Services (see appendix E).

As with the DDA, individual complaints are the main compliance mechanism for disability standards. A major exception to this general rule will be the disability standards for access to premises, which (if introduced as currently drafted) will be enforced proactively, through the approvals process for new buildings and major renovations.

Voluntary action plans

Any organisation can submit a voluntary action plan under the DDA to be registered by HREOC. If a discrimination complaint is subsequently made against the organisation, its voluntary action plan must be taken into account in the assessment of 'unjustifiable hardship' (s.11(d)). However, an action plan does not confer immunity from liability against a discrimination complaint.

The DDA does not specify the content of action plans. HREOC provides guidelines on what such plans should contain, but does not check their contents upon registration, or monitor their implementation later. Although not explicitly required by the DDA, HREOC can link the granting of temporary exemptions to an organisation having a satisfactory action plan, so as to achieve compliance over time. HREOC had registered 305 action plans at March 2004. Most of these were submitted by government agencies (see chapter 14).

HREOC guidelines and advice

HREOC may develop guidelines to help explain the DDA (s.67(1)(k)). These are not legally binding. In practice, HREOC provides advice on the DDA in several different formats, including guidelines, advisory notes and frequently asked questions (see chapter 14).

4.4 The complaints process

The HREOC Act specifies the process for making complaints on the ground of disability (among other grounds). People who think they have been discriminated against or harassed on the ground of their disability in one of the specified areas of activity may make a formal complaint to HREOC. The person must be directly 'aggrieved' to make a complaint, and not just have a moral or 'in principle' objection. Organisations can make representative complaints to HREOC on behalf of an aggrieved person or a class or group of people who are discriminated against in a similar way, without making public the name of individual aggrieved persons. Organisations can also make complaints if they are an aggrieved party, or they can assist or represent an aggrieved person.

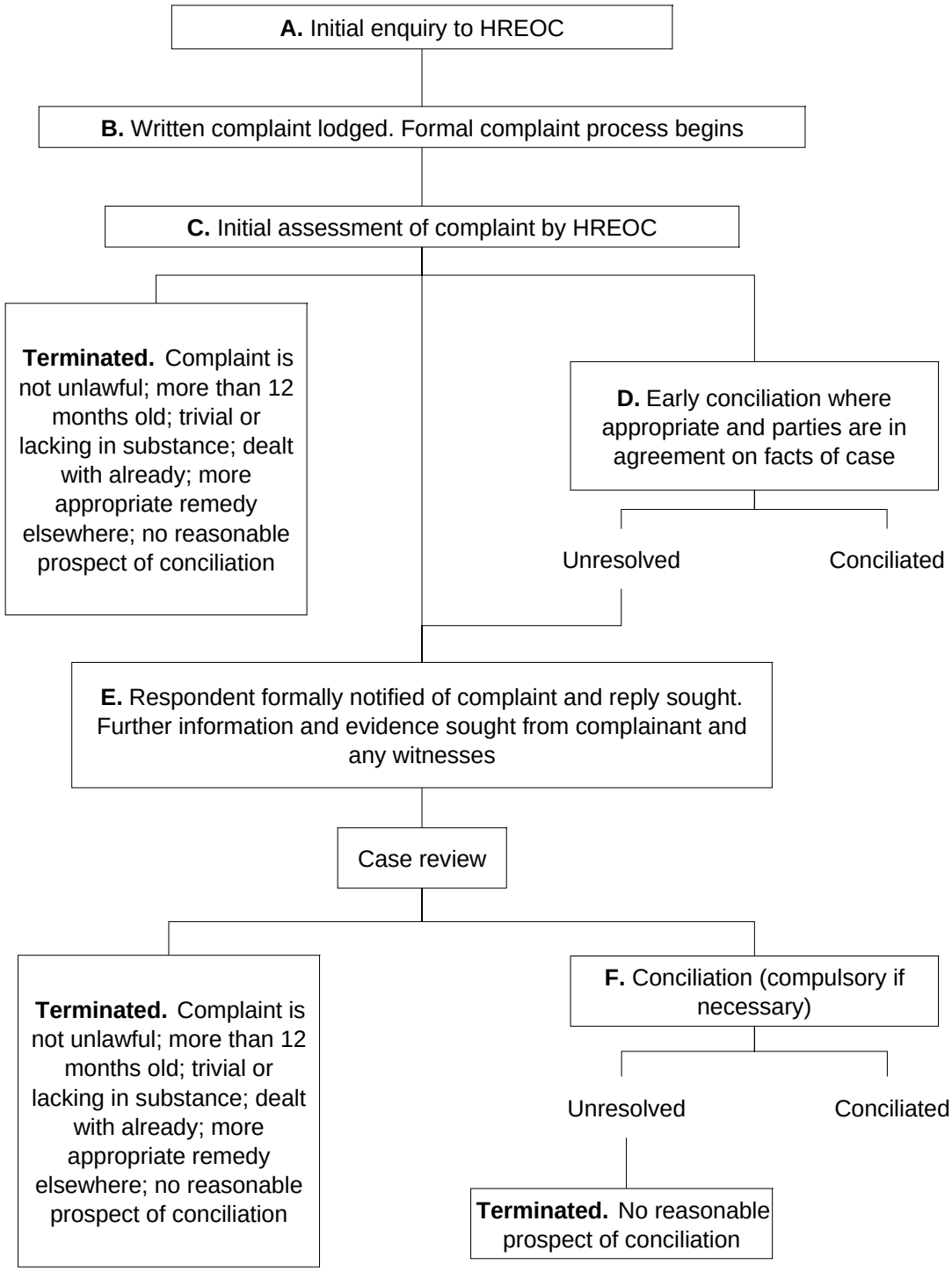
Stage 1: HREOC investigation and conciliation

HREOC's complaint handling process involves a number of steps (figure 4.1). The process is documented in HREOC's *Complaint Procedures Manual*, in accordance with the requirements of the HREOC Act (HREOC 2003c). HREOC provides advice and assistance to the public about this process. A person who considers that they have been unlawfully discriminated against on the ground of disability lodges a formal, written complaint under section 46P of the HREOC Act (steps A and B in figure 4.1). HREOC is obliged to assist people to formulate their complaint or put it in writing if needed (HREOC, sub. 235).

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

- it is not unlawful
- it is more than 12 months old
- it is trivial, vexatious, frivolous, misconceived or lacking in substance
- it has been adequately dealt with by another body
- a more appropriate remedy is available (for example, it would be better dealt with by another jurisdiction)
- there is no reasonable prospect of conciliation
- the subject matter is 'of public importance' and should be taken to the Federal Court or Federal Magistrates Court rather than be conciliated (HREOC 2003c).

Figure 4.1 **HREOC's complaints handling process**[a]



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

Source: Productivity Commission based on HREOC 2002a; HREOC 2003c.

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

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

If conciliation is successful and an agreement is reached, that is the end of the process. Conciliated outcomes can include agreements to apologise, rectify an ongoing barrier or problem or (more rarely) pay compensation. They can take the form of a private contract between the parties. Parties generally pay their own costs. HREOC has no power to award costs in conciliation.

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

Stage 2: Federal Court and Federal Magistrates Court

If complaints are not resolved through conciliation by HREOC, complainants can apply to the Federal Court to have their case heard in the Federal Court or, since July 2000, the Federal Magistrates Court (box 4.2). If the application to hear the case is successful, the Federal Court decides which of the two courts is used. There is a $50 filing fee to lodge a complaint at either the Federal Court or the Federal Magistrates Court. This fee may be waived if a case of financial hardship is made, if the complainant has been granted legal aid or holds a pensioner concession card or

other benefit card. With the permission of the Federal Court, HREOC can act as an *amicus curiae* (friend of the court) in cases involving discrimination (s.67(l)).

If the Federal Court or the Federal Magistrates Court decides that unlawful discrimination has occurred, it may order the respondent to rectify the discriminatory situation and/or pay compensation to the complainant, or it may decide to settle the case in some other way (HREOC 2003b). It may also order the losing side to pay the other side's legal costs. Legal costs vary depending on the type of legal representation employed and the length of the case. Many inquiry participants were concerned that the risk of having costs awarded against the complainant discourages applications for Federal Court or Federal Magistrates Court determination (see chapter 13).

Box 4.2 **Federal Magistrates Court**

The Federal Magistrates Court was established by the *Federal Magistrates Act 1999*, as an independent federal court. It commenced operation on 3 July 2000. It is Australia's first lower level federal court. Previously, federal law work was done in State and Territory courts of summary jurisdiction under the provisions of the *Judiciary Act 1903*.

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

The purpose of the Court is to provide a simple and accessible service for litigants and to ease the workload of the Family Court and Federal Court. It focuses on less complex matters, which typically require less than two days of court hearing time.

The Court encourages people to resolve disputes through dispute resolution before proceeding to court. It uses community based counselling and mediation services as well as the existing counselling and mediation services of the Family Court and Federal Court. These are separate to the conciliation processes of HREOC.

Sources: Federal Magistrates Court 2003; HREOC 2003c.

Offences and penalties

The DDA and HREOC Act list various offences and penalties for actions that might interfere in the complaint process (box 4.3). The DDA and HREOC Act do not contain penalties for proven cases of discrimination. In discrimination complaints that are resolved through conciliation, the outcome is decided by agreement between the parties. As noted above, conciliated outcomes may include an agreement to pay compensation. However, there are no penalties as such and no formal admission of guilt. In discrimination cases that proceed to Court, the Court

may order either or both parties to undertake appropriate remedies, such as remedial action or compensation. The Court may also award legal costs to one or both parties (see chapter 13).

Box 4.3 **Examples of offences and penalties in the DDA and HREOC Act**

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

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

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

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

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

4.5 Administration of other Disability Discrimination Act functions

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

- undertaking inquiries
- administering temporary exemptions to the DDA
- reporting to the Minister on the development and monitoring of disability standards
- registering voluntary action plans from organisations

- promoting an understanding and acceptance of, and compliance with, the DDA
- undertaking research and education programs
- advising the Minister on the consistency of other legislation with the DDA, and on the development of legislation relating to disability discrimination
- publishing guidelines
- acting as *amicus curiae* in court cases involving discrimination.

HREOC's inquiry function is discussed below. Its other functions are discussed in chapters 10 (promoting community acceptance), 13 (the complaints process) and 14 (regulation). The Attorney General and Attorney-General's Department also have administrative and policy roles of relevance to the DDA (see below).

HREOC inquiries into disability discrimination

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

First, the Attorney General may give HREOC a reference to undertake an inquiry, resulting in a report tabled in Parliament. These referrals are rare. An example is the inquiry into access to e-commerce and related matters for people with disabilities and older people. This inquiry resulted in the Australian Bankers' Association developing voluntary industry standards covering automatic teller machines, EFTPOS, Internet banking and telephone banking (see appendix D).

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

Third, HREOC can initiate an inquiry, which may result in a report but also aims to resolve a specific issue.

There is no set process for these three types of HREOC inquiries, but they usually involve public, government and business consultation. Although HREOC cannot force a resolution, businesses such as insurers, banks and cinemas have participated in inquiries and agreed to resolutions.

The Attorney-General's portfolio

HREOC is part of the Attorney-General's portfolio. Disability discrimination responsibilities of the Attorney General and Attorney-General's Department include:

- the structure and functions of HREOC
- matters arising under the HREOC Act and the DDA, including giving HREOC references to undertake inquiries
- legal and policy advice on legislative proposals, including, for example, the Australian Human Rights Commission Legislation Bill 2003 and the proposed UN International Convention on Human Rights and Disability (see section 4.6)
- the development and enactment of disability standards for access to premises, education and public transport (see chapter 14)
- the prevention of unauthorised sterilisation of girls with intellectual disabilities (see chapter 9)
- the accessibility of information technology and e-commerce.

The Attorney-General's Department is also responsible for the Federal Court and Federal Magistrates Court and funds Australia's network of legal aid services, including dedicated disability legal aid services. Legal aid services mainly assist people with legal representation in the Federal Court and in criminal matters. They may sometimes provide advice and representation for DDA cases that proceed to court, although this is limited by eligibility criteria and funding (see chapter 15).

4.6 Future developments in discrimination legislation

A number of reviews and legislative initiatives in progress are relevant to the DDA.

Disability Discrimination Act Amendment Bill 2003

This Bill proposes to exclude people who are addicted to prohibited drugs from claiming disability discrimination, by adding an exemption clause to Division 5 (exemptions) of the DDA. People who are addicted to prohibited drugs but who are receiving treatment for their addiction and associates of people who are addicted to prohibited drugs would still be protected from unlawful discrimination by the DDA.

The Senate Legal and Constitutional Committee examined this Bill and reported back to the Senate on 15 April 2004. The Committee received 118 submissions, the great majority of which were opposed to introducing this Bill. The Senate

Committee concluded that it was not satisfied that the Bill was necessary; existing legal frameworks are adequate for dealing with the community's concerns about drug addiction. Further, the Committee noted practical difficulties, such as problems associated with defining addiction and treatment. It did not believe that the amendment Bill would provide the certainty required by individuals and organisations covered by the DDA.

The Senate Committee made three recommendations:

- first, that the Bill be referred to the Ministerial Council on Drugs Strategy for further consideration to allow consultation with all Australian, State and Territory governments dealing with this matter
- second, that if the Bill proceeds, its application be limited to employment, as is the case with the New South Wales *Anti-Discrimination Act 1977*
- third, the Bill should not proceed if it extends to all areas covered by the DDA (Senate 2004).

As noted in chapter 1, the Productivity Commission has not reviewed this Bill as part of this inquiry, although the Commission does comment on related issues in this report, such as the definition of disability (see chapter 11) and the role of exemptions (see chapter 12).

Australian Human Rights Commission Legislation Bill 2003

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

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

- re-name and re-structure HREOC as the Australian Human Rights Commission
- replace the current sex, race, disability and other specific Commissioner roles with generic Commissioner roles that cover all areas of discrimination
- amend the powers and responsibilities of HREOC, including its power to intervene in federal unlawful discrimination cases before the courts
- highlight the public education and information dissemination roles of HREOC (see chapter 10)

Many participants to this inquiry commented on this Bill and most were opposed to it. The changes that it proposes to the structure and operation of HREOC may affect

the administration of the DDA. However, the Bill is outside the terms of reference for this inquiry into the DDA.

Age Discrimination legislation

The *Age Discrimination Act 2004*[5] makes discrimination on the ground of age unlawful in much the same areas of activity as covered by the DDA—employment, education, premises, the provision of goods and services, accommodation, the purchase of land and the administration of Commonwealth laws and programs. It uses very similar, but not identical, definitions and tests for direct and indirect discrimination. It also contains exemptions similar to those of the DDA, including exemptions for superannuation, insurance, social security and migration laws.

The Age Discrimination Bill 2003 expressly stated that 'age discrimination [is] not to include disability discrimination' (s.6). This provision was intended to minimise potential 'overlap between the operation of this Act and the DDA' and ensure:

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

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

Proposed UN convention on human rights for people with disabilities

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

At the second session, a working group was established to commence drafting the Convention. A large number of international government and non-government

[5] The Age Discrimination Bill 2003 was passed by both houses of Parliament in March 2004 but has yet to receive royal assent.

organisations are represented on the Ad Hoc Committee. The smaller working group consists of 27 government and 12 non-government representatives. It is scheduled to present a draft convention at a third session in early 2004 (UN 2003).

Australia is represented on the Ad Hoc Committee by officers of HREOC, the Attorney-General's Department and the Office of Disability. These representatives are consulting Australian disability organisations and other interested parties about the Convention. Some Australian non-government organisations that represent people with disabilities have also attended the UN Committee's sessions.

5 Eliminating discrimination

The first object of the *Disability Discrimination Act 1992* (DDA) is to eliminate, as far as possible, discrimination against persons on the ground of disability in specific areas of activity. This chapter examines the effectiveness of the DDA in achieving this objective. As noted in chapter 8, the DDA aims to achieve substantive equality (that is, to remove barriers to equality of opportunity), rather than equality of outcome. This should be borne in mind in assessing its effectiveness. Progress in eliminating discrimination also contributes to the other objects of the DDA: 'equality before the law' (discussed in chapter 9) and 'promoting community recognition and acceptance of the rights of people with disabilities' (discussed in chapter 10).

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

- the protective framework provided by State and Territory anti-discrimination legislation, much of which pre-dated the DDA (see chapter 4)
- changes over time in the provision of disability services and the Disability Support Pension, which could have affected the ability or willingness of people with disabilities to participate in various activities
- policies of de-institutionalising and 'mainstreaming' many people with disabilities (see chapter 9)
- changes in the proportion of the population identified as having a disability
- technological developments over the past 10 years that have helped reduce the barriers faced by many people with disabilities.

Section 5.1 analyses disability discrimination complaints data. Sections 5.2 to 5.6 examine the effectiveness of the DDA in specific areas of activity. Section 5.7 looks at the effectiveness of the DDA in eliminating discrimination for different groups of people and section 5.8 assesses the DDA's effectiveness overall in eliminating discrimination.

5.1 Complaints data

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

Second, complaints data measure how many people believe they have experienced discrimination and are willing and able to make a formal complaint. Complaints do not indicate whether discrimination necessarily has occurred, nor does the absence of complaints necessarily indicate an absence of discrimination. In this respect the Office of the Public Advocate, Queensland, noted that intellectual impairment:

> … is present in around 3 per cent of the general population. That is approximately 600 000 people out of a total disability population of 2.4 million (based on a 12 per cent estimate for all forms of disability). In terms of individuals complaining of discrimination on the basis of their disability, however, people with intellectual impairment have been responsible for only 219 complaints out of a total of 5400 complaints in the first 10 years of operation of the *Disability Discrimination Act 1992*.
>
> So a cohort comprising around 25 per cent of all Australians with disability have been responsible for only 4 per cent of the disability discrimination complaints. Whether happy or unhappy, these vulnerable citizens are being very quiet about their lot in life in a way that can only be described as most unsettling. (sub. 246, pp. 2–3)

Third, aggregate complaint numbers do not reveal the nature of complaints: one complaint might concern widespread systemic discrimination, while another concerns a specific instance of discrimination.

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

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

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

Complaint outcomes

For the reasons outlined above, the number of formal complaints is a relatively crude guide to the level and nature of discrimination in the community. However, the outcomes of the complaints process can give some insight into the likely presence of discrimination (table 5.1).

Table 5.1 **Outcomes of finalised Disability Discrimination Act complaints, 2002-03**

Outcome	*Number*	*Per cent*
Terminated	**219**	**47.3**
Not unlawful	25	5.4
More than 12 months old	5	1.1
Trivial, vexatious, misconceived, lacking in substance	100	21.6
Adequately dealt with already	11	2.4
Had more appropriate remedy available	8	1.7
Had no reasonable prospect of conciliation	70	15.1
Withdrawn	**43**	**9.3**
Conciliated	**186**	**40.2**
Administrative closure (for example, because complainant was not an aggrieved party)	**15**	**3.2**
Total	**463**	**100.0**

Source: HREOC, sub. 235, app C.

The first point to note about HREOC complaints data from any one year is that the number of complaints finalised will differ from the number received, simply because it takes time to deal with them. In 2002-03, HREOC received 493 complaints about discrimination on the ground of disability and finalised 463 complaints.

The second point to note is that almost half of all complaints are terminated. A relatively large proportion of these are terminated because they are judged to be 'trivial, vexatious, misconceived, or lacking in substance' (21.6 per cent), or 'not unlawful' (5.4 per cent). That is, HREOC regarded 27 per cent of complaints as not warranting redress.

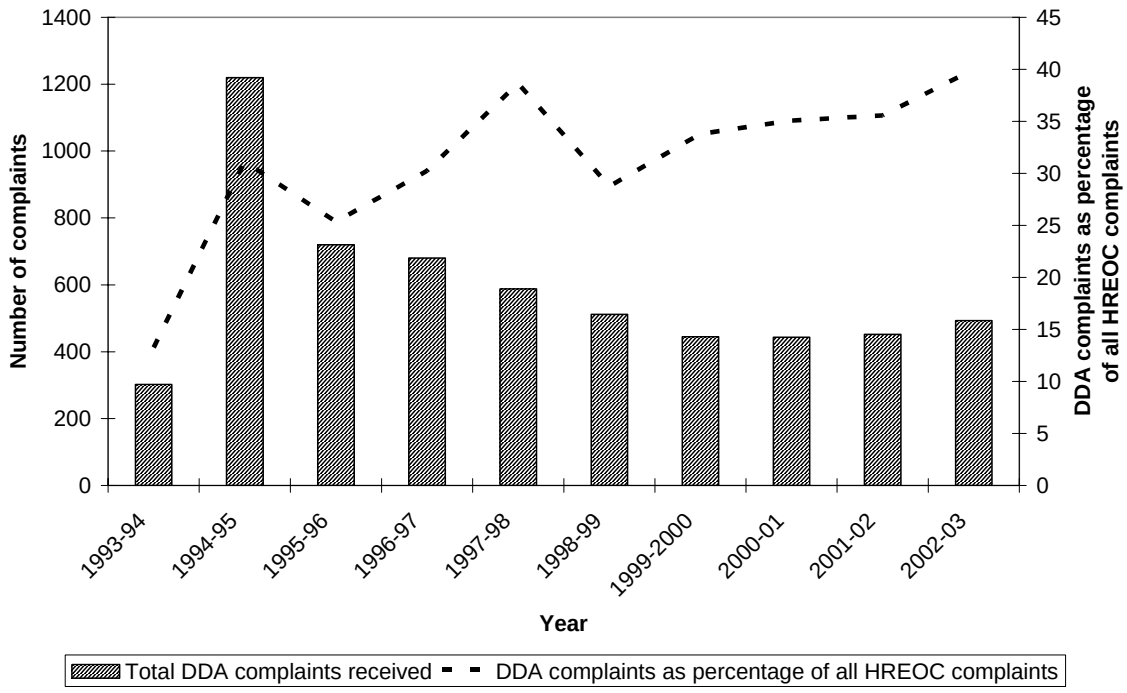
In 2002-03, a total of 256 complaints (55.3 per cent) passed HREOC's initial screening, implying that they were not 'lacking in substance'. (These were made up of 40.2 per cent of complaints that were successfully conciliated and 15.1 per cent that had 'no reasonable prospect of conciliation'). It is not possible to draw any inferences about the remaining 17.7 per cent of complaints.

Complaints over time

Changes over time in the number of DDA complaints might indicate changes in discrimination and, indirectly, the effectiveness of the DDA (although the possible influence of other factors must be considered).

The number of DDA complaints has generally declined since the DDA was introduced in March 1993 (figure 5.1). This decline would be more marked if the increase in the number of people declaring a disability over the same period were taken into account (see chapter 3). Within this general decline, three phases appear to be present: an initial period when complaints peaked in 1994-95; a gradual year-on-year decline running from 1995-96 to 1998-99; and relative stability since 1999-2000.

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



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

The 1994-95 spike in DDA complaints appears to have been influenced by pent-up demand to use the new Act and its vigorous promotion by HREOC. The reasons for the gradual decline in the number of DDA complaints since 1995-96 and subsequent stabilisation since 1999-2000 are difficult to determine.

It is possible that disability discrimination might have decreased over this period, reflecting the success of the DDA in addressing systemic discrimination in areas such as telecommunications (section 5.5). Existence of the DDA might also have encouraged parties to reach informal solutions without the need for formal complaints. Or the decline in complaints could indicate that the complaints process became less effective or less accessible over time, discouraging people from making complaints.

The general decline in the number of DDA complaints must be set against two other observations.

First, the number of complaints successfully conciliated remained constant over this period (HREOC, sub. 235). In combination with the decline in numbers, this meant that the proportion of complaints successfully conciliated increased over time. This trend could reflect several factors unrelated to the level of discrimination:

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

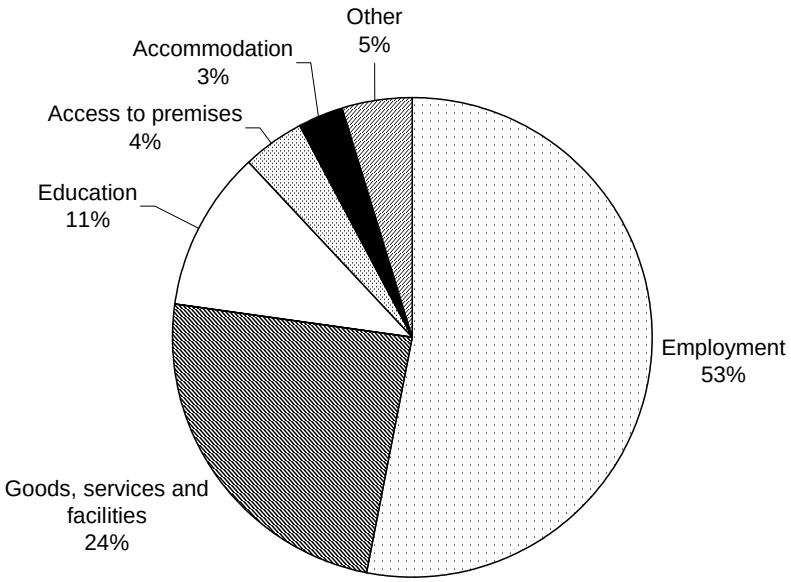
Second, despite declining in number since 1994-95, DDA complaints have generally increased as a proportion of all HREOC complaints (with some fluctuations).

The Productivity Commission considers that the number of DDA complaints, although small, indicates that disability discrimination remains an issue.

Complaints by area of activity

DDA complaints can be divided by area of activity (figure 5.2). In 2002-03, the most recent year for which disaggregated data are available, 53 per cent of DDA complaints were in the area of employment. The second largest area of complaint concerned the provision of goods, services and facilities (24 per cent). Relatively few complaints were made about access to premises (4 per cent)—a category that includes complaints about access to public transport.

Figure 5.2 **DDA complaints received by area[a], 2002-03**



a An area is recorded for each ground of discrimination. There may be some double counting where complaints are made on multiple grounds (such as provision of goods and services and access to premises).

Data source: HREOC 2003p, p. 80.

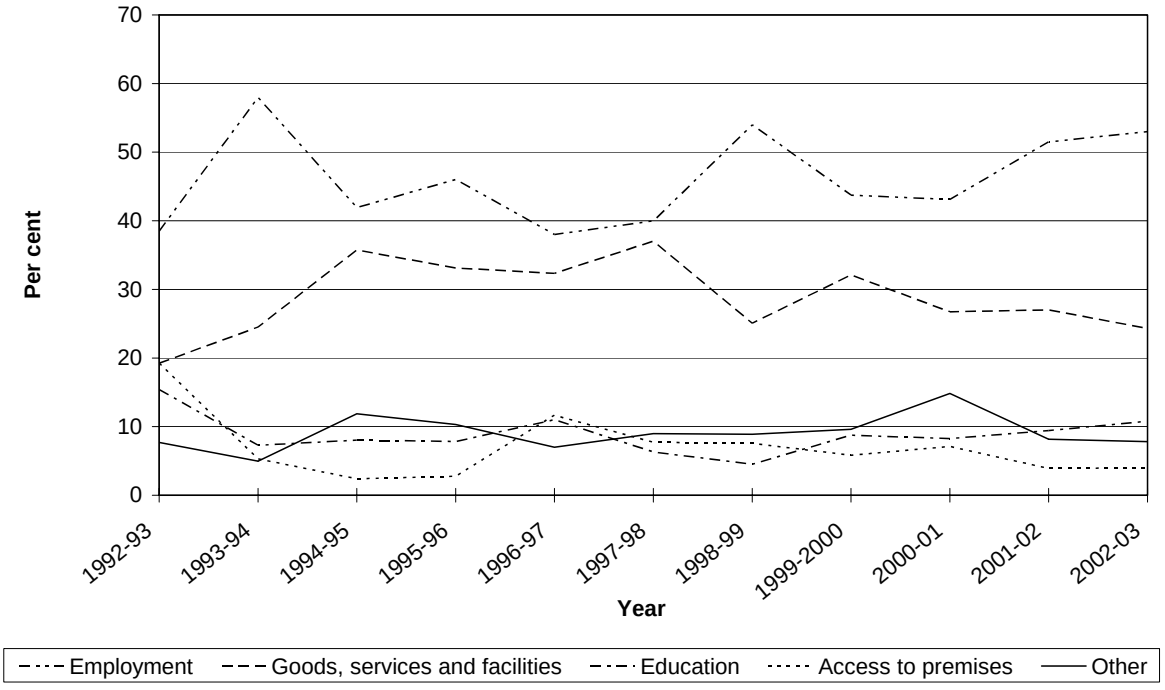
Employment has consistently accounted for most DDA complaints over time (figure 5.3). Access to goods and services has consistently made up the second largest area of complaints, but appears to have decreased slightly in importance since 1994-95.

The proportion of complaints about education, access to premises (including public transport) and 'other' have remained relatively constant over time.

5.2 Eliminating discrimination in employment

Discrimination in employment is not unlawful where a person with a disability does not meet the inherent requirements of a position, or can only meet them with the aid of workplace adjustments that would cause the employer unjustifiable hardship. These provisions of the Act mean that many job opportunities might not be available to some people with disabilities.

Figure 5.3 **DDA complaints received, by area of activity, 1992-93 to 2002-03**



Data sources: HREOC annual reports, various years.

In assessing the DDA's effectiveness in the area of employment, the Productivity Commission has relied on four separate sources of information, namely complaints, inquiry participants' comments, labour market outcomes and overseas evidence on the effectiveness of similar legislation. These sources are now investigated in turn. This is followed by a brief examination of other possible influences on employment of people with disabilities.

Complaints data

As noted, employment consistently attracts the most complaints under the DDA (around 50 per cent of all DDA complaints). While this proportion has fluctuated over the years, there has been no discernible increasing or decreasing trend. As noted, the total number of complaints, which had been broadly decreasing between 1994-95 and 1999-2000, has been relatively stable since then.

HREOC data indicate that the majority of DDA employment complaints are lodged by people with a physical disability or persons who have suffered a work injury. Complaints about unlawful work termination outweigh complaints about recruitment (HREOC, sub. 235). This aligns with the concerns many inquiry participants expressed about the difficulty in proving discrimination at the hiring

stage. They argued that discrimination occurring at that stage is relatively easy to conceal and that indirect discrimination is an issue in the way in which jobs are designed and advertised.

Inquiry participants' views on employment discrimination and the DDA

Most inquiry participants who commented on this issue argued that disability discrimination in employment is widespread. Many gave examples of personal experience or knowledge of discrimination in employment (Maxine Singer, sub. 8; Victor Camp, sub. 20; Debbie-Lee McAullay, sub. 25; Terry Humphries, sub. 66; Physical Disability Council of NSW, sub. 78; David W. Norton, sub. 111; Advocacy Tasmania, sub. 130; James Bond, sub. DR337). Box 5.1 summarises some problems encountered by these participants.

The Australian Chamber of Commerce and Industry provided a dissenting view on the prevalence of discrimination in employment:

> There appears to be … no explicit evidence of widespread discrimination by Australian employers toward people with disabilities. … It is unacceptable to impute that Australian employers' attitudes and practices are the main cause of lower participation rates and higher unemployment rates than are experienced by those without disabilities. There is no evidence for such a conclusion and it does nothing to assist either persons with disabilities or their potential employers. (sub. DR288, pp. 3–4)

Many participants also argued that the DDA has had only limited effect on disability discrimination in employment, for several reasons (box 5.2).

Labour market outcomes

The DDA aims to achieve substantive equality, rather than equality of outcome. It cannot guarantee employment for people with disabilities, nor is this one of its objectives. This led some inquiry participants to argue that aggregate employment outcomes should not be used to assess the Act's effectiveness in this area (Australian Chamber of Commerce and Industry, sub. DR288; Ability Technology Limited, sub. DR295).

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

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

> He has learnt in his job applications not to mention that he was educated at Deafness Units, but the fact that he wears two obvious hearing aids (this because of his severe hearing loss, although the aids enable him to hear quite well) he is turned down at every interview. He has even been told the reason for this is because his aids are a give-away to his hearing loss. (Deafness Association of Northern Territory, sub. 89, p. 3)
>
> … for me this has meant well over 200 job interviews I did not succeed at in spite of qualifications in excess of those required, as the interviewers had the concept of my disability in the front of their mind, allowing their second-guessing and pre-judging of me as valid assessment protocol. (Andrew Van Diesen, sub. 93, p. 2)
>
> … how can a disabled actor ever get that [public] profile if they are never given the casting opportunities in the first place? It is an industry which is entirely unaccountable for discrimination. And there are so many grounds on which it does discriminate. A casting agent can say they didn't consider a disabled actor for a role because that actor is too tall, too short, too dark, too fair, nose is too big, eyes too narrow, hair too short, hair not curly, fingers too short, teeth imperfect, too good looking, not good looking enough, looks too young—the list is endless. They need never mention the real reason for not casting that actor—disability. (Media Entertainment and Arts Alliance, sub. DR328, p. 1)
>
> … discrimination in employment is very hard to prove. Employers of course do not actually say that these are the reasons the person did not get the job. They need only say that 'another person was better qualified' and under State and federal legislation, which was designed to eliminate these practices, the deaf person has nothing on which to appeal. In addition, with the vast number of employers using recruitment agencies, they are able to hide behind an additional smokescreen to escape being called to account under these laws. (Australian Association of the Deaf, sub. 229, p. 4)
>
> I have even heard the opinion expressed by different levels of management that 'the person has a disability why don't they just go on [Disability Support Pension] and not even worry about trying to get employment'. (Peter Simpson, sub. 192, p. 2)
>
> … people with mental illness who are seeking employment are still experiencing direct discrimination because of their disability. … up to 90 per cent of [member organisations'] clients do not disclose their history of mental illness to a prospective employer as they have learned from past experience that if they do, they will not get the job. (Mental Health Coordinating Council, sub. 84, p. 3)
>
> … discrimination in employment is a major running sore … (National Council for Intellectual Disabilities, sub. 112, p. 15)

Box 5.2 **Inquiry participants' views on the effectiveness of the Disability Discrimination Act in employment**

Inquiry participants' views on the effectiveness of the DDA were generally negative.

> Comprehensive evidence on the effectiveness of achievement of the objective of elimination of discrimination in employment is not available but such evidence as HREOC is aware of is not encouraging. (HREOC sub. 143, p. 59)
>
> … significant discrimination still exists and historical attitudes remain entrenched in many areas. In particular, very little improvement can be seen in the areas of employment … (Disability Services Commission, Western Australia, sub. 44, p. 4)
>
> There has been excellent progress in other areas such as Public Transport and Physical Access, yet an issue [employment] that dominates the complaint process is so lacking in any action over the past 10 years … (Terry Humphries, sub. DR345, p. 4)

A number of inquiry participants identified specific aspects of the DDA which limited its effectiveness:

- difficulty in proving discrimination (Australian Association of the Deaf, sub. 229; Blind Citizens Australia, trans., p. 1685)
- complainants being branded 'troublemakers' (Australian Association of the Deaf, sub. 229; Darwin Community Legal Service, trans., pp. 31–2)
- successful complainants did not often get their job back (Disability Action Inc., trans., p. 934; Larry Laikind, sub. 70)
- absence of employment standards (Disability Action Inc., trans; NSW Office of Employment Diversity, sub. 172; Terry Humphries, sub. DR345)
- inconsistencies with occupational health and safety legislation (Maxine Singer, sub. 8; Debbie McAullay, sub. 25; Job Watch, sub. 90; South Australian Equal Opportunity Commission, sub. 178).
- most employment barriers against people with disabilities are attitudinal, not physical, which means that the DDA's contribution to creating an accessible physical environment has had virtually no impact on discrimination against people who are blind or vision impaired (Blind Citizens Australia, sub. DR269).

To the extent that the Act removes discrimination from employment decisions, it should create additional opportunities and hence ultimately improve employment outcomes for people with disabilities, all other things being equal. For this reason, the Commission considers that employment data can provide an indirect, albeit imperfect, indicator of the existence of discrimination. However, the influence of factors other than discrimination should be borne in mind.

As briefly discussed in chapter 3, people with disabilities are less likely than people without disabilities to be in the labour force (that is, employed or actively looking for work). The ABS estimated the labour force participation rate of people with disabilities in 1998 at 53.2 per cent, compared with 80.1 per cent of people without a disability (table 5.2). Although people with disabilities made up 16.6 per cent of the working age population in that year, they made up only 11.7 per cent of the labour force (ABS 1999b).

Table 5.2 **Labour force participation and unemployment rates of people[a] with and without disabilities, 1988, 1993, 1998**

	People with disabilities			*People without a disability*		
	1988	*1993*	*1998*	*1988*	*1993*	*1998*
	%	%	%	%	%	%
Labour force participation rate	51.5	54.9	53.2	75.3	76.9	80.1
Unemployment rate	11.5	17.8	11.5	8.1	12.0	7.8

a Persons aged 15–64 years living in households.

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

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

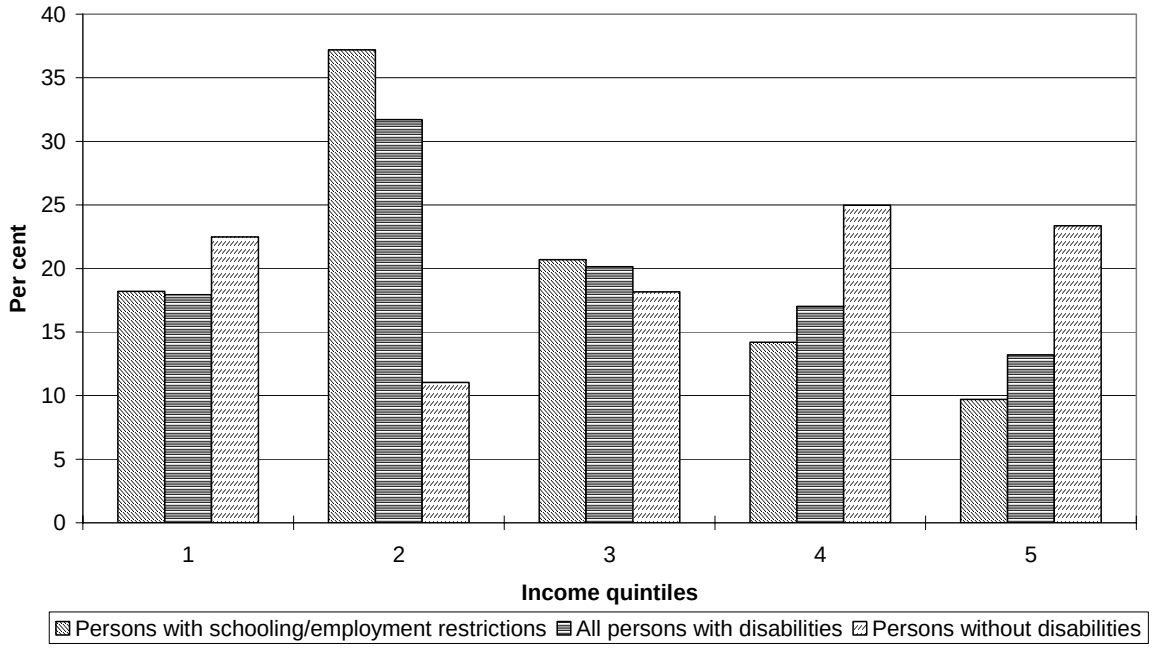
When in the labour force, people with disabilities are more likely to be unemployed than those without a disability. The unemployment rate differential between the two groups ranged between 3.4 percentage points in 1988 and 5.8 percentage points in 1993 and was 3.7 percentage points in 1998. The combination of lower labour force participation and higher unemployment means that people with disabilities were 23 per cent less likely to be employed in 1993, and 26 per cent less likely to be employed in 1998, compared to people without a disability.[2] On average, people with disabilities also are less likely to be employed full time and experience longer unemployment spells (see appendix A).

Compared with people without disabilities, people with disabilities also display different income and occupational characteristics. They:

2 These percentages measure the raw probability of being employed (as opposed to unemployed or not in the labour force), which does not account for the different characteristics of the two groups. In appendix A, the Productivity Commission conducts a multivariate analysis of the probability of employment for each group, controlling for a number of other influences beside disability.

- tend to be clustered at opposite ends of the occupational spectrum, in the categories 'managers and administrators' or 'labourers and related workers' (see appendix A)
- are overrepresented in the second and third lowest income quintiles for working age Australians (figure 5.4).[3] People with a schooling or employment restriction are even more likely to be found in the second and third income quintile. This pattern reflects the impact of these restrictions on wage earning ability.

Figure 5.4 **Distribution of persons with schooling/employment restrictions, with and without disabilities, by total weekly cash income quintile, 1998[a, b, c]**



a The height of the bars measures the percentage of each group that is found in a particular income quintile. For example, 37 per cent of persons with schooling or employment restrictions are in the second income quintile, compared to 32 per cent of all persons with disabilities and 11 per cent of persons without a disability. **b** Persons aged 15–64 years living in households. **c** Quintiles exclude 'income not stated'. First quintile excludes refusals to respond.

Data source: ABS 1999b, cat. no. 4430.0.

The Productivity Commission compared the wages of people with disabilities and people without disabilities. On average, women with disabilities earned 7 per cent less per hour than women without disabilities. Men with disabilities earned 6 per cent less per hour than men without disabilities (see appendix A). However, these

3 The representation of people with a disability in the first quintile may be underestimated because that quintile includes people with nil income and people who reported no source of income.

differences do not account for the different characteristics of the groups being compared.

Testing wage differentials

The Commission conducted econometric analyses to gain a better understanding of the relative wages earned by people with disabilities. Using an analytical approach known as indirect testing of discrimination, the Commission analysed the differences in hourly wage rates between people with disabilities and people without disabilities. Indirect testing attempts to measure the extent to which socio-demographic characteristics such as age, education or experience, explain each group's average earnings. Health status can also be taken into account, as it is likely to influence the productivity of people with and without disabilities. If, after accounting for as many determinants of wages as possible, there is still a difference in wages between the two groups, this may be interpreted as wage discrimination towards people with disabilities. The 'unexplained' gap demonstrates that members of the two groups would be rewarded differently even if they had the same characteristics (except for disability).

The Productivity Commission applied two variants of this approach to a recent, detailed dataset for Australia: the 2001 wave of the survey of Household, Income and Labour Dynamics in Australia (HILDA). The analysis is discussed further in appendix A and detailed in appendix F. Its results suggest that different characteristics cannot explain between 20 and 44 per cent of the difference in the hourly wage rates of women with disabilities and women without disabilities, and between 27 and 49 per cent of the difference in hourly wage rates for men.[4] These gaps could be interpreted as discrimination on the ground of disability.

Although its results are consistent with those of overseas studies, the analysis conducted by the Commission has a technically low explanatory power. This is common in this type of work, where many unobservable influences are at work simultaneously. Therefore, these results are very tentative. The Commission has endeavoured to include all relevant characteristics in its calculations, but some of the unexplained gap may stem from omitted characteristics or from differences in unobservable characteristics, such as motivation.

The Commission's results suggest that the difference in hourly wage rates between people with and without disabilities which could be due to discrimination is

[4] Results from the Commission's preferred model (the Heckman extension of the Oaxaca–Blinder decomposition) suggest that 44 per cent (27 per cent) of the difference in hourly wage rates between women (men) with disabilities and women (men) without disabilities cannot be explained by differences in their characteristics (see appendices A and F).

relatively small. Disability discrimination leads to women with disabilities earning 3 per cent less per hour than similar women without disabilities. For men, the equivalent differential is 1.7 per cent. This might suggest that other industrial relations mechanisms provide significant protection from wage discrimination for people with disabilities who are employed, and that disability discrimination is more of an issue in obtaining and retaining employment.

However, the relatively small unexplained difference in wages between people with disabilities and people without disabilities might underestimate the role that disability discrimination plays in lowering the labour earnings of the former group.

Additional results from the quantitative analysis undertaken by the Commission show that lower educational qualifications, on average, are responsible for around 40 per cent of the explained wage gap between men with disabilities and men without disabilities, and 12 per cent for women (see appendix A). If, as is likely, part of the educational gap between people with disabilities and people without disabilities is due to the existence of discriminatory barriers in the education sector, then the overall effect of disability discrimination on the earning capacity of people with disabilities is higher than suggested by measures of discrimination occurring in the employment area alone.

In conclusion, available data indicate that people with disabilities have poorer labour market outcomes overall than people without disabilities. Moreover, in some areas, outcomes have not improved markedly since the introduction of the DDA. It might have been expected that, since 1993, progress in assistive technology would have allowed at least some improvement in the employment situation of people with disabilities.

However, poorer outcomes might be caused by many reasons other than discrimination. These include differences in capacity to work, labour productivity, work incentives, and job matching ability (box 5.3). They also include differences in education and work experience between people with and without disabilities.

Overseas evidence

Anti-discrimination legislation has the potential to have both positive and negative effects on the demand for workers with disabilities. It might increase demand for their labour, because employers are under threat of a complaint if they discriminate. Alternatively, employers might consider that anti-discrimination legislation makes hiring workers with a disability more expensive (through, for example, incurring adjustment costs, paying equal wages and experiencing difficulties in dismissing protected workers). Cost-sensitive employers might, therefore, prefer to hire

relatively less expensive workers without disabilities (even though, without the anti-discrimination legislation, they might have hired workers with disabilities). This effect could lead to reduced demand for workers with disabilities.

Box 5.3 Influences on labour market outcomes for people with disabilities

When analysing labour market outcomes for people with disabilities, the following influences are worth noting. Their disabilities might mean that:

- they are less productive (and therefore less employable) than people without a disability
- they are not capable of working, or they can work only intermittently
- the additional personal costs imposed by their disability mean it is not worthwhile joining the labour force
- if unemployed, they will take longer to find a job that provides a good match for their skills and their limitations.

These influences mean that, at any particular point in time, a higher proportion of the population with disabilities is likely to be classified as out of the labour force or unemployed, for reasons that may not be related to discrimination.

Moreover, there is evidence to suggest that disability can be a consequence, as much as a cause, of joblessness (Jenkins and Rigg 2004; Cai and Kalb 2004). The link between disability and disadvantage that such 'reverse causality' creates in published statistics is unrelated to disability discrimination.

Source: see appendix A.

There is a continuing debate in the United States about whether the Americans with Disabilities Act 1990 might have hurt the employment situation of people with disabilities in that country (box 5.4).

The DDA has employment provisions broadly similar to those of the Americans with Disabilities Act, so arguments used in that debate might be relevant to Australia. However, there is insufficient Australian data to replicate some of the detailed US analyses at the centre of this debate. For this reason, the Productivity Commission has chosen to rely on many strands of evidence to assess the effectiveness of the DDA in reducing disability discrimination in employment (and, hence, in enhancing the employment situation of people with disabilities).

Box 5.4 **Impact of the Americans with Disabilities Act on employment**

There has been much disagreement among researchers about the impact of the Americans with Disabilities Act in the United States. Acemoglu and Angrist (1998) and DeLeire (2000) found that the introduction of the Act had had an overall detrimental impact on the employment of people (especially men) with disabilities in the United States. They also found that the detrimental employment effects had occurred through reductions in hiring rather than increases in firing, suggesting that accommodation costs concern employers more than do the costs of litigation. None of these researchers found that the Act had affected the relative wages of workers with disabilities.

Other authors (Bound and Waidmann 2002; Hotchkiss 2003; Kruse and Schur 2003; Schwochau and Blanck 2000, 2003), however, have challenged these conclusions, based on the difficulty of defining disability that is covered by the ADA and of isolating the effects of the Act from other economic phenomena occurring at the time of its introduction.

The most recent research, by Kruse and Schur (2003), showed that the results were influenced by the choice of data and definition of disability. The authors concluded that:

> These results do not permit a clear overall answer to the question of whether the [Americans with Disabilities Act] has helped or hurt the employment of people with disabilities, since both positive and negative signs can be found. Rather, the main conclusion is that there is reason to be cautious about findings of either positive or negative effects … (Kruse and Schur 2003, p. 62)

Sources: see appendix A.

Other influences on employment

Inquiry participants identified several factors as having had a negative impact on the employment situation of people with disabilities since the introduction of the DDA. Blind Citizens Australia highlighted the influence of recent changes affecting the Australian economy and labour market on the employment of people with disabilities, such as the expansion of the retail sector, the visual emphasis of many new jobs, a reduction in entry-level jobs, an increased emphasis on multi-skilling, the expansion of the small business sector, a reduction in employment in the public sector, and the expansion in the use of recruitment and labour hire agencies (sub. 72, pp. 17–18).

Other factors identified by inquiry participants included the increasing requirement to hold a driver's licence (Mental Health Coordinating Council of Australia, sub. 84), the resistance of small business to the DDA's objectives (South Australian Equal Opportunity Commission, sub. 178), a shortage of Auslan interpreters (Australian Federation of Deaf Societies, sub. DR363) and the lack of an Australian

equivalent of the US Job Accommodation Network, which offers free advice to employers on possible adjustments (HREOC, trans.; ACE National Network, sub. DR361).

The Australian Chamber of Commerce and Industry argued that the labour market disadvantage experienced by people with disabilities was more likely to reflect barriers other than disability discrimination, such as low participation in vocational education, work disincentives created by income support arrangements, and ineffective return to work arrangements (sub. DR288).

In addition to the specific factors noted above, structural changes on the demand and supply sides of the labour market, unrelated to disability discrimination, could have shaped employment outcomes for people with disabilities.

A widely reported change affecting the labour markets of Australia (and other countries) during the 1990s was an increase in the relative demand for skilled workers (de Laine et al. 2000). It has been suggested that this phenomenon was associated with the rise in the number of disability pension recipients in some countries, as relatively less skilled, older workers faced the progressive loss of their traditional sources of employment (Nickell and Quintini 2001). Older workers, especially men, are both relatively less skilled and more likely to have a disability than the remainder of the workforce. Thus, as the labour market prospects of people in this group declined, the attractiveness of disability benefits to them increased.

As in the United Kingdom and the United States, a rapid increase in the number of recipients of the Disability Support Pension occurred in Australia during the 1990s. A number of studies (ACOSS 2002; Argyrous and Neale 2001, 2003; Cai 2000; Healy 2002) have contended that deteriorating labour market conditions for older men underpinned this increase. Argyrous and Neale stated that 'the disability support program has acted as an institutional mop for soaking up older males who have lost jobs' (2003, p. 21). They argued that this trend had been encouraged by a simultaneous relaxing of eligibility criteria for the pension and tightening of criteria for other forms of income support (such as unemployment benefits).

Another reason why demand for the labour of older workers might have decreased in recent years is age discrimination. According to the Australian Government, such discrimination is widespread and rising, and requires age discrimination legislation to be introduced (Australia 2003, p. 17622). Given that older workers are more likely to have a disability than their younger counterparts, lower labour force participation and employment rates for people with disabilities than for people without a disability could reflect age discrimination rather than disability discrimination. Nonetheless, it is likely that age and disability discrimination coexist to some extent.

Wilkins (2003) examined the probability of being employed in 1998, depending on age, disability status and age of onset of disability. He found that persons aged 55-64 who also reported a disability acquired late in life (late onset) were least likely to be in employment. This might suggest that older workers with disabilities experience both age and disability discrimination. However, discrimination is not the only possible explanation for their weak employment participation. Wilkins (2003) attributed the connection between ageing, mature-age disability onset and barriers to employment, to older workers having greater difficulties in adapting to a disability and fewer incentives to do so. Underlying both reasons, he suggested, was the fact that late onset disability was more likely to happen to relatively less skilled workers undertaking manual work. For this group of workers, both the attractiveness and feasibility of acquiring new skills once a disability is present is quite low, leading to their exit from the labour force.

Conclusions on effectiveness in employment

The employment situation of people with disabilities has not improved markedly since the introduction of the DDA. Employment is the principal area of complaints under the DDA, although the number of complaints remains low relative to the number of people with disabilities.

Despite an increase in the absolute number of people with disabilities in employment, this group made up a smaller proportion of the labour force in 1998 (the last year for which comparable data are available) than it did in 1993. This proportional decline has been accompanied by a significant increase in the number of people receiving the Disability Support Pension.

The Productivity Commission acknowledges that many factors on the demand and the supply side of the labour market shape the employment outcomes of people with disabilities. It is not easy to disentangle these factors to assess the role disability discrimination plays in the underrepresentation of people with disabilities in employment. What might at first appear to be employment barriers created by disability discrimination, might in reality be due to other types of discrimination, such as age discrimination, or to structural changes affecting the economy.

For a number of reasons, people with disabilities can be expected to participate less (and less successfully) in the labour market than people without disabilities, even in the absence of discrimination. Nevertheless, the Commission received many submissions arguing that employment discrimination was widespread, and providing circumstantial evidence of such discrimination. The Commission's own quantitative analysis points to the existence of some wage discrimination, albeit relatively limited.

Even allowing for the existence of disability discrimination in employment, it is not possible to measure precisely the role that anti-discrimination legislation in general, and the DDA in particular, may have played in reducing it. This is partly due to data deficiencies and partly to not knowing what the situation would be like in the absence of the DDA.

Taking all available qualitative and quantitative information into account, however, it is difficult to conclude that the DDA has been successful in this area. The lack of a significant improvement in the employment situation of people with disabilities suggests that the Act has been relatively ineffective in reducing disability discrimination in employment. But there are no indications that the Act's provisions have inadvertently led to even greater employment barriers being erected, in the manner attributed to the Americans with Disabilities Act by some US studies. Moreover, there are encouraging signs that the DDA has met with some recent success in persuading employer organisations to become more pro-active in educating their members about their duties under the Act, and about the potential advantages of employing people with disabilities (Australian Chamber of Commerce and Industry, sub. DR288; Australian Industry Group, sub. DR326).

FINDING 5.1

Complaints under the Disability Discrimination Act 1992*, combined with participants' views and labour market statistics, indicate that disability discrimination in employment remains a significant issue.*

5.3 Eliminating discrimination in education

Arguably, one of the most serious forms of disability discrimination (in terms of long-term effects on individuals) is exclusion from, and segregation in, education.

Although problems with discrimination and harassment remain evident, more students identified as having a disability (for government program purposes, see appendix B) are attending mainstream government and non-government primary and secondary schools. More students with disabilities are participating in vocational education and training (VET, including apprenticeships and Technical and Further Education (TAFE) courses) and universities. No data are available to indicate participation in pre-school education. Average educational attainment for people with disabilities improved during the past decade, but on average, remained lower than for people without disabilities.

Anecdotal evidence indicates the DDA has been, at least partly, responsible for these improvements in participation and attainment, although other factors, such as

inclusive education policies (many of which pre-date the DDA), have been important (see appendix B).

Disability discrimination complaints in education

Education accounted for the third highest number of complaints made under the DDA in 2002-03 (11 per cent of all complaints) (figure 5.2). Available data cover only a short period, but DDA complaints increased in all education sectors except TAFE colleges—part of the VET sector—between 1998-99 and 2002-03 (table 5.3). However, these numbers are very small in absolute terms and should be interpreted with caution. Disability discrimination complaints about education have also been made under State and Territory anti-discrimination Acts and directly to education authorities.

Disability discrimination in education can manifest itself in many ways. Inquiry participants and other sources indicated that the types of problems reported in disability discrimination complaints (under either the DDA or State and Territory anti-discrimination Acts) included: refusal of enrolment; reduced or limited enrolment; exclusion from sports, excursions or other activities; negative attitudes, harassment or bullying by other students; lack of suitably trained staff or special amenities; and unsuitable or inflexible curricula (see appendix B).

Table 5.3 **DDA complaints received that relate to education, by institution type, 1998-99 to 2002-03**

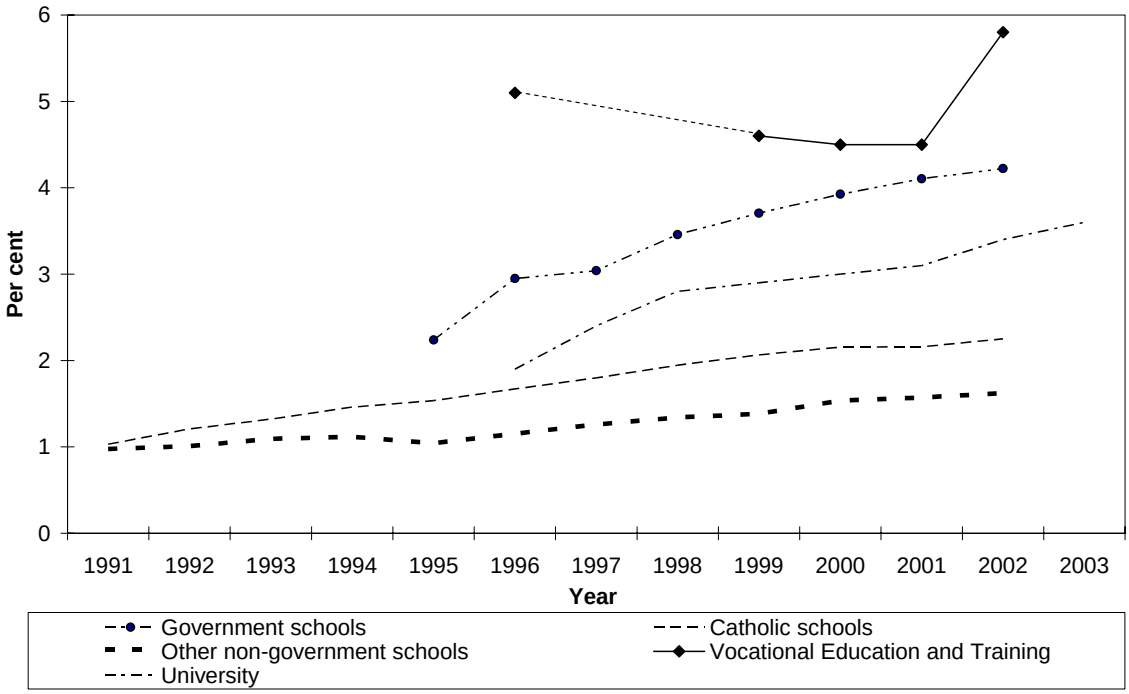
Institution type	*1998-99*	*1999-2000*	*2000-01*	*2001-02*	*2002-03*
	no.	no.	no.	no.	no.
Primary school	5	9	10	13	11
Secondary school	4	11	10	10	15
TAFE	6	6	4	3	4
University	5	9	10	14	17
Other	3	9	0	1	4
Total	**23**	**35**	**34**	**41**	**51**

Source: HREOC, sub. 235, app. H.

Participation in schools

The number and proportion of full-time equivalent school students identified as having a disability (for government program purposes, see appendix B) increased across all three school sectors in the 1990s (government, Catholic and other non-government), but remained highest in government schools (figure 5.5).

Figure 5.5 **Students with disabilities as a proportion of all students, by education sector, 1991–2003[a,b,c]**



a National data are not available for all education sectors in all years. Government schools data are available from 1995. University data are available from 1996, for Australian domestic students only. **b** In VET and universities, students with disabilities are self-identified on enrolment forms. In government schools, Catholic schools and other non-government schools, students with disabilities are defined as full-time equivalent students who satisfy the criteria for special education services or programs provided by their State or Territory government. Eligibility criteria vary across States and Territories. Data for schools sectors include full-time equivalent students in mainstream and special schools. **c** There are no VET data between 1996 and 1999.

Data sources: Productivity Commission estimates based on DEST data (unpublished); NCVER 2002a, p. 3; NCVER 2002b, table 41; DEST 2002a, p. 22; DEST 2004, app. 4.1.

In government schools, the number of full-time equivalent students identified as having a disability for government programs almost doubled between 1995 and 2002—from 50 280 (2.2 per cent of all full-time equivalent students in government schools) to 96 567 (4.2 per cent of students in government schools). The reasons for this large increase are not clear, but may include increased and/or earlier diagnoses, and changes in the range and severity of conditions that are recognised as a disability for government disability funding and programs (see appendix B).

Catholic and other non-government schools also experienced increases in the number and proportion of full-time equivalent students identified as having a disability during the 1990s. For the period 1991 to 2002, the number increased by 240 per cent in Catholic schools and 250 per cent in other non-government schools, albeit from very low bases. Students identified as having a disability appeared to be moving from government to non-government schools at a slower rate than other

school students. While the proportion of school students without disabilities attending non-government schools increased from 29 to 32 per cent between 1995 and 2002, the proportion of students with disabilities attending non-government schools remained steady, at around 18 per cent (see appendix B).

Virtually all of the growth in the number of school students with disabilities appears to have occurred in mainstream rather than special schools. A small but significant proportion of students with disabilities were enrolled in special schools in 2001-02 (16 per cent), almost all in the government sector. These students are likely to be those with more severe disabilities and specialist education requirements.

In mainstream schools, some students with disabilities attend special education units located within the school for some or all of their education, depending on the nature and degree of their disability and the education resources available. Such special education facilities appear to be more common in government schools and larger non-government schools. They often specialise in certain types of disability or education needs—for example, education for students with hearing impairments or learning disabilities. Inquiry participants said there can be advantages and disadvantages for students attending classes in special education units (box 5.5 and appendix B). The extent of such students' day-to-day integration is not known and probably varies considerably. They are, nevertheless, counted as attending mainstream rather than special schools in Australian enrolment data.

Participation in tertiary education

In tertiary education, the proportion of students who chose to identify themselves as having a disability on their enrolment forms remained highest in the VET sector, generally at around 5 per cent of VET students for whom disability status is known, but up to 6 per cent in 2002 (figure 5.5 and appendix B). Among trainees in the New Apprenticeships program, the proportion of trainees who were known to have a disability increased from less than 1 per cent in 1995 (1000 trainees) to 2 per cent in 2000 (over 5600 trainees) (NCVER 2001b, 2002b; see appendix B).

The proportion of university students who reported a disability grew from 1.9 per cent of all domestic students in 1996 to 3.6 per cent in 2003 (figure 5.5). However, in both VET and universities, a high proportion of students chose not to reveal their disability status on their enrolment, graduation or other official forms.

Box 5.5 Inquiry participants' views on the effectiveness of the Disability Discrimination Act in education

Many inquiry participants commented on the positive effects of the DDA in education:

> … schools and other educational settings are safer and there is less likelihood of harassment because of this preparedness to deal with it as it arises. One hopes that harassment is diminishing both as students progress through school and in terms of the overall levels. (Australian Education Union, sub. 39, p. 8)

> … [the DDA's] direct impact can be seen in … ensuring access to private education as a result of the outcomes of complaints. Enrolments in non-government schools have increased dramatically in the past 15 years and this is in part attributable to the requirements of the DDA. … the DDA significantly influenced the … Review of the Western Australian Education Act in 1999 which provided for more choice and inclusive education and resulted in greater integration of students with an intellectual disability; and [the] current Review of Educational Services for Students with a Disability in Western Australia was specifically undertaken to assess the compliance of services and the Western Australian Education Act with the provisions of the DDA. As a result, all students with an intellectual disability who requested fully inclusive education in 2003 were granted it. (Disability Services Commission Western Australia, sub. 44, pp. 3-4)

> A range of factors are likely to account for the growing enrolments of students with disabilities in the independent school sector … the DDA has undoubtedly played a role. ... schools have sought to adjust processes and better meet the needs of students with disabilities in line with their obligations under the Act. This learning and adjustment process is continuing. (National Council of Independent Schools' Associations, sub. 126, pp. 3, 15)

Other inquiry participants were more circumspect about the benefits of the DDA:

> [People with Disability Australia] has … noted no overall improvement in the provision of non-discriminatory educational opportunities for school students with disability over the last decade. Rather, [People with Disability Australia] has witnessed limited advances in some areas, only to witness retreats in others. (People With Disability Australia, sub. DR359, pp. 11–12)

> The introduction of special education units within the grounds of mainstream schools has confused the statistics. Students in units are counted as being in the mainstream. The reality is that they may have no contact at all with the mainstream population. In fact, many students who previously would have remained within the regular classroom have now been labelled as 'disabled' and relocated to 'special' units. (Queensland Parents for People with Disability, sub. DR325, p. 1)

> There may be an increase in the number of students with disabilities in mainstream schools but this does not indicate that the provision of appropriate disability supports has improved. This does not indicate the subtle discrimination that occurs when principals refer students with disabilities to the school down the road which provides better services for students in your situation. (Action for Community Living, sub. DR330, p. 1)

> A greater number of students with disabilities [are] going on to tertiary study. … [but] Students requiring materials in alternative formats … experience considerable delays and most students who are blind or vision impaired still do not receive their course materials at the same time as other students. (Blind Citizens Australia, sub. DR269, p. 4)

In both the VET and university sectors, students who identified themselves as having a disability studied a slightly different mix of fields and subjects to other students, with more arts, humanities and social sciences (and in VET, more generic course modules) and fewer business, economics and engineering subjects. They were likely to be older than other students, more likely to be studying part time, and less likely to be studying at higher qualification levels. In VET courses, they were also less likely than other students to be working while they studied (see appendix B).

Students with disabilities were less likely than other students to successfully complete their VET and university subjects. Completion data for tertiary students with disabilities indicate that subject completion rates for VET students with disabilities were 2 to 8 per cent lower than for other students in 1994 and 1996 (Buys, Kendall and Ramsden 1999) and 2000 (NCVER 2002b). University students with disabilities were around three percentage points less likely to successfully complete their year's studies in 1996 to 2002 (James et al. 2004, p. 30). On the other hand, retention rates (that is, the proportion of students continuing their studies each year) for university students with disabilities were higher than for other students over the same period (DEST 2002b; James et al. 2004; see appendix B).

Educational attainment

National educational attainment data for people with disabilities are limited. They indicate that on average, educational attainment for people with disabilities appeared to have improved during the 1990s, but was still lower than for people without disabilities. For example, the proportion of people with disabilities who had completed bachelor or postgraduate degrees increased between 1993 and 1998, and the proportion who had completed only year 11 or less (or an unknown education level) declined. Average educational attainment varied significantly by type of disability. In 1998, people with a psychiatric or sensory/speech disability were more likely to have a bachelor or postgraduate degree than people with other types of disabilities. People with intellectual disabilities were more likely than other people to still be at school or to have completed only year 11 or less in each of 1993, 1998 and 2001 (ABS 1999b; HILDA unpublished; see appendix B).

Conclusions on effectiveness in education

The number and proportion of students in mainstream government and non-government schools identified as having a disability for funding purposes increased substantially in the 1990s. While such integration should be viewed as a benefit for students with disabilities, there is some uncertainty regarding the practical effect of

these trends for individual school students with disabilities—complaints about disability discrimination and harassment in schools are still being lodged, and some students still attend special schools and special education units (box 5.5).

Further, some inquiry participants argued that the effectiveness of the DDA in Australian schools has been hampered by the failure to provide adequate resources and support to the growing number of school students with disabilities, so as to enable their full and equal participation (and not just physical attendance) in mainstream education. Participants from the non-government schools sector (and others) highlighted access to government programs, funding and resources for students with disabilities, rather than discrimination *per se*, as the key issue facing many school students with disabilities (see chapter 15 and appendix B).

The number and proportion of students with (self-identified) disabilities increased significantly in VET and university courses in the later 1990s. These participation data would appear to indicate real improvements in tertiary education opportunities for students with disabilities. Data on educational attainment for people with disabilities are less conclusive, but appear to have improved over time.

The direct influence of the DDA on these achievements is unclear. In its review of 10 years of the DDA, HREOC noted that 'what has been achieved through the DDA is probably more sharply disputed regarding education than any other area' (HREOC 2003d, p. 47). Inquiry participants gave both positive and negative examples of the effectiveness of the DDA in education.

The DDA—together with State and Territory anti-discrimination legislation—appears to have had some influence on State and Territory education policies (although in most cases, inclusive education policies pre-date the DDA), and encouraged enrolments by students with disabilities in non-government schools and in tertiary education. Anecdotal evidence indicates that the DDA has been relatively effective in resolving individual complaints of discrimination in education, with some flow-on benefits in the form of more 'systemic' improvements (for example, to premises, curricula and assessment procedures), particularly in the VET and higher education sectors. However, as noted in chapter 8, the absence of an unjustifiable hardship defence post enrolment has created problems for educational institutions and may be inadvertently aggravating discrimination. Discrimination and harassment (as well as problems of access to resources and supports) remain important issues for many students with disabilities.

FINDING 5.2

The Disability Discrimination Act 1992 *appears to have had some beneficial effects in education, although it has not been wholly successful in eliminating discrimination for students with disabilities. It appears to have been reasonably effective in improving educational opportunities for tertiary students with disabilities, with mixed results in schools.*

5.4 Eliminating discrimination in access to public premises

There has been some progress in recent years towards a more accessible built environment. In this context, public premises include buildings to which the public has access and public transport. It does not apply to private premises. Many more new buildings are being constructed with access features that do not discriminate against people with disabilities, and most public transport providers are making progress in introducing accessible infrastructure and practices.

Complaints data

Access to public premises has not attracted many DDA complaints. HREOC received 36 complaints in this area in 2002-03 (4 per cent of all DDA complaints in that year) (figure 5.2). The number of complaints and the share of total complaints varied between 1992-93 and 2002-03, although the data suggest a decline since 1996-97 (figure 5.3).

Some individual DDA complaints have had systemic effects in this area. In response to complaints, State and federal transport departments began developing integrated accessible transport systems. In 1994, transport Ministers established a national taskforce.

Access to premises

There are no national data on the extent to which public premises are accessible to people with disabilities, or the influence of accessibility on the level of discrimination. Some inquiry participants claimed that the DDA has had a substantial impact on accessibility, while others acknowledged that small changes have been made, but much more needs to be done (box 5.6).

Box 5.6 **Inquiry participants' views on the effectiveness of the Disability Discrimination Act in access to premises**

Some inquiry participants argued that the DDA has had a substantial impact:

> It is undeniable that the DDA has improved access to public premises. (Leichhardt Council Disability Access Committee, sub. 75, p. 5)
>
> Access to premises is an example of an area of discrimination where the DDA has been of great value. (Disability Action Inc., sub. 43, p. 2)
>
> … access to premises was one of the major barriers to participation. With the adoption of the DDA and further refinement of Australian Standards codes, the building industry and architects have become much more aware of planning and building to eliminate barriers. The local government sector have been key players in lodging disability action plans and raising awareness of their planning and certification processes. We are spoiled for choice when we go to town today for which toilet to use. That change is tremendous. (Becky Llewellyn, sub. 9, pp. 3–4)

Other inquiry participants argued that much more was needed:

> Whilst the accessibility to public places has improved there still remains some difficulties. The current provision of access to premises is focused on the provision of the minimum standards. In some areas this does not allow for independently functional access for people with disabilities. (Northern Territory Disability Advisory Board, sub. 121, p. 5)
>
> The DDA has improved access to public premises to some extent, but not as much as we would have expected in the 10 years of its life span. (Robin and Sheila King, sub. 56, p. 11)
>
> The Building Code of Australia, and the relevant Australian Standards that it calls up, are insufficient in themselves to provide compliance with the DDA. … The Act has served the community well in drawing attention to the issues, but more needs to be done to ensure compliance. (Independent Living Centre New South Wales, sub. 92, pp. 5–6)

The DDA applies to existing public premises and the design and construction of new public premises. The Building Code of Australia (BCA) also regulates the design and construction of buildings. Although the BCA includes some access requirements, compliance with the BCA does not necessarily mean that a building complies with the DDA. Despite the best of intentions, therefore, new buildings might still be approved that do not fully comply with the DDA. This has created considerable confusion for developers and difficulty for planning authorities.

To address this problem, the DDA was amended in 2000 to allow the formulation of disability standards for access to premises. Efforts were subsequently devoted to upgrading the accessibility provisions of the BCA and developing disability standards that would adopt those provisions. The draft standards were released for comment in January 2004 and they are expected to be introduced in May 2005. If implemented, they would help create consistency between the BCA and the DDA (at least for new buildings and renovations to existing buildings covered by the BCA). State and Territory planning processes would enforce the new standards.

When implemented, these arrangements would mean that the stock of accessible buildings that comply with the DDA will steadily increase, as new buildings replace old buildings. HREOC stated:

> Improved access provisions which are coordinated between revised building law requirements and DDA disability standards should result in significant reduction over time in the proportion of Australia's building stock which is inaccessible, as new accessible buildings are constructed and as new work on existing buildings is required more reliably to provide for accessibility. (sub. 143, pp. 70–1)

However, less attention has been paid to the accessibility of existing buildings. The revised BCA will not address existing buildings not undergoing significant renovation, some public space around buildings, and some elements of building fit-out. Several inquiry participants commented on the access implications of public services provided from heritage buildings, particularly in regional areas (DDA Inquiry regional forum notes).

FINDING 5.3

The Disability Discrimination Act 1992 *appears to have had some impact on making new buildings more accessible. However, inconsistencies between the Building Code of Australia and the Act limit the effectiveness of the Act. Proposals for formal links between the building code and disability standards on access to premises would help to address these inconsistencies.*

The Disability Discrimination Act 1992 *has been less effective in improving the accessibility of existing buildings, and the proposed disability standards will only address this issue for refurbished buildings.*

Access to public transport

The introduction of disability standards for public transport in October 2002 greatly increased the influence of the DDA on the accessibility of public transport. The disability standards (and associated guidelines) establish minimum accessibility requirements that providers and operators of public transport conveyances, infrastructure and premises must meet. A timetable for compliance has been agreed, with targets set at 5, 10, 15 and 20 years from the date of commencement.

Negotiation on introducing the standards took many years, during which time some operators made significant improvements in the accessibility of their services, in anticipation of the standards. It is generally accepted that improving accessibility reduces the level of discrimination. However, not all people can take advantage of improved access and others may not wish to. The degree to which people with disabilities will use more accessible transport is uncertain. Many people with

disabilities state that they can use existing public transport (87 per cent in 1998) but only about half report actually using it (47 per cent in 1998) (box 5.7). Further, analysis presented in the Regulation Impact Statement for the transport standards showed that improving the accessibility of Australia's public transport system would result in a relatively small increase in patronage by people with disabilities and the wider community (between 5 and 13 per cent) (Attorney-General's Department 1999).

Box 5.7 **Use of public transport by people with disabilities**

ABS data on the use of public transport by people with disabilities suggest that approximately 1.6 million people with a disability used public transport in 1998 (the latest available statistics), but that almost three million people with disabilities (or 87.3 per cent of all people with disabilities) were capable of using at least some form of public transport.

Over two million people with disabilities (65.6 per cent) were able to use all forms of public transport with no difficulty, and a further 80 500 (2.4 per cent) were able to use some forms of public transport without any difficulty. In total, almost 2.3 million people with disabilities (68 per cent) have no difficulty using public transport. However, almost 12 per cent of people with disabilities (or 396 700) are not able to use any form of public transport, while a further 1 per cent (31 300) do not leave home.

Getting to/onto stops/stations and getting into/out of vehicles/carriages caused most concern for those people with disabilities using public transport, because these activities involve steps. A total of 443 100 people with disabilities (13.1 per cent) reported steps in vehicles/carriages as causing the most difficulty. Getting to/onto stops/stations was the second largest cause for concern, with 297 700 people with disabilities (8.8 per cent) reporting difficulties (see appendix C).

ABS data show an increase in the proportion of people with disabilities using public transport between 1981 and 1998. Over three quarters of people with disabilities (78.4 per cent) did not use public transport in 1981, but this proportion had fallen to 53.3 per cent by 1998. The proportion of people with disabilities who reported difficulties using public transport changed little over the period, down from 33.3 per cent in 1981 to 31.1 per cent in 1998.

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

Inquiry participants' views on the accessibility of public transport varied (box 5.8). Some participants argued that there have been marked improvements in accessibility, largely driven by the DDA. Others acknowledged improvements in accessibility, but argued that they are limited to particular geographic areas. Still other participants argued that there have been few improvements in the accessibility of public transport (see appendix C).

Box 5.8 Inquiry participants' views on the effectiveness of the Disability Discrimination Act in public transport

Some inquiry participants considered that the DDA had improved public transport access:

> The Act has certainly been very useful in achieving systemic change for people with disability in particular areas of everyday living, including public transport. (National Ethnic Disability Alliance, trans., p. 1430)
>
> Though improvements in accessibility have been predominantly to access for people with physical disabilities, we have been able to use the DDA to support our advocacy for measures to create an accessible physical environment for blind people including the provision of tactile ground surface indicators, audible announcements on public transport and Braille and tactile signage. (Blind Citizens Australia, sub. 72, p. 22)
>
> Access to public transport in South Australia has improved significantly since 1994 when a complaint was lodged against the State Government on the grounds that it was discriminating against people with disabilities in the provision of transport services. (South Australian Equal Opportunity Commission, sub. 178, p. 6)
>
> … the access on public transport has improved. Maybe that's because of legislation within the State area, as well as the federal, because that has improved dramatically. (Dennis Denning, trans., p. 134)

Other inquiry participants noted only patchy gains or no improvement:

> In NSW, accessibility of public transport has improved on state transit buses and some train stations with newly installed lifts. However, this is not the case with privately owned buses that operate outside the inner metropolitan area of Sydney ... (Independent Living Centre NSW, sub. 92, p. 5)
>
> Public transport is significantly more accessible than it was before the question of access was first raised under the Disability Discrimination Act. That said, people with disabilities argue that it is still inadequate. Improvement in access has mainly occurred in cities and it not yet anywhere near achieving 'ordinary' access. (Department of Family and Community Services, sub. DR362, p. 15)
>
> … other trends in transport services are making public transport less safe and thus less accessible for blind people. For example, transport operators are reducing staff at railway and bus stations without providing other means to assist blind travellers. (Blind Citizens Australia, sub. 72, p. 22)
>
> The majority of the attention has been on rolling stock and access issues related to boarding the conveyances. … no formal arrangement has been proposed to inform cooperation between the range of players that collectively control and maintain the assets that support transport stock. This includes footpath and road maintenance and improvements along with other pedestrian and traffic facility management. (Marrickville Council, sub. 157, p. 11)
>
> … things have not changed a lot for us in the last 10 years in public transport. (Barb Edis, trans., p. 1838)
>
> In Tasmania, regional and rural areas receive greatly reduced transport services … Accessible transport in many of these areas is non-existent. … The provision of accessible bus services is thought to be decades away due to the ability to claim 'unjustifiable hardship' on the grounds of economic viability. (Advocacy Tasmania, sub. 130, p. 4)

Little national data are available to assess progress in implementing accessible public transport. The Productivity Commission notes that an Accessible Public Transport National Advisory Committee was established to monitor compliance with the new disability standard. However, the reporting framework being developed by the Committee has yet to be finalised and it is unclear when data will be available to the public. In the meantime, HREOC (sub. 143) has provided the following summary of improvements in public transport accessibility.

- Almost 25 per cent of publicly operated and 20 per cent of privately operated metropolitan buses are now accessible. The accessibility of non-metropolitan buses is substantially lower but has begun to be implemented with around 6 per cent now accessible.
- Almost 100 per cent of metropolitan rail carriages provide some degree of access even if not in full compliance with the standards. The figure for non-metropolitan rail carriages is lower but still exceeds the first five-year 25 per cent target.
- Rail station access is difficult to quantify but appears to have exceeded 25 per cent for physical access in all jurisdictions either for independent or assisted access.
- Accessible acquisitions commenced later for trams than for other transport modes, but is at 100 per cent in Sydney (which has seven trams) and is 20 per cent in Melbourne. However, a much lower proportion of tram stops in Melbourne are accessible.

HREOC (sub. 143, pp. 64–5) also identified the need to improve:

- local and State government coordination to ensure accessible transport services match with accessible local infrastructure (such as bus stops and access paths connecting with rail stations)
- access for passengers using wheelchairs to regional and rural air services.

Some inquiry participants were concerned about wheelchair accessible taxis (WAT). For example, the Independent Living Centre NSW submitted:

> Taxis are available, but not reliable. People who need an accessible taxi are never guaranteed of its arrival, let alone arrival on time. It is very difficult to organise your life with such uncertainty built into your daily program. (sub. 92, p. 5)

The Disability Council of NSW provided a list of common complaints with WAT:

- the demand for signed blank cab vouchers
- the practice of signing vouchers on behalf of the person with the disability who is unable (due to their position in the cab) to see the meter

- licensing taxis that do not fit licensing requirements (like the roof being too low or safety straps (seat belts) not being available
- refusing to pick up a fare because the passenger is known to be 'too much bother'
- using accessible taxis for the most profitable enterprise (eg delivering flowers on Valentine's Day) when license restrictions note the licences are provided principally for the purpose of transporting disabled passengers. (sub. 64, p. 20)

Similar views were expressed by Bruno Marmo (trans., p. 2987); Disability Action Inc. (trans., p. 943); Dr Harry New (sub. 218) and people participating in the Upper Hume regional forum (DDA Inquiry regional forum notes).

HREOC (sub. 143, p. 64) noted that the proportion of WAT had increased to 7 per cent in metropolitan areas and 9 per cent in non-metropolitan areas, but that response times required further improvement. The Australian Taxi Industry Association (ATIA) (pers. comm., 7 April 2004) submitted that the figures quoted by HREOC were likely to underestimate the number of WAT currently in operation. Data for New South Wales, Victoria, Queensland, Western Australia, South Australia and the ACT indicate that, on average, 8.1 per cent of metropolitan and non-metropolitan taxis are wheelchair accessible. The proportions were generally higher in regional areas than in metropolitan areas (see appendix C). The ATIA also noted that WAT were not suitable for all people with disabilities, such as passengers with visual impairments (sub. DR311).

A number of reasons have been suggested for the problems identified with WAT. First, the ATIA (sub. DR311) argued that the regulations governing WAT provided few incentives for operators to provide these services. It noted that only 4 of the 15 WAT licences released by the South Australian Government in 2002 were taken up (sub. DR311, p. 1). State and Territory regulators determine the fare structure for wheelchair dependent passengers, which the ATIA argued does not reflect the time required to pick up and drop off these passengers. It argued further that WAT represent a greater proportion of the taxi fleet compared with proportion of people generally requiring those services, and therefore it was important that WAT operators be allowed to carry passengers without disabilities (sub. DR311, p. 1).

Second, the South Australian Government noted that the structure of the industry makes it difficult to ensure compliance with the disability standards for accessible public transport:

> Taxi services are provided commercially by independent small business operators, with every level within the taxi industry being a separate business entity. … drivers, as individual business entities, can choose how to prioritise the jobs they accept from the booking service. State Government regulation and specified licence conditions ensure that taxi services are available for people who require an Access Cab. However,

> compliance with standards ultimately falls on the business decisions of operators and drivers of taxis, as small business operators. (sub. DR356, p. 3)

The ATIA (sub. DR311) noted that many people with disabilities responded to the slow response times by booking services directly with WAT operators, a practice resulting in further increases in general waiting times. Some jurisdictions, such as New South Wales, have introduced measures to monitor this situation, by requiring WAT operators not accepting radio bookings to prove that they are providing sufficient services to wheelchair passengers (ATIA, pers. comm., 7 April 2004).

Additional data on accessible public transport in some jurisdictions are presented in appendix C.

FINDING 5.4

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

5.5 Eliminating discrimination in the provision of goods and services and other areas

The DDA makes it unlawful to discriminate in the provision of goods, services and facilities, and in providing access to other areas that this report terms 'social participation' (the disposal of land, accommodation, clubs and incorporated associations, superannuation and insurance, and sport). Given the wide coverage of everyday activities, it is difficult to measure the effectiveness of the DDA in eliminating discrimination in all these areas.

The provision of goods, services and facilities accounts for the second highest proportion of DDA complaints after employment (section 5.2). The social participation areas do not usually attract many complaints. In 2002-03, about 3 per cent of DDA complaints related to accommodation, 2 per cent related to superannuation and insurance, and 1 per cent related to clubs and incorporated associations. No complaints were received about the purchase of land or sport (see appendix D).

Effectiveness of the Disability Discrimination Act in selected areas

The DDA has contributed to positive outcomes in the provision of certain goods and services, both for individuals and at a systemic level (box 5.9). There is little

evidence of the use of the DDA in most areas of social participation, and it is not possible to assess the effectiveness of the Act in these areas. There has been some use of the DDA in relation to insurance (superannuation and insurance are discussed in chapter 12).

Box 5.9 **The Disability Discrimination Act and goods and services**

Banking

Following a HREOC inquiry, the banking industry adopted industry accessibility standards on Internet and phone banking, EFTPOS facilities and automatic teller machines. The Australian Bankers' Association and some banks have also developed (or updated) DDA voluntary action plans (Jolley 2003, p. 50).

Telecommunications

A DDA complaint and HREOC inquiry encouraged mobile phone companies to introduce schemes in April 2001 addressing problems for people using hearing aids (HREOC 2001e).

A DDA complaint (*Scott v Telstra* [1995] H95/34, H95/51) changed company and industry practices, and influenced the definition of a standard telephone service under the *Telecommunications Act 1997*. It has been described by many, including Bourk (2000a) and Jolley (2003), as a watershed for people with disabilities.

HREOC has received requests to investigate other telecommunications services, particularly SMS messaging on mobile phones (HREOC 2002h).

Access to information

A DDA complaint (*Maguire v SOCOG* [1999] H 99/115) had a significant impact on information availability, particularly website accessibility (Blind Citizens Australia, sub. 72, p. 9). However, some inquiry participants argued that the DDA corrective and punishment mechanisms had an effect only 'after the event', and that other influences such as international Internet standards have been more important (Physical Disability Council of NSW, sub. 78, p. 23).

Insurance and superannuation

The insurance and superannuation exemption was a topical issue in this inquiry (see chapter 12). The DDA has played a role in encouraging insurance industry reforms. The threat of a DDA complaint led to progress in developing a memorandum of understanding (MOU) between the Insurance and Financial Services Association (IFSA) and mental health sector stakeholders. The MOU requires IFSA members to revise their underwriting practices and adopt new guidelines for dealing with people with mental health problems (Mental Health Council of Australia, sub. 150, p. 10). It is too early to tell how successful this MOU might be or how it might translate into treatment received by people with other disabilities.

Access to goods and services and social participation includes a broad range of activities. Access for people with disabilities appears to have improved in some of these areas, often as a direct result of a DDA complaint or inquiry.

Many inquiry participants acknowledged the role of the DDA, with Blind Citizens Australia (sub. 72, p. 23) commenting that the DDA 'has certainly provided a mechanism to get services to change entrenched practices'. The Deafness Forum of Australia (sub. 71, p. 3) acknowledged that 'without the DDA, many deaf and hearing impaired people would be isolated and unable to participate in the society and economy at all'.

Public inquiries into some specific goods and services—including captioning and ecommerce—appear to have been particularly effective in improving outcomes for people with disabilities, as well as awareness of disability issues. The consultation processes involved have been a major factor contributing to their impact (see chapter 10). High profile complaints have also helped to improve outcomes for people with disabilities in certain areas, including the accessibility of information and telecommunications (see appendix D).

However, some inquiry participants argued that progress was the result of a number of factors, with the DDA being only one. The Mental Health Coalition of South Australia (sub. 171, p. 2) commented, for example, that the greater ability of most people with a disability to participate in community life is due 'in part to funding increases for services since 1985 as well as regulatory actions like the introduction of the DDA'.

FINDING 5.5

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

5.6 Eliminating discrimination in the administration of Commonwealth laws and programs

The DDA makes discrimination in the administration of Commonwealth laws and programs unlawful (s.29). The number of complaints in this area grew from 1992 to 2001, but has been falling steadily since, and the total number of complaints is relatively small (see appendix E). HREOC noted that federal agencies, in general, 'do not appear to have been a particular target for complaints above and beyond other providers of services' (HREOC, sub. 143, p. 79). Moreover, many complaints in this area were about the content of laws or the eligibility criteria for government

programs, rather than about the way in which these laws and programs were administered. Of the remaining complaints, most were related to the physical accessibility of government premises and the availability of program information in alternative formats. However, progress in areas such as the accessibility of polling places continues to be lacking (see chapter 9).

The Australian Government has also been subject to a number of complaints under section 15 (employment) and section 24 (goods, services and facilities) (see appendix E). Between 1998-99 and 2002-03, employment complaints were the most numerous of all complaints against the Government; they also represented 12 to 21 per cent of all employment complaints received by HREOC under the DDA.

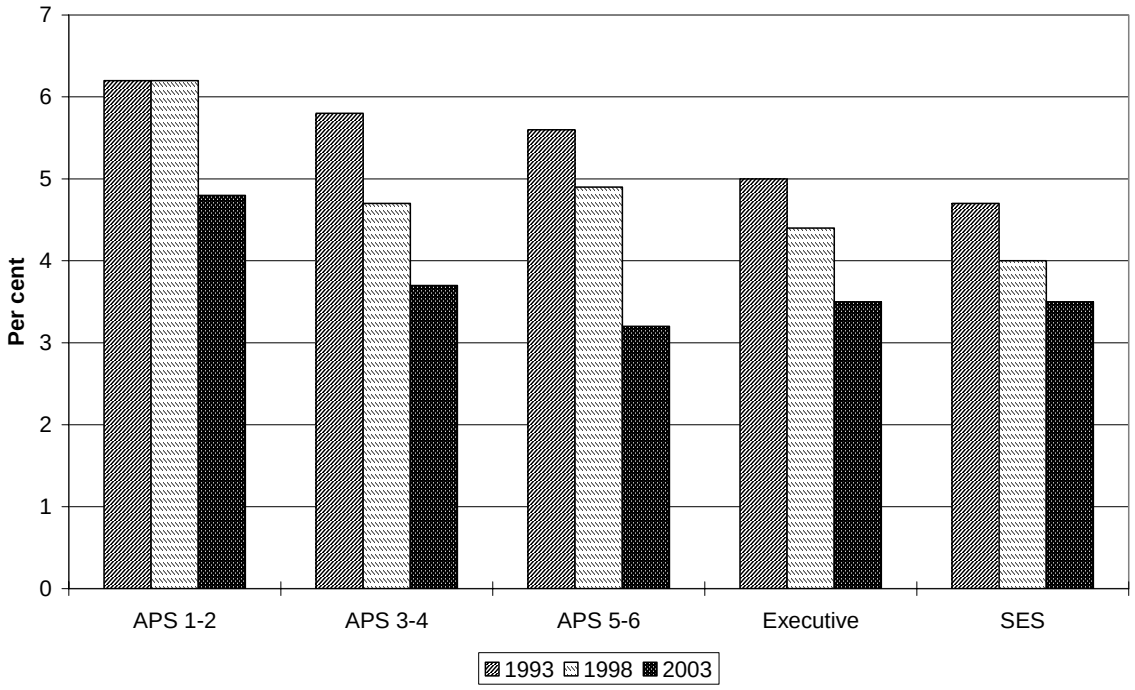
Some inquiry participants criticised the Australian Government's performance and behaviour as an employer of people with disabilities (Terry Humphries, sub. 66; Alexa McLaughlin, trans.; Blind Citizens Australia, trans.). The original Commonwealth Disability Strategy (the planning framework adopted by the Australian Government in response to the DDA), aimed to increase the representation of people with disabilities in the Australian Public Service (APS) between 1994 and 2000. However, that proportion has declined since 1993 (see appendix E). In 2003, only 3.6 per cent of APS employees reported a disability. (This figure is based on self-reporting of disability, and the true representation of people with disabilities in the APS is likely to be somewhat higher.)

The overall decline might be explained in part by the effects of downsizing and contracting out of lower level administrative positions. But this does not explain why the employment rates of people with disabilities in the APS decreased at all staff levels (figure 5.6).

Other Australian Government activities, such as the provision of accessible information, have met with somewhat more success under the Commonwealth Disability Strategy. For example, in the successive reviews of the strategy, most agencies reported improvements in the accessibility of the information they provide. The adoption, as part of the Government Online Strategy, of the World Wide Web Consortium guidelines for accessible web sites has been beneficial in this regard.

Given the wide-ranging nature of the activities carried out by the Australian Government, it is not possible to provide a single-line assessment of its performance of in relation to all its obligations under the DDA. Although the Australian Government has been the target of a number of DDA complaints, this is to be expected given the breadth of its responsibilities. Moreover, a number of those complaints appear to have been about the content of laws and funding of programs rather than about their administration.

Figure 5.6 **Ongoing staff with disabilities, by Australian Public Service classification group, 1993, 1998, and 2003**



Data source: APSC 2002; 2003a.

There are indications, however, that Australian Government departments and agencies have not consistently provided harassment- and discrimination-free environments for employees with disabilities. This might explain why, despite several reviews since its introduction, the Commonwealth Disability Strategy has failed to ensure adequate representation of people with disabilities in the APS.

FINDING 5.6

The Australian Government has implemented its own Commonwealth Disability Strategy in response to the Disability Discrimination Act 1992. *This strategy has been ineffective in improving employment opportunities for people with disabilities in the Australian Public Service.*

5.7 Effectiveness of the Disability Discrimination Act for different groups

The effectiveness of the DDA has varied for different groups of people with disabilities. These groups include people with different types of disability, and people with disabilities and other potential sources of disadvantage.

People with different types of disability

Many inquiry participants noted that the DDA appears to have been less effective for people with certain types of disability. As Queensland Parents for People with a Disability noted, the DDA appears to be least effective for those who are most vulnerable:

> … people who are most vulnerable (ie people living in institutions, people with mental illness or intellectual disability, people with multiple disabilities) are provided the least protection under the Act. (sub. DR325, p. 1)

HREOC has stated that the DDA has led to better outcomes for people with 'visible' disabilities (such as mobility and sensory impairments) than for people with 'hidden' disabilities (such as mental illness, intellectual disability, acquired brain injury and long term chronic illness such as multiple chemical sensitivity and chronic fatigue syndrome). Outcomes have also been less favourable for people with dual or multiple disabilities (HREOC 2003d; NNDDLS 2001).

The Guide Dogs Association of South Australia and the Northern Territory (sub. DR292) stated that, even among people with sensory disabilities, the 'DDA seems to have been of most use to those who are articulate and/or courageous, and often any success they may have had, has had little impact on those who are less advantaged' and that although 'some with a sensory disability have benefited':

> … still many people with sensory disabilities have significant issues in terms of employment, education, access to community services, access to government service, access to community and private legal and medical supports because of direct and indirect discrimination. (sub. DR292, pp. 2–3)

As noted in chapter 13, some people with disabilities face particular barriers to using the DDA complaints process, which in turn limits the effectiveness of the DDA for these people. The Mental Health Council Australia, for example, argued that people with psychiatric disability faced particular barriers:

> The complaints process for reporting occurrences of discrimination is no doubt a stressful process. But particularly for people with a psychiatric disability, the necessary self-disclosure and stigma they may experience during the process may act as a deterrent and the process may indeed be a risk factor in illness relapse. (sub. 150, p. 19)

Similarly, people with different forms of cognitive disability often rely on carers or advocates to complain on their behalf (see chapter 9). People living in institutional accommodation can also find it difficult to make complaints because they are wholly or partly dependent on the person or organisation about whom they would like to complain (see chapter 13). In addition, the process of 'de-institutionalisation (see chapter 9) means that only those with the greatest restrictions, and most difficult to integrate, remain in institutions.

As noted in chapters 2 and 8, the DDA aims to provide substantive equality for people with disabilities—that is, access to the same opportunities as other people. But the nature of some people's disabilities may be such that they cannot take advantage of these opportunities. As discussed in chapter 3, there is a relationship between different disability types and the nature and severity of restriction those disabilities impose (ABS 1999b). A far greater proportion of people with a psychiatric or intellectual disability required constant help (profound restriction) or frequent help (severe restriction) to carry out communication, mobility and/or self-care, compared with people with a 'physical/diverse' disability. In contrast, people with sensory/speech disabilities seemed the least restricted group. This group had the largest proportion with either no restrictions or only mild restrictions.

There is a limit to how far the DDA can address the disadvantages faced by some people with disabilities. Anti-discrimination legislation benefits most those against whom discrimination is most unreasonable; that is, where the disability is least relevant (in degree or kind) to the circumstances. Some people may not be able to take advantage of the opportunities created by the DDA without additional support, such as legal aid or disability services. Although legal aid and disability services are extremely important for improving participation by many people with disabilities, the Productivity Commission considers that decisions about their establishment, funding and eligibility are beyond the scope of anti-discrimination legislation (see chapter 15).

FINDING 5.7

The Disability Discrimination Act 1992 *appears to have been more effective for people with mobility and sensory impairments than those with a mental illness, intellectual disability, acquired brain injury, multiple chemical sensitivity or chronic fatigue syndrome. It also appears to have been less effective for people with dual or multiple disabilities and those living in institutional accommodation. However, reasons for these differences often relate to factors other than disability discrimination, such as the severity of disability.*

People with multiple disadvantages

Some people with disabilities have other sources of potential disadvantage, apart from their disabilities, which can limit the effectiveness of the DDA in eliminating discrimination.

Indigenous people with disabilities

There is a lack of comprehensive data on Indigenous people with disabilities. The report *Overcoming Indigenous Disadvantage* cited research that found that although Indigenous people might have around the same rate of genetic disabilities as the rest of the population, they have a higher rate of disability owing to environment and trauma-related disabilities (SCRGSP 2003, pp. 3.4–3.5).

The 2001 HILDA survey found that 29.7 per cent of people identifying as Aboriginal or Torres Strait Islander reported having a disability, compared with 23.2 per cent of those who did not identify as such. This is likely to underestimate the true prevalence of disability among Indigenous Australians because the survey did not cover people living in remote areas of Australia, and the cultural basis of disability means that Indigenous Australians are likely to identify with disability differently from the way in which non-Indigenous Australians do (box 5.10).

There is strong anecdotal evidence that the DDA has been much less effective in addressing discrimination for Indigenous people with disabilities. The Aboriginal and Torres Strait Islander Commission (ATSIC) argued that Aboriginal and Torres Strait Islander peoples with disabilities, their families and their carers face specific difficulties:

> … difficulties normally experienced by people with disabilities, including disability discrimination, are compounded in the case of Indigenous people with disabilities by various factors. These factors include, in particular:
>
> - a lack of sensitivity and understanding of Indigenous culture by service providers
> - lack of understanding by urban support services and hospital, medical and nursing staff about the facilities and support available in Indigenous communities. For example, service providers may not fully appreciate that equipment such as wheel chairs may suffer increased wear and tear because of the terrain
> - limited influence on decisions affecting them (for example, concerning better access to government services that suit their particular needs)
> - insufficient government action to make Indigenous people with disabilities aware of their entitlements under law
> - the socially disadvantageous position of Indigenous people (in terms of health, education, employment and infrastructure services) which detracts from their awareness of their rights and their capacity to assert them. (sub. 59, pp. 2–3)

In addition, ATSIC noted that complaint procedures do not reflect the needs of Indigenous people with disabilities (sub. 59, pp. 2–3, 5).

Box 5.10 **Centre for Remote Health information on Indigenous disability**

There is a severe lack of comprehensive data in regard to Indigenous disability.

There are difficulties in establishing the prevalence of 'disability'. Available research tends to be confounded by several factors—the identification of Indigenous peoples, the accuracy of estimates of the Indigenous population, varying methodologies of different studies and most importantly the differing definitions of disability between Indigenous and non-Indigenous peoples. This is partly because 'disability' is a social construct. Definitions of disability used by non-Indigenous health professionals may not be the same definitions as those used by Indigenous people. This may have substantial impact on reporting rates of disability, particularly when the methodology depends on self reporting.

While the exact extent of disability in the Indigenous population is unclear, there are indications that it may be substantially more than in the non-Indigenous population. In general terms, the extremely poor health status and large burden of ill health, as measured by mortality, hospital separations, injury rates, and prevalence of medical illnesses, of Indigenous peoples is likely to give rise to an increased prevalence of disability. Given that many diseases affect Indigenous people at an earlier age than non-Indigenous people, it is likely that disability will also affect Indigenous people at an earlier age than the non-Indigenous population.

One of the most thorough studies estimating the numbers of Indigenous people with a disability was undertaken by Thomson and Snow in 1994 in New South Wales. This study found that in the sample of the 907 Aboriginal usual residents of Taree, 25.0 per cent were identified as having one or more disabilities, 13.7 per cent as being handicapped by their disability and 5.1 per cent as being severely handicapped.

When adjusted for age, the Taree study found that Aboriginal males were 2.5 times more likely to have a disability than were all Australian males, 1.7 times more likely to be handicapped and 2.4 times more likely to have a severe handicap. Similar differences were noted between Aboriginal females and all Australian females**.**

Source: Centre for Remote Health 2001.

The Disability Services Commission Western Australia, along with Edith Cowan University, is currently undertaking an Indigenous Disability Action Research Project. Consultations to date have identified a number of issues regarding 'lack of sensitivity and understanding of Indigenous culture by service providers', and 'the need to establish local disability advocacy groups to have a strong united voice to inform government of their needs' (sub. DR360, pp. 5–6).

Many Indigenous people with disabilities also have other potential sources of disadvantage, including multiple disabilities and remoteness. The Physical Disability Council of the Northern Territory stated:

> Many Indigenous persons have high levels of multiple disabilities and their rights can be easily infringed upon, due to the disempowerment of a most marginalised group of people. The remoteness and tyranny of distance can lend itself to discrimination occurring and not being acted upon to reverse the situation. (sub. 125, p. 1)

The Productivity Commission visited Indigenous people and disability service providers in Alice Springs in July 2003. These visits highlighted a number of barriers that limit the effectiveness of the DDA for Indigenous people in that area, but also provided at least one example of the use of the DDA to address discrimination (box 5.11).

Box 5.11 Inquiry participants' views in Alice Spring visits

ATSIC Commissioner Alison Anderson stated:

> A rate of deafness of 4 per cent is considered a crisis in the rest of Australia. Yet 70 per cent of children in some remote communities are hearing impaired. Vision impairment problems are severe, too, due to glaucoma.
>
> There is a culture of non-complaint amongst Aborigines, including in regard to racial discrimination. This is partly because of lack of awareness of rights, partly because of historical reasons. Also, they can be victimised if they complain, by the only service provider in town.
>
> The HREOC complaints process is too long and not culturally adapted. People will just walk away.

The Alice Springs Disability Services Centre stated:

> It appears that disability is not a primary issue when primary health care is still lacking and high on the list of priority.
>
> While individuals would like to remain in their communities, they usually have to go to Alice Springs for health care and services. This can lead to big social issues and cultural dislocation.
>
> Many Indigenous people with disabilities are not job ready and the labour market is limited.
>
> There are two Indigenous schools in Alice Springs; one is a primary school (Yiprinya) and the other one, Yirara, is the Indigenous high school. There are, and have been, students with disabilities at these schools. Originally, no extra support was provided to these students without a fuss being made. Support was eventually provided under threat of the Disability Discrimination Act, which has proven a powerful ally in addressing such matters.
>
> Indigenous organisations require more education about the DDA as there is a lack of knowledge and understanding of the Act.

Source: Alice Springs visit notes.

The Productivity Commission considers that Indigenous Australians with disabilities can face multiple disadvantages. These disadvantages relate to factors such as race discrimination, language barriers, socioeconomic background and

remoteness. The DDA can be of only limited effectiveness in addressing these other sources of disadvantage. Nevertheless, DDA-specific issues should be addressed.

More comprehensive data on the experiences of Indigenous Australians with disabilities is needed to allow the development of better policy. Some of this work is underway. The ABS *Indigenous Social Survey*, expected to be published in 2004, will provide information on the prevalence of disability in the Indigenous population (it is planned to conduct the survey on a six yearly basis).

In addition, the Council of Australian Government (COAG) Steering Committee publishes the *Indigenous Compendium*, a collation of Indigenous data from the *Report on Government Services* (SCRGSP 2004), and Ov*ercoming Indigenous Disadvantage: key indicators 2003* (SCRGSP 2003). This presents indicators of Indigenous disadvantage, including in the area of disability.

In 2002, a working party made up of representatives chosen by ATSIC, the National Disability Advisory Council and National Caucus of Disability Consumer Organisations recommended the establishment of a National Indigenous Disability Network. The Australian Government is currently considering a consultant's report into the establishment of such a network.

The Productivity Commission considers that a National Indigenous Disability Network could perform a valuable role in ensuring disability policy recognises appropriate cultural sensitivities. There appears to be a role for HREOC in liaising with the National Indigenous Disability Network to improve awareness of the DDA among Indigenous disability groups and individuals. However, as discussed in chapter 7, the Productivity Commission does not think it is appropriate to amend the DDA to refer specifically to Indigenous disability issues.

People with disabilities from non-English speaking backgrounds

The 2001 HILDA survey indicated that 17 per cent of people with disabilities came from non-English speaking backgrounds (NESB).[5] This was the same proportion as for people without a disability (HILDA unpublished).

The National Ethnic Disability Alliance (NEDA) stated that people with disabilities who are from a NESB face many barriers including:

- lack of accessible information and knowledge about rights, essential services and supports

[5] The National Ethnic Disability Alliance stated that 25 per cent of people with disabilities come from a non-English speaking background (sub. 114, p. 4).

- lack of culturally appropriate services and supports
- myths, misconceptions and negative stereotypes about disability and ethnicity in both the NESB and Anglo-Australian communities
- prejudice against people with disability from both NESB and Anglo-Australian communities
- government's emphasis on 'mainstreaming' without acknowledgment of the inequities that exist in relation to ethnicity
- NESB people may not understand concepts used to describe their situation
- ethnic communities often do not have the capacity to advocate for their needs. (sub. 114, p. 7)

NEDA argued that people from a NESB are reluctant to use the DDA due to:

- the complexity of the process involved—high degree of English literacy and comprehension of the Australian legal and service system is required
- fear of reprisal—a very real fear for those who originally come from countries under harsh dictatorships
- cultural perspectives of making complaints
- the associated costs—by and large, people from a NESB with disability are poorer than their Anglo-Australian counterparts
- the adversarial nature of making complaints
- the burden of proof that rests on the complainant
- not all people have, or are offered, the services of an advocate to support them through the process. (sub. 114, pp. 7–8)

NEDA suggested increasing HREOC's resources so it could 'provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against' (sub. 114, pp. 5–6).

As for Indigenous people with disabilities, the Productivity Commission considers that the DDA can be less effective for people from non-English speaking backgrounds. This lower effectiveness partly relates to barriers to using the complaints process. The Productivity Commission has made recommendations to improve the complaints process, which should reduce some of these barriers (see chapter 13).

People with disabilities from rural and remote regions

The 2001 HILDA survey found that 59 per cent of people with disabilities were living in major cities, 29 per cent in 'inner regional areas' and 11 per cent were in

'outer regional areas' (defined in terms of road distance from the nearest urban centre). Only 1 per cent were living in remote areas. These proportions were not very different from those for people without disabilities.

The DDA can be less effective for people with disabilities living in rural and remote regions. The Productivity Commission attended a number of regional forums in northern Victoria, at which several participants commented on difficulties faced by people with disabilities in regional areas (box 5.12). Some of these difficulties, such as limited choice, are more closely related to remoteness and small populations than to shortcomings in the DDA. But other disadvantages are more closely related to the DDA, such as the lack of awareness and barriers to using the complaints process (see chapter 13).

The effectiveness of the DDA in regional areas can also be affected by the increased likelihood that the defence of 'unjustifiable hardship' will apply. As noted by participants in the regional forums, many services in the regions are provided by small businesses or local councils that do not have significant resources. In addition, many services are provided in historic premises which can be expensive to modify or which have heritage considerations.

FINDING 5.8

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

5.8 Summary and conclusions

There is no direct measure of the level of discrimination. The Productivity Commission has drawn together a number of indirect measures with evidence from inquiry participants to give a general picture of disability discrimination and the effectiveness of the DDA in eliminating discrimination.

The DDA has been reasonably effective in addressing disability discrimination. But its effectiveness has been patchy and there is still a long way to go. The Commission is especially concerned about discrimination in employment, because having a job is a key to people participating more fully in the community. Furthermore, the nature of the challenge facing the DDA is changing as the focus shifts from addressing physical barriers to attitudinal barriers.

Box 5.12 **Inquiry participants' views in Victorian regional forums**

Comments on awareness included:

> There are fewer people with each type of disability than in the city, so people with a disability are even more of an invisible minority than in city areas. (Upper Hume)
>
> People do not have much knowledge of anti-discrimination law. … There is no general community awareness of the DDA, so how can they be expected to comply? (Central Hume)

Comments on belonging to a small regional community included:

> Belonging to a small community can have benefits if people understand your needs. But it can have disadvantages if you become identified as a troublemaker. (Central Hume)
>
> Many services are located in historic buildings with access issues. (Central Hume)
>
> Even local offices that people with disabilities need to visit regularly, such as Centrelink and FaCS, are not accessible. (Upper Hume)
>
> Students with disabilities and their families often have to move to larger towns to get access to suitable services. This is not a discrimination issue as such, but a problem of access to specialist services in small population centres. (Upper Hume)
>
> There are limited accommodation options for people with disabilities … Public housing is not always suitable ... The private rental market is tight, so people who might require the landlord to spend money on adjustments are not considered. (Upper Hume)

Comments on making complaints included:

> People are not inclined to make complaints about discrimination because of the fear of being ostracised or victimised. This is particularly important in a small community. … It seems contradictory to the general objective of getting along with others. People want to fit in, not to make waves and draw attention to themselves. (Central Hume)
>
> The DDA is seen as too difficult, and HREOC as too distant, to respond effectively to complaints. (Upper Hume)

Comments on progress over the past 10 years included:

> Generally there has been some progress over the last 10 years or so in reducing discrimination but there is a long way to go. Improvements have been more in the physical disabilities area than in the less obvious non-physical areas such as intellectual disability, mental health, chemical sensitivities etc. (Central Hume)
>
> The DDA brought so much hope when it was established in 1992, but it has been very disappointing. There has been no practical change in regional areas. (Upper Hume)
>
> With regard to physical access to public buildings such as shops and offices, threatening to make a formal complaint under the DDA has brought results in several cases. (Upper Hume)

Source: DDA Inquiry regional forum notes.

Eleven years is not a long time in which to achieve the types of fundamental change intended to be achieved by the DDA. Pervasive 'network effects' mean that many of the benefits of the DDA will be fully realised only as more of the system becomes accessible. Reducing discrimination in employment, for example, might be less effective if discrimination in education limits the opportunities for people to

obtain labour force skills. Similarly, the benefits of accessible public transport will increase as more destinations become accessible.

FINDING 5.9

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

The effectiveness of the DDA in achieving its other objectives is discussed in chapter 9 (equality before the law) and chapter 10 (promoting community acceptance and recognition).

6 Benefits and costs of the DDA

6.1 Introduction

This chapter, together with chapter 7, address the inquiry's terms of reference relating to the competition and economic effects of the *Disability Discrimination Act 1992* (DDA). As noted in chapter 1, the terms of reference require the Productivity Commission to use a broad analytical framework that draws on the Competition Principles Agreement (CPA) between the Australian, State and Territory governments and on the Regulatory Impact Statement (RIS) process of the Australian Government.

Although these two processes have somewhat different objectives, they have largely similar analytical requirements. Moreover, they overlap with the Productivity Commission's own policy guidelines for the conduct of research and inquiries, defined in section 8(1) of the *Productivity Commission Act 1998*.

Particularly relevant to the three approaches mentioned above are those terms of reference that require the Productivity Commission, in reporting on the appropriate arrangements for regulation, to account for:

- the social impacts in terms of costs and benefits that the legislation has on the community as a whole
- any parts of the legislation that restrict competition
- efficient regulatory administration
- compliance costs on small business.

Within this framework, the purpose of this chapter is to ascertain whether:

- the DDA has the potential to restrict competition (section 6.2)
- the benefits of the DDA outweigh its costs (sections 6.3 to 6.6).

The third question posed in CPA legislation reviews—whether there are alternative ways of achieving the objectives of the DDA that would impose lesser restrictions on competition—is addressed in chapter 7.

6.2 Can the DDA restrict competition?

Under the terms of CPA legislation reviews, legislation should not restrict competition unless the benefits to society of those restrictions outweigh the costs, and the objectives of the legislation can only be achieved by restricting competition.

Some inquiry participants criticised the rationale for subjecting the DDA to a CPA review (Dorothy Bowes, AHESA Queensland, sub. DR286; Women with Disabilities Australia, sub. DR318; D. Buckland, sub. DR252). However, competitive pressures in an economy encourage efficiency gains, which result in higher living standards for all, including people with disabilities. These gains are diverse and widespread, ranging from innovation and greater choice, to lower costs and higher productivity. By reducing such benefits, legislation that imposes restrictions on competition can result in a net welfare loss for the community.

It is possible, nonetheless, that the disadvantages from restricting competition might be outweighed by the benefits of the legislation. If there are no alternatives to the legislation that would impose lesser restrictions on competition, the legislation would be deemed to meet the CPA principles for good regulation.

According to the National Competition Council (CIE and NCC 1999, p. 34), regulation or legislation could restrict competition if it:

- governs the entry or exit of firms or individuals into or out of markets
- controls prices or production levels
- specifies strict technical standards for products or services
- restricts advertising and promotional activities
- restricts the quality, level or location of goods and services available
- restricts price or type of input used in the production process
- is likely to confer significant costs on business, or
- provides advantages to some firms over others by, for example, shielding some activities from pressures of competition.

Based on the above, several of the DDA's features may have the potential to restrict competition. It could be argued, for example, that the DDA creates barriers to firm entry because it limits the potential for business and other organisations to market non-accessible goods and services. Also, the DDA's requirement to accommodate people with disabilities might impose significant compliance costs on business and other organisations, and restrict the type of inputs used by them. For example, although employers are entitled to recruit employees based on merit, under the DDA they are not at liberty to take the costs of any workplace adjustments into

account (unless these would cause unjustifiable hardship). This might mean recruiting a person with a disability who, although ranked highest on merit, does not make the largest net contribution to the firm's profit.

In summary, the DDA might restrict competition by regulating the inputs and outputs of organisations. There is, therefore, an *a priori* case for investigating whether these potential restrictions on competition are justified by the net benefits that the DDA generates.

FINDING 6.1

By regulating inputs used by organisations and their outputs, the Disability Discrimination Act 1992 *has the potential to impose costs on business and other organisations, and to restrict competition in the Australian economy.*

6.3 Approaches to measuring the benefits and costs of the DDA

Some of the benefits the DDA produces come at a cost in terms of community resources. Thus, tradeoffs arise between policies aimed at combating disability discrimination and those pursuing other desirable societal objectives. Society faces a tradeoff, for example, between expenditure on preventing disability from occurring (for example, through medical research and workplace accident prevention) and expenditure on reducing discriminatory barriers by accommodating disability that does occur.

The unjustifiable hardship defence and some exemptions contained in the DDA are an acknowledgment of these tradeoffs (see chapter 8). These provisions recognise the need for society's resources to be allocated among conflicting ends in a way that maximises overall welfare. This goal would not be achieved if, for example, disability adjustment costs imposed on an organisation left it unable to address workplace safety issues adequately or drove it out of business.

The costs and benefits of the DDA are likely to be widespread and, to a large extent, intangible and non-measurable. It is not feasible, therefore, to carry out a quantitative cost–benefit analysis of the DDA. This problem was acknowledged by the Equal Opportunity Commission Victoria, which stated that:

> Although the [Equal Opportunity] Commission acknowledges that measuring the effectiveness of anti-discrimination schemes is essential, it warns against the application of a rigid costs/benefits analysis without regard for the overriding value and importance of protecting human rights. (sub. 129, p. i)

There is scope for CPA legislation reviews to go beyond quantifiable costs and benefits, to gauge whether, on balance, the legislation is in the 'public interest'. That is, where the CPA calls for the costs of a particular policy to be balanced against its benefits, a range of matters other than narrowly defined direct costs and benefits may be taken into account, where relevant. These matters include social welfare and equity, the interests of consumers generally, economic and regional development, and ecologically sustainable development.

The remainder of this chapter relies on a combination of quantitative and qualitative evidence that, although necessarily fragmented and incomplete, allows a tentative conclusion to be reached about whether the DDA, in its present form, is in the public interest (section 6.6). This conclusion is based on an examination of the benefits (section 6.4), costs (section 6.5) and net benefits (section 6.6) of the DDA.

6.4 Benefits of the DDA

This section examines the nature of the ongoing benefits generated by the DDA. Because the DDA reaches into virtually all areas of economic and social life, it has the potential to produce myriad benefits, both direct and indirect.

Not all benefits of the DDA might be tangible. As discussed in chapter 2, the DDA embodies a social model of disability. According to that model, disability stems from physical and attitudinal barriers erected by society that prevent people with disabilities from making the most of their abilities, participating more fully in the community, and expressing their human rights. The range of barriers suggests that disability discrimination legislation can also generate intangible benefits in the form of greater fulfilment, wellbeing and self-esteem, and a more cohesive society.

Direct benefits

Disability discrimination legislation can generate direct benefits for people with disabilities, for people without disabilities, for organisations and for the community in general.

Benefits accruing to people with disabilities

For people with disabilities, important direct, tangible benefits of the DDA arise from greater disposable income and higher levels of consumption. These benefits arise when barriers that restrict the range of education, work, consumption, leisure and socialising opportunities available to them are removed.

Direct and indirect discrimination in several areas of society mean that people with disabilities are often unable to express fully whatever abilities and objectives they have. Barriers encountered in accessing school, university, the workplace, the sports field, the theatre or other social networks combine to lower the income earning opportunities of people with disabilities below those of people with identical potential but without disabilities. Those barriers might result from prejudice or a lack of adjustments at school, university, or in the workplace. They might also be a consequence of an inaccessible environment.

Frisch (1998a) estimated the loss in income due to an inaccessible environment (for example, buildings and transport) for people who use a wheelchair. He argued that lack of access constituted a significant barrier to the greater labour force participation of this group of people with disabilities. He calculated, based on conservative assumptions about productivity, wages and potential increases in participation, that the value of income forgone in Australia as a result of an environment which is inaccessible to people using a wheelchair was $300 million per annum. He suggested that this figure was an underestimate of the total loss of income due to an inaccessible environment, as it did not account for other types of physical disabilities or for the income forgone because carers of people with disabilities had to 'step in' to assist with transport, transfer and mobility (see appendix C).

An inaccessible physical environment also prevents people with disabilities from making consumption decisions that they would otherwise choose. A person who has a disability is limited in the range of goods and services that they can consume, because they lack access to some products. In some cases, making a product accessible to a person with any type of disability poses insurmountable technical challenges. In many more cases, however, technical solutions are available that would make the product accessible at little extra cost. For example, the increasing use of e-commerce in society means that relatively inexpensive adjustments to make websites accessible can produce large benefits for users with disabilities. By mandating such adjustments, the DDA can broaden the consumption options of people with disabilities, and thus increase the level of utility and fulfilment that they derive from goods and services.

The range of goods and services from which a person with a disability can choose is also constrained by the additional, non-discretionary costs associated with having a disability. Where a person without a disability may choose to spend more on, say, entertainment than transport, a person with a disability with the same disposable income and preferences may have no choice but to spend more on transport because of having to use taxis rather than public transport or private cars. By requiring public transport and public buildings to be accessible, the DDA lowers the

additional costs of having a disability. This allows people with disabilities to act more in accordance with their innate preferences and obtain greater satisfaction from their consumption decisions.[1]

Frisch (1998b) estimated the additional costs that an inaccessible environment (including transport, buildings, goods and services) imposes on wheelchair users at $4000 per annum on average (this figure includes, for example, the cost of portable ramps). Based on 120 000 wheelchair users of all ages, this translates into a total cost of disability of $480 million per annum. If the additional costs incurred by other mobility-impaired people (for example, people on crutches) are taken into account and assumed to be $1000 per annum affecting 250 000 persons, the total benefits of an accessible environment increase to $730 million per annum.

Combining Frisch's estimates of the potential aggregate benefits from higher incomes ($300 million) and lower additional costs for people in wheelchairs ($730 million) yields a total figure of approximately $1 billion per annum. This suggests that, when all areas and forms of disability covered by the Act are included, the benefits that the DDA might produce are commensurately higher. However, this conclusion—and Frisch's estimates—require qualification, for several methodological reasons (box 6.1).

Putting the issue of estimation aside, however, it would appear that people with disabilities can derive important tangible benefits from anti-discrimination legislation such as the DDA. These benefits are in the form of greater consumption opportunities and associated utility, which arise because of increases in income and decreases in the additional costs of disability.

Alongside the tangible benefits of the DDA for people with disabilities are potentially significant intangible benefits—for example, the sense of worth and equality that a reduction in discrimination can give them. SANE Australia noted:

> Research … reveals that stigma and discrimination—being treated as less worthy than other members of the community—is a primary concern of people with a mental illness, contributing to low self-esteem … (sub. 62, p. 1)

Even when not experiencing discrimination personally, people with disabilities can benefit from the sense of belonging and inclusion that being able to move freely in the community can bring.

[1] This includes the consumption of leisure: reduced costs of living lead to an increase in real income, to which some people with disabilities might respond by choosing to work less.

Box 6.1 Measuring the benefits of disability discrimination legislation

Considerable uncertainty surrounds the appropriate methodology for measuring the value of the benefits produced by disability discrimination legislation. When, as in the case of the general provisions of the DDA, the benefits arise through voluntary compliance or through complaints, they are impossible to estimate in the aggregate. The reason for this is that the number of beneficiaries is not known. In the case of disability standards, quantification of benefits is on firmer ground, because widespread compliance can be assumed and the number of beneficiaries estimated.

Even so, the benefits arising from successive disability standards have been subjected to inconsistent measurement methodologies. The least satisfactory of these has been the 'cross-benefits' methodology used in the transport standards RIS by consultants Booz Allen and Hamilton (Attorney-General's Department 1999). This method, originally developed in the United Kingdom (Fowkes et al. 1994), defines the benefits of the standards as the government savings that would follow an increase in employment and mobility of people with disabilities (see appendix C). Such savings would arise as a result of lower public expenditures on aged and health care, and on the disability support pension, and of an increase in income tax.

However, such savings only benefit the government's budget constraint. As income transfers, they do not represent an increase in the welfare of the community.

A different approach to measuring the benefits of disability standards has been proposed by Jack Frisch (1998a, 1998b and subs. 120, 196, DR331). He argues that the benefits of the standards are threefold: (1) the 'insurance value' of an accessible environment; (2) the lost income due to an inaccessible environment and the additional costs of disability; and (3) the value of an accessible environment to people other than people with disabilities. Frisch's approach is anchored in the welfare economics concepts of 'compensating variation', 'existence value' and 'willingness to pay' (Johansson 1991). These concepts are commonly used to measure the value to individuals of goods and services—such as an accessible environment—for which no markets exist (or are incomplete). However, their application to disability policy is relatively new.

Using the Frisch methodology, the Physical Disability Council of NSW (PDCN) calculated benefits for the transport standards far in excess of those appearing in the RIS (PDCN 1998a). That methodology was subsequently adopted, with some modifications, for the quantification of benefits in the access to premises standards RIS (see appendix C and ABCB 2004).

Although the Frisch approach is preferable to the government savings approach adopted in the transport standards RIS, it is not without problems. First, it is unable to apportion the benefits of accessibility between the transport and access to premises standards. It is arguable that, because of network effects, the benefits calculated by the PDCN (1998a and 1998b) will only arise once a completely accessible environment is achieved.

(Continued next page)

Box 6.1 (continued)

Second, the Frisch approach assumes knowledge of:

- the number of people benefiting from the standards, and
- the extent to which they would benefit.

Yet, both of these unknowns are hard to estimate. People with different types of disability would benefit to a varying extent from greater access to public transport and buildings.

More importantly, it is not possible to rely on rigid parameters to estimate how greater accessibility will affect the employment, income and costs of living of people with disabilities. These parameters cannot be known in advance because the interrelationships that exist in any economy can give rise to second-round and flow-on effects that might reinforce or reduce the initial effects of the standards.

Given the possible existence of unforeseen effects, therefore, the net employment and income impact of the standards cannot be known *ex ante* with any certainty. Similar concerns have led Barrell et al. (2003) to recommend the use of macroeconomic modelling as part of any assessment of the impact of large scale disability policies. This aligns with the view, expressed in the access to premises standards RIS, that general equilibrium modelling might be more suited to the estimation of the economywide costs and benefits of those standards, given the pervasiveness and importance of buildings as an input into production.

Sources: Barrell et al. 2003; PDCN 1998a and 1998b; Attorney-General's Department 1999; Frisch 1998a, 1998b and subs. 120, 196 and DR331; Fowkes et al. 1994; Johansson 1991.

In some instances, intangible benefits might serve to reinforce the tangible benefits previously mentioned. For example, the potential benefits from a reduction in employers' discriminatory attitudes might go unrealised if people with psychiatric conditions lack the self-motivation or confidence to apply for a position. If greater acceptance of this group by society leads to greater levels of self-confidence for its members, they might take up more job opportunities.

In summary, the tangible and intangible benefits of the DDA allow people with disabilities to lead richer and more fulfilling lives, psychologically, socially and materially. Blind Citizens Australia expressed the benefits of the Act as follows:

> The DDA has literally increased the visibility of people with disabilities. Since the introduction of the DDA, increasing accessibility has enabled people with disabilities to become more active as employees, consumers and as social, political and cultural participants in the community. (sub. 72, p. 11)

Benefits accruing to people without disabilities

Disability discrimination legislation that increases the participation of people with disabilities in all facets of daily life might also produce direct benefits for people without disabilities. Within the workplace, for example, management's willingness to accommodate the needs of employees with disabilities (and their carers) might lead to more flexible work arrangements that meet the needs of all employees. In the area of transport, the increase in patronage predicted to result from the introduction of disability standards was partly attributed to an increase in transport usage by people without disabilities, particularly parents with prams and elderly people. One inquiry participant claimed that, to all intents and purposes, a person caring for two children under five years of age suffers from a temporary disability (Kaerest Houston, sub. 19). It may be argued that these groups of people without disabilities would also benefit from the greater accessibility of public buildings that might follow the introduction of the access to premises standards. In addition, people without disabilities would benefit from the reduction in staircase accidents that would follow the installation of lifts (ABCB 2004). Finally, in the area of goods and services, customers from minority groups other than people with disabilities might enjoy the benefits of better, more flexible customer care in businesses that are aware of diversity.

The DDA is aimed at people with disabilities, but also at their carers and associates. Carers in particular might benefit from the increase in employment, education and consumption opportunities that a reduction in discrimination might allow people with disabilities. In 1998, the labour force participation rate of primary carers was 59.2 per cent, compared with 80.1 per cent for people without disabilities (ABS 1999b). This difference suggests that carers also face significant barriers in employment, reflecting the constraints on their time from caring for people with disabilities (Cora Barclay Centre, trans., p. 1030). To the extent that the DDA allows people with disabilities to become more independent and self-sufficient, carers might become more employable and, hence, achieve greater income and consumption levels.

As with people with disabilities, people without disabilities can benefit in intangible ways from reductions in discrimination. In education, for example, most inquiry participants who commented on this issue agreed that inclusive education was of significant benefit to the school culture and to the school community (see appendix B).

Benefits accruing to complying organisations

Greater involvement with people with disabilities might also have advantages for those organisations complying with anti-discrimination legislation. In employment, some inquiry participants suggested that the operation of the DDA has increased the quality of labour and the range of skills from which employers can choose (Human Rights and Equal Opportunity Commission, sub. 143; Equal Opportunity Commission Victoria, sub. 129). The availability of a wider range of skills to employers might, in turn, lead to increases in firm productivity through, for example, better matching between jobs and individuals (Office of the Director of Equal Opportunity in Public Employment, sub. 172).

Some Australian case studies have shown that employees with disabilities can equal or better the work performance of their counterparts without disabilities (see appendix A). Many inquiry participants mentioned low absenteeism and turnover, and greater employee loyalty and staff morale as some of the benefits of employing people with disabilities (The Australian Industry Group, sub. DR326; Department of Family and Community Services, sub. DR362; Tasmanians with Disabilities, trans., p. 2171; Recruitment and Consulting Services Association, sub. 29). These claims are consistent with the results of some overseas studies reported in Stein (2003). Lower turnover costs would also result from employers making adjustments for their employees who acquire a disability, as such adjustments have been shown to prolong employment of these employees (Burkhauser et al. 1995).

Whether people with disabilities would continue to display better performance in these areas in the absence of discrimination in the labour market is open to question. Faced with an absence of discrimination, they may prove to be just as mobile as other workers and no more or less loyal.

In the area of goods and services, many inquiry participants argued that complying with the DDA produced commercial benefits for businesses, in excess of the costs of complying with the Act (see appendix D). Despite these views, no incontrovertible evidence is available that the benefits in terms of sales of complying with the DDA generally outweigh the costs. If this were the case, it might be expected that businesses that knew of these benefits would voluntarily make adjustments to cater for customers with disabilities, without the need for legislation. The relatively large number of complaints received by the Human Rights and Equal Opportunity Commission (HREOC) in the area of goods and services seems to suggest that businesses are either unaware of the DDA or of the benefits of compliance, or that they do not view benefits as offsetting the costs (see chapter 5 and appendix D).

Insights into the potential benefits of adjustments in the provision of goods and services may be gained from a detailed 2001 survey of the effects of part III of the UK Disability Discrimination Act 1995 by Meager et al. (2002) (see appendix D). Of the establishments surveyed that had made adjustments to cater for customers with disabilities, a majority reported that the benefits from those adjustments outweighed their costs. Benefits reported by the establishments were both commercial (for example, increases in the number of customers with and without disabilities, and in sales/turnover) and non-commercial (for example, improvements in staff morale, customer satisfaction, and reputation/image). Few establishments reported a reduction in complaints/litigation as a benefit of making adjustments.

Meager et al.'s results must be interpreted with caution, because they apply only to establishments that had made adjustments (40 per cent of the sample). Establishments that make adjustments might do so because they anticipate benefits and are predisposed to finding that the benefits outweigh the costs. Equally, the 58 per cent of establishments surveyed that did not make adjustments (2 per cent did not respond) might have found that the costs of adjustments outweighed the benefits.

Nonetheless, if applicable to Australia, Meager et al.'s results support the anecdotal evidence provided by inquiry participants, suggesting that individual organisations can benefit in commercial and non-commercial ways from improving their accessibility. The fact that some organisations do not make adjustments and are the target of complaints, therefore, may be due more to a lack of knowledge and awareness of those benefits, than to a desire to discriminate or an inability to pay for adjustments (see section 6.5).

Indirect benefits

Beyond the direct benefits outlined in the previous section, the DDA has the potential to generate a number of other benefits, less closely related to the Act's objectives. The occurrence of these indirect effects is somewhat less certain. Possible indirect benefits of the Act include cross-sector benefits and improvements in social capital. They are examined below.

Cross-sector benefits

Cross-sector benefits arise when the DDA causes a reduction in discrimination in one area, which in turn leads to improvements in another. For example, if lower discrimination in education results in better educational outcomes for students with disabilities, then those students might enjoy greater labour market access and higher

earnings (provided an influx of qualified people with disabilities into the labour market does not lower the returns to education).

Dockery et al. (2001) estimated the economic benefits that might flow to people with disabilities from their greater representation in the vocational education and training (VET) sector. They considered two alternative scenarios: (1) a one-off increase Australia-wide that would bring the VET participation of people with disabilities in each age group on par with that of people without disabilities; and (2) a one-off increase Australia-wide that would put the VET representation of people with disabilities on par with their representation in the overall population. Dockery et al. assumed that new entrants into the VET sector would accrue lifetime benefits comprised of an increased likelihood of employment and higher earnings. They calculated that such increases would yield economic benefits with a net present value of $2.5 to 4.3 billion (after allowing for additional training and workplace accommodation costs) over the working life of the new entrants (depending on the scenario).

Dockery et al.'s results underline the potential loss in income and output that could result from disability discrimination preventing greater participation in education by people with disabilities. However, these results probably represent an upper-bound estimate of the benefits from their assumed greater educational participation. The link between educational attainment and labour income that this study relies on is mainly applicable to people without disabilities. Given the diversity of disabilities that the new entrants into the VET sector would have, it cannot be assumed that their employability and income would similarly benefit from improved educational attainment. For some, their disabilities might be such that their productivity would not significantly benefit from the acquisition of formal skills. This pessimistic scenario appears to be supported by evidence showing that the employment rate of students with disabilities enrolled in the Technical and Further Education (TAFE) sector in 2000 did not appear to benefit to the same extent from vocational education and training as that of students without a disability (see appendix B). On the other hand, at least part of the gap in benefits from vocational education between the two groups might be due to disability discrimination in employment.

Social capital

Social capital is a way of thinking about how people interact. It relates to the social norms, networks and trust that facilitate cooperation within or among groups in society (OECD 2001b, p. 41). The World Bank developed the following definition:

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

Social capital can arise in many areas of life, such as families, religious, ethnic and community groups, and the workplace. The potential for social capital to influence economic wellbeing, both positively and negatively, is increasingly recognised. Greater amounts of social capital in a country can help reduce transaction costs, disseminate knowledge and information, and promote cooperative and socially minded behaviour (PC 2003b).[2]

A number of inquiry participants argued that one of the benefits of the DDA was its contribution to social capital (Disability Services Commission, Western Australia, sub. 44; Paul Jenkin, sub. 100; Office of the Director of Equal Opportunity in Public Employment, sub. 172; Mental Health Council of Australia, sub. 150). Disability Action Inc. stated:

> There is no doubt that the DDA contributes to the reduction of discrimination against people with disabilities in Australia. The reduction of discrimination in turn enhances the social capital of the nation and contributes ultimately to growth in the gross national product … (sub. 43, p. 2)

The Anti-Discrimination Commission Queensland similarly observed that:

> In our view, the major benefit of legislation such as the DDA is its contribution to elevating not only the dignity of individuals but, perhaps more importantly, the quality of our society. (sub. 119, p. 4)

However, it is not possible to make clear predictions regarding the direction and nature of the interaction between social capital and anti-discrimination legislation such as the DDA.

Governments adopt many policies that implicitly aim to support or enhance social capital. Measures of social capital include participation in community activities and civic engagement. Anti-discrimination legislation which aims to include people with disabilities in all facets of society thus might contribute positively to the nation's stock of social capital. It could do so directly, for example by prohibiting discrimination in sports and clubs, or indirectly by providing people with disabilities with the disposable income necessary to engage in non-work activities. For example, Schur (2002) showed that having a job increases the likelihood of people with disabilities participating in community and political activities. She noted that this likelihood is due to employment encouraging the development of 'civic skills' and the perception that one's voice is being heard instead of ignored. Based on Schur's findings, it might be argued that anti-discrimination legislation that results in more people with disabilities being employed and thus participating

[2] This contribution may be direct (lower transaction costs) or indirect (improvements in government performance, improvements in education and health, and reductions in crime and violence).

in community and political life would lead to greater amounts of social capital, to the ultimate benefit of the economy. Similar benefits might result from the DDA's prohibition of discrimination in areas such as recreation, sport and entertainment.

Social capital can also be associated with strong internal group cohesion, which can lead to intolerance of others. If anti-discrimination legislation influenced social norms to incorporate tolerance for difference within society's shared values and rules for social conduct, it might lead to a reduction in such harmful forms of social capital.

By contrast, the DDA might also lead to an erosion of social capital if it meant that some community organisations or volunteer services could no longer operate, due to the costs of complying with the Act's access requirements. There is a potential risk that people with disabilities enforcing their rights could also be viewed as 'troublemakers' or as the source of social disharmony.

Given the potential for the DDA to erode as well as enhance social capital, it is important that any proposals to reform the Act be cognisant of the effects on social capital. Cox and Caldwell (2000 quoted in PC 2003b) proposed a checklist to assist policy analysts to account for social capital considerations.

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

Notwithstanding the potential drawbacks of disability discrimination legislation for some aspects of social capital, the Productivity Commission considers that the DDA has the potential to contribute more than it detracts from the amount of beneficial social capital, and so have broad benefits for Australian society.

Economy-wide benefits

With almost one in five Australians experiencing a disability in 1998 (see chapter 3), the costs imposed by disability on the Australian economy overall are large and pervasive. Measures that reduced these costs could be expected to produce economy-wide benefits. It is arguable that anti-discrimination legislation is one such measure (box 6.2).

Many inquiry participants argued that the operation of the DDA has the potential to have economy-wide benefits, by increasing both the amount of goods and services that the economy can produce (the supply side) and the demand for these goods and services (the demand side). For example, the Office of the Director of Equal Opportunity in Public Employment stated:

> The reduction in unlawful discrimination can aid [gross national product] in a number of ways. The enhancement of the economic and social participation of people with disabilities contributes to both the supply and the demand side of the economy. Greater participation of people with disabilities in training, education and employment directly affects the productive capacity of the nation. (sub. 172, p. 3)

Box 6.2 The economy-wide cost of disability and of disability discrimination

The economy-wide costs of disability are significant. For example, Access Economics (2002) estimated the total cost of schizophrenia at $1.85 billion (in real dollars) in 2001. This figure would be greatly multiplied if the costs of all disabilities were added together. A policy that successfully reduced the prevalence and/or impact of disability would therefore produce significant economy-wide benefits.

The costs of disability discrimination are one element of the total cost of disability. However, the aim of the DDA is to reduce disability discrimination, not reduce disability *per se*. Most of the costs associated with disability are not amenable to reduction via anti-discrimination policies. For example, the cost estimate for schizophrenia, mentioned above, includes direct health costs estimated at $653 million. But there are other costs that are likely to stem in part from disability discrimination. Access Economics (2002) extrapolated that, if people with schizophrenia had enjoyed the same employment rate as the overall population, there would have been an extra 13 210 persons with schizophrenia in the workforce in 2001. This was, however, a partial estimate which did not account for possible displacement and feedback effects in the labour market. Nonetheless, assuming that discrimination is part of the reason that people with schizophrenia experienced relatively greater unemployment, any progress achieved by the DDA in that area might lead to an increase in employment and, hence, income and output.

Source: Access Economics 2002.

Supply-side effects

The output of an economy depends on the quantity and quality of factors of production such as labour. In some circumstances, an increase in the number of workers will result in greater output (a 'quantity' effect). Output also increases when labour productivity rises—for example, as a result of improvements in the intrinsic quality of labour (from greater education and skill levels) or better matching of jobs and job seekers.

A number of inquiry participants argued that a 'quantity of labour' effect is one of the benefits of the DDA, especially in the context of an ageing population (Disability Action Inc., sub. 43; Equal Opportunity Commission Victoria, sub. 129).

In theory, by reducing discrimination, the DDA could lead to a long term increase in the quantity of labour available to the Australian economy. This could result in greater national income and output.

Quantitative estimates presented in appendix A suggest that employed workers with disabilities received slightly lower hourly wages in 2001 than did their counterparts with identical characteristics but no disability. While care was taken to ensure that these estimates are statistically independent of any differences in productivity-related characteristics, the extent to which this 'unexplained' gap in earnings is due to wage discrimination cannot be ascertained conclusively.

Although the hourly wage differential between workers with and without a disability is small in absolute terms, the discrimination component of that differential might nonetheless have discouraged some workers with disabilities from entering the labour force (see appendices A and F). The fact that the labour of these discouraged workers remained unused in 2001 means that overall output, income and employment in Australia could have been below potential in that year, all else being equal. Nonetheless, it is possible that wage discrimination and thus the number of discouraged workers would have been greater without the DDA. If this were true, then the DDA might have led to greater levels of output, income and employment than would have been achieved in its absence.

Beyond this wage effect, a 'quantity of labour' effect might also be expected from a successful reduction in disability discrimination at the hiring and firing stages of the employment relationship. Results from Wilkins (2003) suggest that having a disability significantly reduced the probability of being employed for both men and women in 1998. To the extent that this probability effect was due to disability discrimination at the recruitment and lay-off stages, reducing discrimination would add to the productive capacity of the economy. The Productivity Commission estimates that the probability of being employed increased from 1993 to 1998 for

men with disabilities and decreased for women with disabilities. However, it is not possible to isolate the role of the DDA in either of these changes (see appendices A and F).

The DDA might also give rise to 'quantity of labour' effects in regard to carers and older Australians. As noted earlier, the ability of primary carers to seek and find employment might be enhanced if discrimination towards those in their care diminishes. Moreover, as suggested by Rita Struthers, greater accessibility of the physical environment might provide incentives for older Australians to delay retirement (sub. 118).

If the DDA creates an increase in employment of people with disabilities and other groups, it cannot be assumed that employment would rise in aggregate. In the presence of unemployment in the economy, increases in the employment of some groups of workers can occur at the expense of other groups of workers, with no or little improvement in employment overall. This is termed a 'substitution' or a 'displacement' effect, and can have two alternative explanations.

- If anti-discrimination legislation leads to some employers hiring people with disabilities where previously they would have hired workers without disabilities, then the latter group will experience reduced levels of employment (Ability Technology Limited, sub. DR295).
- If anti-discrimination legislation leads to some employers making costly workplace adjustments, then those employers' overall capacity to hire labour will be diminished. In this scenario, all categories of workers will experience reduced levels of employment (Australian Industry Group, sub. DR326).

Although these two scenarios have opposite implications for the employment of people with disabilities, they suggest that aggregate employment might fall or stay the same following reductions in employment discrimination, with no improvements in the economy's productive capacity.

It is difficult to detect any displacement effects caused by the DDA (or any legislation). Doing so would require knowledge of what changes would have taken place in the labour market in the absence of the DDA. Although displacement effects could have occurred in individual firms, Acemoglu and Angrist (1998) found no evidence that the Americans with Disabilities Act 1990 had negative consequences on the overall employment of people without disabilities in the United States. Neither were long term displacement effects observed by Barrell et al. (2003) in their modelling of UK disability employment policy (box 6.3). Instead, these researchers found that an influx of people with disabilities into employment would lead to a number of favourable outcomes in the medium- to long term, such

as increases in real Gross Domestic Product (GDP) and employment and reductions in consumer prices.

The key to the absence of long term displacement effects in Barrell et al.'s simulations is the downward adjustment in real wages, following an inflow of ex-disability pension recipients into the labour force. Such an adjustment requires a flexible labour market. To the extent that this may be the case in Australia, an inflow of people with disabilities into the Australian labour market might not produce durable displacement effects. Applying Barrell et al.'s results to Australia suggests that a reduction in disability discrimination that persuaded, for example, 5 per cent of those receiving the Disability Support Pension to enter the labour force in 1995-96 might then have resulted in GDP exceeding its 2000-01 value by $1100 million (all other influences kept constant). The existence of some rigidities in the Australian labour market (for example, minimum wages) would mean that the benefits are likely to be somewhat less than that figure.

Box 6.3 **Economy-wide effects of disability benefits recipients moving into the labour force**

Barrell et al. (2003) used a modified model of the UK economy to investigate the effects on key macroeconomic variables of a government program that permanently shifts 5 per cent of all current disability benefit recipients into the labour force.

The authors hypothesize that such a large-scale policy is likely to have economic implications that go beyond the target group, for example affecting the labour market situation of non-participants through substitution and displacement effects.

Results confirm the existence of such indirect effects initially, with new labour force entrants displacing existing workers to some extent. These displaced workers add to unemployment numbers, as do new entrants who fail to find a job. In time, however, real wages adjust downward, leading to the creation of more jobs and the absorption of all new labour market entrants, so that the unemployment rate returns to its long term equilibrium. After 5 years, employment is predicted to exceed its base case value by 39 000 workers.

Lower labour costs lead to lower production costs, lower prices, greater employment and greater output. Five years on from the initial shock, real annual Gross Domestic Product is forecast to be 0.16 per cent higher than it would otherwise have been.

Source: Barrell et al. 2003.

It should be noted, finally, that the likelihood of substitution and displacement effects is considerably reduced in times of full employment and/or labour shortages. If, as is predicted, population ageing in Australia results in such shortages, it might be expected that the entry into the labour force of people with disabilities would increase GDP.

Economy-wide benefits might also arise if people with disabilities achieve higher productivity as a result of the DDA's operation. This could be due to greater levels of human capital (broadly defined as educational attainment, professional skills and work experience) allowed by a reduction in discrimination in education. Greater human capital would also result from reductions in discrimination in employment that allowed employees with disabilities to gain experience and take advantage of training and promotion opportunities. In an example of a virtuous cycle, lower employment discrimination would result in greater returns to education for people with disabilities, which would encourage greater educational participation on their part, and to further increases in human capital.

The economy could also benefit where the quality of the match between job applicants and job openings improved as a result of the DDA's provisions. This would lead to an increase in labour market efficiency, which would translate into productivity gains.

Verkerke (2002) argued, in the context of the Americans with Disabilities Act 1990, that the duty of employers to accommodate workers' disabilities (especially those that are initially hidden) can alleviate labour market inefficiencies such as 'mismatching', 'churning' and 'scarring' (box 6.4).[3]

It is likely that Australian employers are sometimes confronted with the discovery of hidden disabilities in their employees. This likelihood is apparent from evidence presented by inquiry participants that people with mental illnesses often do not disclose their disability to their employers for fear of being discriminated against (Mental Health Council of Australia, sub. 150; Advocacy Tasmania, sub. 130; Mental Health Coordinating Council, sub. 84 and trans., p. 1460).

Given the existence of hidden disabilities in Australia, and the broad similarities between the employment provisions of the Americans with Disabilities Act 1990 and the DDA, it is possible that the DDA alleviates the unproductive churning of some workers with hidden disabilities, as hypothesized by Verkerke. This would result in greater labour market efficiency, and hence in greater income and output in the economy. It is difficult, however, to be definite about the likelihood and scale of these efficiency benefits.

[3] 'Mismatching' occurs when jobs are not assigned to those workers who are best suited to them. 'Churning' occurs when an employee is laid off and moves from job to job, without the quality of the job match increasing. 'Scarring' occurs when employers rely on readily observable signals such as a blemished work history or lack of employment references to refuse work to someone whom they could employ profitably. Scarring is related to statistical discrimination (see chapter 7 and appendix A).

Box 6.4 **Labour market efficiency under the Americans with Disabilities Act**

Verkerke argues that, because many disabilities are hidden, their effects on productivity can be observed only after the employee has been recruited. In these circumstances, employees and past employers have more information than has a new (potential) employer about the productivity effects of the disability. According to Verkerke, this information asymmetry would result in market failure and inefficiency without the reasonable accommodation provision of the Americans with Disabilities Act. The discovery that a hidden disability impairs productivity would lead to employees being dismissed. The process of hiring–discovery–firing would then repeat itself, leading to labour market mismatching, churning and scarring, thus reducing efficiency, productivity and output.

In Verkerke's analysis, the duty of employers to accommodate workers' disabilities helps reduce the occurrence of mismatching, churning and scarring. Even though the disability increases employer costs relative to worker productivity, the employer must retain the worker and accommodate their needs. This avoids a repeat of the above process, whereby each new employer wastes resources on screening, recruiting, training and firing the employee. Mandated accommodation avoids scarring of the employee and the risk of chronic unemployment of persons who could be employed productively.

Source: Verkerke 2002.

Demand-side effects

Several inquiry participants suggested that the DDA produces (or has the potential to produce) economic benefits on the demand side of the economy, through increases in the amount of goods and services purchased by people with disabilities and the broader community. Three reasons were put forward in support of this view.

- Lower reliance, by people with disabilities, on government transfers such as the Disability Support Pension could mean that general taxation could be lowered, resulting in increases in aggregate demand (Physical Disability Council of NSW, sub. 78; Disability Rights Victoria, sub. 95; Disability Services Commission, Western Australia, sub. 44).
- By increasing employment of people with disabilities, the DDA could lead to greater household income and consumption levels (Paraquad Victoria, sub. 77; Disability Services Commission, Western Australia sub. 44; National Disability Advisory Council, sub. DR358).
- Improvements in the accessibility of buildings, transport, and goods and services could result in expanded/more profitable markets for individual organisations, which could translate into increased consumption levels overall in the economy

(Disability Services Commission, Western Australia, sub. 44; Paraplegic and Quadriplegic Association of Queensland, trans., p. 116; Office of the Director of Equal Opportunity in Public Employment, sub. 172).

The first of the demand-side benefits claimed for the DDA appears potentially well founded. Australian Government expenditure on the Disability Support Pension was $6.4 billion in 2001-02 (Department of Family and Community Services, sub. DR362). By promoting the employment of people with disabilities and lowering the additional costs associated with disability, the DDA could lead to a reduction in income transfers and other subsidies required by people with disabilities. Although such savings would be of benefit to the Government, they are transfers from one sector of the economy to another. Social security expenditures funded by taxation do not add to or detract from the welfare of society overall, that is, to the value of goods and services being produced. However, lower government expenditure on disability programs could result in additions to welfare in two sets of circumstances.

- If government savings allowed a reduction in taxation. This would generate both efficiency and consumption benefits, through reductions in so-called 'deadweight losses' (the losses that arise from resources not being allocated to their most productive uses).
- If taxation remains unchanged, demand-side benefits could still arise as a result of lower government borrowing needs and/or debt servicing. Barrell et al. (2003) have shown that an influx of 5 per cent of disability pension recipients into the labour force would significantly reduce the interest payments the UK government makes to service its public debt. Lower public sector borrowing could in turn lead to falls in interest rates, and a rise in private sector investment (that is, to a reduction in crowding-out by government of private investment). As a result, aggregate demand in the economy would increase.

In relation to the second claim, while it is true that greater employment of people with disabilities would be likely to lead to higher income and consumption levels economy-wide, such increases would be moderated by taxation effects. Newly employed persons previously on income support would lose part or whole of their existing government entitlements (such as the Disability Support Pension or unemployment allowances). They would thus experience high marginal effective tax rates that would dampen the positive effects of greater employment on income and consumption. Moreover, it is inevitable that some of the people with disabilities who re-entered the labour force if they perceived employment discrimination to have diminished would spend some time in unemployment, while they search for jobs. Given that the financial value of unemployment benefits is less than that of the disability support pension, the income and consumption levels of those job seekers

would fall, pending a successful job match. This would further detract from the economy-wide income and consumption benefits of less disability discrimination.

In support of the third claim and as noted earlier, a number of inquiry participants reported anecdotal evidence that catering for people with disabilities was good for business (see appendix D). However, benefits accruing to individual organisations might not translate into economy-wide benefits. Any market share advantage that is gained by one organisation through its disability-friendly policies will be to the detriment of its competitors that are inaccessible, with no net positive effect on the amount of goods and services consumed in Australia. Moreover, the advantage enjoyed by the first organisation might be short-lived. Overall demand for goods and services produced in Australia would increase only if greater accessibility gave Australian organisations a competitive advantage over their overseas competitors. However, that advantage might be offset if some competitor countries enjoyed lower costs due to the absence of disability discrimination legislation.

Conclusion

To the extent that the DDA reduces levels of disability discrimination, it has the potential to generate widespread benefits for society. First and foremost, such legislation would improve the material, social and psychological situation of people with disabilities. For this group, the potential benefits of the Act would be compounded in cases where discrimination is reduced in several areas simultaneously. For example, the effects of reductions in discrimination affecting education and employment would be self-reinforcing, as would the effects of greater accessibility and employment.

People without disabilities, such as carers, older Australians or parents with young children, also stand to benefit from the DDA, as do organisations that comply with the Act.

Finally, the DDA has the potential to benefit the community in general, in two main ways. First, reductions in discrimination can lead to an increase in the productive capacity of the economy. For example, reducing discrimination can enhance the participation and employment of people with disabilities in the workforce. In turn, better employment prospects can provide incentives to students with disabilities to improve their educational outcomes, making them more productive members of the community.

Second, an effective DDA that improved the acceptance and integration of people with disabilities in society would benefit the community in less tangible but not less significant ways, by promoting greater trust and mutual cooperation.

Notwithstanding these observations, it is difficult to provide a definitive assessment of the amount of benefits the DDA has generated to date. First, it is not known precisely how effective the DDA has been in reducing discrimination, overall and in separate areas (see chapter 5). Second, many of the links claimed between a reduction in discrimination and tangible economic benefits are often speculative, subject to methodological difficulties and only rarely backed by empirical evidence. Available studies, both in Australia and overseas, nonetheless suggest that the DDA has the potential to produce considerable tangible benefits for the economy in general and for some groups in particular. However, perhaps the most valuable benefits that a successful DDA can confer are intangible.

FINDING 6.2

A reduction in disability discrimination arising from the Disability Discrimination Act 1992 *has the potential to confer important tangible and intangible benefits on people with disabilities; to contribute to beneficial 'social capital'; and to generate widespread community benefits.*

6.5 Costs of the DDA

This section examines the nature of the costs generated by the DDA, with particular emphasis on ways in which these costs might restrict competition and efficiency. Just as the DDA, because of its breadth and scope, can confer benefits on a variety of groups, it also has the potential to impose costs, directly and indirectly, and in tangible and intangible ways.

Direct costs

The direct costs of the DDA fall mainly in two categories: the costs of administering, monitoring and enforcing the DDA (the 'costs of applying the DDA'), and the costs of complying with the DDA.

Costs of applying the DDA

At present, the costs of administering, monitoring and enforcing the DDA fall partly on HREOC, partly on people with disabilities and their carers, associates and advocates, and partly on other organisations. The role of HREOC is, among other things, to receive and investigate complaints, and to conciliate. It can also conduct DDA-related inquiries and research. As a budget-funded agency of the Australian Government, the burden of funding HREOC's operations rests with taxpayers generally.

The role of monitoring the application of the DDA and enforcing its provisions rests mainly with people with disabilities and their advocacy groups. According to the Victorian Government:

> Under the DDA and the [Victorian] Equal Opportunity Act, a significant proportion of the cost of monitoring compliance with the legislation falls on complainants who lodge and pursue complaints. (sub. DR367, p. 12)

The costs of lodging and pursuing a complaint under the DDA can be extremely high for people with disabilities and/or their representatives. These costs include learning about the complaints process, preparing a complaint, and securing legal representation (see chapter 13). In the event of a loss at court, costs can also include the legal costs of the opposing party. These tangible costs can be compounded by intangible costs, such as stress or family breakdown.

In some cases, some of the enforcement costs mentioned above are assumed by specialised agencies, such as Disability Discrimination Legal Services and legal aid commissions. This means that these costs can fall, in whole or in part, on taxpayers.

In the case of disability standards, finally, monitoring and enforcement might be built into mainstream processes, in which case some of the costs are borne by industry or government organisations. However, individuals would still bear the costs of making individual complaints under standards.

Costs of complying with the DDA

Many of the obligations the DDA places on organisations can be expected to give rise to costs. Without being exhaustive, it is likely that regulatory costs will include the following:

- administrative costs (for example, time costs spent producing and updating action plans)
- equipment and infrastructure costs (for example, purchasing disability aids to accommodate the employment or education needs of people with disabilities)
- indirect adjustment costs (for example, reductions in innovation and flexibility due to the need to accommodate people with disabilities)
- transactions costs (for example, litigation costs arising from defending a DDA complaint through conciliation or in the courts)
- costs linked to uncertainty about the timing, nature and magnitude of all the other costs (for example, not knowing if and when a complaint is likely to come).

The balance between various types of costs will differ depending on whether or not an organisation is complying with its obligations as an employer, a goods and services provider, or an educator. It might also depend on whether the organisation is covered by the general provisions of the DDA or by disability standards.

In the next section, factors influencing compliance costs imposed on individual organisations that face the general provisions of the DDA are examined. Following this, the case of compliance costs under standards is investigated in more detail.

Compliance costs under general provisions

Compliance costs created by the DDA can vary greatly among organisations, depending on their commitment to the objectives of the Act, their degree of interaction with people with disabilities, and the success with which they meet their obligations. Under complaints-based enforcement, compliance with the DDA could be treated by some organisations as optional, to be enforced in the breach. Of those organisations that may not comply, some might manage to avoid detection, and hence incur no costs.

For some organisations, compliance might mean little more than being prepared to accommodate people with disabilities. If this results only in the adoption of an action plan, the organisation might incur relatively few costs. Compliance costs might rise if the organisation takes active steps to improve access. For example, the adjustment costs of replacing a set of stairs with a lift are likely to be high. On the other hand, revising job selection criteria so that they reflect the inherent requirements of a position more accurately is not likely to be costly.

Alternatively, adjustment costs might arise if they are triggered by interaction with people with disabilities (for example, when a university enrols students with disabilities). The nature and magnitude of adjustment costs vary greatly, and no generalisation is possible, particularly given the lack of Australian data on such costs (box 6.5). Costs can be one-off capital costs (for example, ramps) or ongoing personnel costs (for example, teaching aides in schools). Also, costs can be ‘hard’, that is, involve monetary outlays, or can be ‘soft’, that is, involve non-measurable expenses. Soft costs include time spent searching for a technical solution, training personnel, restructuring work processes and/or applying for government funding. One inquiry participant argued that soft costs ‘are probably more troublesome for employers than the actual cost of any special equipment required’ (Ability Technology Limited, sub. DR295, p. 2).

Box 6.5 **Adjustment costs under the general provisions of the DDA**

Evidence on adjustment costs is scarce and fragmented. The following is a selection of information on adjustment costs contained in appendices A, B, and D.

Education

Adjustment costs in education include ramps, teaching aides, speech therapy, staff training and specialist education services. One inquiry participant reported costs of between $48 and $80 per hour for adjustments benefiting school students with disabilities. Another reported spending an average of $18,000 on assisting each school student with disability each year. At the university level, estimates of adjustment costs ranged from $91 per annum on average for 'low support' students, to $391 per annum for 'medium support' students, to $1147 per annum for 'high support' students.

Employment

Adjustments in employment include ramps, hearing loops, AUSLAN interpreters, special furniture and voice activated software. The Productivity Commission did not receive detailed quantitative evidence on the costs of adjustment to Australian employers. Data quoted by DeLeire (2000) indicated that 51 per cent of accommodations made by US employers cost nothing. On the other hand, the median cost per accommodation was US$500, while 12 per cent of accommodations cost more than US$2000, 4 per cent cost more than US$5000 and 2 per cent cost more than US$20 000. In Australia, the average cost of workplace modifications made under the Australian Government funded Workplace Modifications Scheme between 1998 and 2002 was $2200. During the same period, the 20 most expensive modifications (out of 1228) cost between $7815 and $14 636.

Goods and services

Overseas evidence suggests that the costs of adjustments imposed by disability discrimination legislation on goods and services providers (although they vary significantly) are often low or non-existent. Figures provided by Meager et al. (2002) on the average initial costs of adjustments carried out by UK providers ranged from zero for many adjustments to £12 167 ($33 518) for lifts, hoists or evacuation chairs.[4] Average ongoing costs ranged from zero to £589 ($1623) per year (excluding website maintenance).

Sources: Meager et al. 2002; Appendices A, B and D; DeLeire 2000; FACS, sub. DR362.

Although hard costs can occasionally be very high, they mainly consist of one-off expenses. On the other hand, soft costs are often ongoing, which means they can outweigh the hard costs in time.

4 Foreign exchange conversion at the average 2001-02 British pound sterling–Australian dollar exchange rate.

On balance, based on the available evidence, it appears likely that the quantifiable costs of adjustments imposed by the general provisions of the DDA are mainly low. Only in a few cases are the costs of adjustments likely to be significant.

Uncertainty

A problem for organisations covered by the general provisions of the DDA is that compliance costs of all types can be unpredictable. For an employer, for instance, the costs might be relatively minor until a person with a disability applies for a job. If that person is hired and does not have any special needs, compliance costs remain low. If, on the other hand, the new recruit's adjustment needs involve equipment, infrastructure and indirect costs, it might be some time before the employer realises the full magnitude of all the costs associated with that hiring decision. Moreover, many costs are additive, so that even small compliance costs could add up to material impacts on business profitability and viability if several job candidates with disabilities were to be hired.

Uncertainty and risk are heightened in the event that an organisation is the target of a complaint (and possibly court action). Then, an organisation might face additional monetary and non-monetary compliance costs that are largely unpredictable. The former would include legal costs associated with defending itself against the complaint (see chapter 13).[5] Non-monetary costs would arise from the disruption caused to the organisation's normal operations.

Although, in the absence of disability standards, action plans can provide limited 'insurance' against disability discrimination complaints, they cannot cancel that risk out completely (see chapter 4). As stated by the Allen Consulting Group, organisations cannot be certain about their compliance until they face a complaint:

> … the DDA does not prescribe particular compliance approaches and compliance is only identified in the negative once a complaint has successfully been made … the DDA is passive legislation, in that organisations may believe that they are compliant with the DDA, but can only ever be sure when challenged by parties seeking to rely on the DDA. (The Allen Consulting Group 2003a, pp. 24–5)

The uncertainty about the likelihood, timing and cost implications of a complaint is a problem for businesses. In commenting on legal decisions on indirect disability discrimination, the Australian Chamber of Commerce and Industry stated:

> How could an employer have predicted the results when the courts themselves were thoroughly divided? How can employers quickly and accurately deal with such issues

[5] Excluding any damages awarded against the organisation as these are, by definition, a result of courts finding non-compliance with the DDA.

> when the tribunals and courts themselves have so much difficulty in resolving them? (ACCI 2000, p. 3)

Apart from the costs that arise when an organisation has to defend itself against a complaint, uncertainty regarding compliance is likely to increase the organisation's ongoing transactions costs. Some organisations, for example, might retain specialised personnel to deal with such issues, or to monitor compliance (Equal Opportunity Commission Victoria, sub. 129). This regulatory burden is likely to be less onerous for large organisations with permanent legal personnel than for small to medium sized businesses which lack such specialist skills.

FINDING 6.3

Under the general provisions of the Disability Discrimination Act 1992*, the costs of adjustments incurred by organisations are mainly low. However, in some cases, they can be very high. These, and other compliance costs, can be unpredictable, especially where complaints are made.*

Compliance costs under disability standards

Since October 2002, most providers of public transport services have been covered by disability standards. Draft education standards are being considered by the Australian Government, and access to premises standards have been released for comment (see chapter 14).

In theory, the compliance costs imposed on individual organisations by clearly defined and adequately enforced disability standards are both more precise and more predictable than in the case of complaints. Thus, transport standards set precise requirements and a detailed implementation timetable for all organisations providing a particular type of service. For example, buses with more than 32 fixed seats must provide two designated wheelchair spaces. In the education sector, schools, TAFEs and universities will be able to refer to the detailed requirements in the proposed education standards, and to the standards' guidance notes, to check whether they are complying. Under the proposed premises standards, compliance of buildings with the DDA will be achieved by compliance with the Building Code of Australia. Through the implementation of standards, therefore, DDA compliance costs could become another, predictable 'cost of doing business', much like the costs of complying with building regulations and occupational health and safety regulations.

As illustrated by the consultation process preceding the draft education standards, organisations often have difficulty in determining the extent of their obligations under the DDA without standards (see appendix B). Although they can still be the

target of complaints, those organisations that are subject to standards should experience greater certainty about how to comply and, hence, a reduction in litigation, compensation and other transactions costs. The question arises, however, as to whether lower transactions costs under standards are only achieved at the expense of higher compliance costs in other areas.

There is continuing debate about whether standards impose additional costs on the organisations they cover. Some have argued that the role of standards is merely to clarify and operationalise what is required under the DDA (Blind Citizens Australia, sub. DR269; Australian Building Codes Board, sub. 153; ACTU, sub. 134). Thus, by translating the Act's general duties into specific requirements and deadlines, standards might simply bring forward costs that would have arisen anyway in response to complaints. If additional costs arose as a result of the standards, it might be concluded that organisations were not previously complying with the DDA.

In some cases, standards might even lower compliance costs, by removing the need for retro-fitting of equipment (Anti-Discrimination Commission Tasmania, trans., p. 323), or by imposing less demanding specifications than would have been required following a complaint (Blind Citizens Australia, sub. DR269).

There are other circumstances, however, when standards might increase the costs of complying with the DDA for an organisation. First, having to incur costs earlier than would have been the case in the absence of the standards can increase an organisation's costs. The accelerated replacement of assets under the transport standards is an example. Implementation of these standards requires providers to meet accessibility targets at regular intervals over a period of up to 30 years. While a set timetable for implementation offers providers considerable certainty about the meaning of DDA compliance over time, it also means that providers might no longer be able to amortise an existing asset over its entire economic life. Nevertheless, the extended time scale for implementation should alleviate such costs. Moreover, transport providers continue to have access to the unjustifiable hardship defence, and they can seek temporary exemptions from the standards from HREOC. Finally, it is conceivable that courts might have ordered more rapid or costly transformations in response to a successful complaint.

Second, standards could impose unnecessary costs if they required organisations and individuals to make adjustments too soon or that are not required at all. This would create 'deadweight losses' in the economy, as resources would be wasted on producing goods and services that hold little value for society in general at a particular point in time. This is of particular concern given the high number of organisations required to make adjustments under standards.

The issue of unwarranted costs and the need for prioritisation of expenditures was raised by the Victorian Government. It argued that the universal access objective in the transport standards was unjustified in the light of the costs involved, possible repercussions on other segments of society and the relatively low number of beneficiaries (sub. DR367). It stated:

> … 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. (sub. DR367, p. 12)

It is not clear that the transport standards require universal access and, in any event, the unjustifiable hardship defence is designed to account for disproportionate or unwarranted detriments to the community at large. Thus, it provides a safeguard against the occurrence of such deadweight losses under the transport and (proposed) education standards. But this defence would not be available to new buildings under the proposed premises standards (see chapter 8), nor would any building be able to claim a temporary exemption from the provisions of the DDA. This is of concern because it removes consideration of the balance between the costs and benefits of the standards as they apply to a particular construction project. This issue is discussed further in chapters 8 and 14.

FINDING 6.4

The introduction of disability standards under the Disability Discrimination Act 1992 *can reduce the costs of complaints and uncertainty for individual organisations, but has the potential to raise compliance costs across all organisations covered by standards.*

Effects of general provisions on competition

As mentioned in section 6.2, CPA legislation reviews require the identification of any restrictions on competition that the regulation imposes. It concluded that, *a priori*, the DDA could impose a number of restrictions on competition. It could, for example, restrict the ability of new competitors to enter markets, impose significant costs on business, or provide advantages to some firms over others.

However, for the combined effects of 'voluntary' compliance and complaints (under the general provisions of the DDA) to restrict competition, they would have to have a significant adverse effect on the factors that facilitate competition in the economy. It is generally not sufficient that the costs of a few organisations within an industry rise for the whole competitive environment in that industry to be adversely affected. This is particularly true if some low cost competitors are able to replace high-cost

firms. Where competition might suffer is if regulations have a disproportionate effect on a large enough group of competitors so that competitive pressures in the remainder of the market are reduced.

At first glance, the general provisions of the DDA would appear to apply equally to all organisations in all sectors of the economy not covered by standards. Unlike equivalent legislation in the United States and the United Kingdom, for example, the DDA has no small employer exemption. From this, it might be inferred that the DDA has no or little competition effects. For example, the Disability Services Commission, Western Australia stated:

> Within any one industry, any impact on competition is going to be neutral or at least minimal as all services will be required to make accommodation for the needs of people with a disability. (sub. 44, p. 6)

However, the fact that the requirements of the legislation are nominally the same for everyone does not mean that all organisations are affected in the same way or to the same extent. An organisation that faces the general provisions of the DDA has considerable discretion regarding its response to the legislation. It might intend to comply, but the opportunity might not have arisen because it has no employees and/or customers with disabilities. Or it might take anticipatory steps for the accommodation of future needs. Or, as noted earlier, it might not comply.

For organisations that comply voluntarily with the DDA, the costs of regulation can be expected to vary depending on their degree of commitment and on their level of interaction with people with disabilities. They might incur very significant costs or no costs at all.

For organisations that do *not* comply with the Act, the regulatory burden might also vary, because of differences in the probability of detection and of litigation taking place. They might escape detection and face no regulatory burden, or they might face conciliation or the courts, and possibly incur large litigation costs (and compensation and/or retrospective adjustment costs). If the expected value of litigation costs differs across non-complying organisations, then this is akin to them facing different regulatory costs.

The case of small business

The relative cost burdens of complying with the DDA can vary according to the size of the organisations concerned. Smaller organisations may have less capacity to absorb large adjustment or litigation costs than their larger competitors.

Some inquiry participants argued that the costs of complying with the DDA were particularly damaging to smaller organisations (UnitingCare Australia and

UnitingCare NSW.ACT, trans., p. 2973; Australian Chamber of Commerce and Industry, trans., p. 2125; Janet Hope in conjunction with Margaret Kilcullen, sub. 165; Australian Federation of Deaf Societies, sub. DR363). For example, Ability Technology Limited stated:

> My second point in relation to costs to employers is that the burden of these is likely to be greater for smaller firms. This applies, not only in the obvious case of ramps and accessible toilet facilities, but even more so in the case of the hidden, managerial costs referred to earlier. (sub. DR295, p. 3)

There are arguments both for and against the view that the regulatory burden imposed by the DDA might weigh more heavily on smaller organisations. Smaller organisations might be less accustomed to interacting with employees or customers with disabilities and, therefore, might not be as familiar with their obligations under the DDA. This might mean that they are proportionately more likely to face a discrimination complaint.

On the other hand, size may increase the susceptibility of larger organisations to discrimination complaints if, as suggested by Jolls (2000), indirect discrimination is easier to prove in large organisations.

Smaller organisations might also be advantaged with regard to the application of the unjustifiable hardship defence. One inquiry participant argued that firms operating in competitive markets would stand a good chance of claiming unjustifiable hardship (Jack Frisch, subs 120, 196). Firms in such markets cannot charge a higher price than charged by their competitors, so have limited ability to pass on additional costs to their customers. The fact that smaller organisations typically operate in a more competitive environment than large firms might help them avoid the compliance burden imposed on larger organisations. Courts might be more inclined to equate size with market power and capacity to pay for adjustments.

If small and large organisations face different compliance burdens, it should be possible to detect systematic differences in the propensity to make adjustments of each category of firms. Meager et al. (2002) used statistical techniques to analyse the factors that influenced the propensity of UK establishments covered by part III of the UK Disability Discrimination Act (applying to the provision of goods and services) to undertake adjustments. Contrary to expectations, they did not find that factors such as the number of employees, belonging to the public sector, or being part of a larger organisation were significant influences. Instead, their results showed that an establishment's propensity to make adjustments was related to the extent of its interaction with people with disabilities, its awareness of its duties under the law and its awareness of ways in which to accommodate customers with disabilities.

That these factors increased the likelihood of UK establishments making adjustments suggests some adjustments are undertaken voluntarily and not forced by anti-discrimination legislation only on those establishments with the requisite financial capacity. Had ability to pay been an issue, an establishment's structural characteristics might have been expected to play a greater role, with large organisations with many employees and customers better able to exploit economies of scale in making adjustments.[6]

Meager et al.'s findings regarding the importance of awareness as a determinant of the probability of undertaking adjustments appear consistent with a recent study by Pérotin et al. (2003). According to that study, 20 per cent of small-to-medium Australian workplaces (500 employees or less) provided specific facilities for employees with disabilities in 1995, compared to 36 per cent of larger workplaces. This gap might be interpreted as reflecting a differing ability to pay for adjustments. However, larger workplaces were almost three times as likely to have formal equal employment opportunity (EEO) policies in place than smaller ones (86 per cent against 32 per cent). This could indicate that awareness of EEO requirements (as reflected in the existence of a formal policy) is a significant influence on the decision to make facilities available. This seems confirmed by the fact that, when only workplaces with formal policies were compared, the percentage providing people with disabilities with facilities was virtually identical in both groups (36 per cent of smaller workplaces against 37 per cent of larger workplaces).

Pérotin et al.'s results therefore suggest that, while smaller and larger organisations differ in their awareness of EEO requirements, those that demonstrate their awareness by having formal policies in place might be equally prepared—whether small or large—to facilitate the employment of people with disabilities by making adjustments.

In summary, the incidence of costs imposed by the general provisions of DDA is likely to vary between organisations. Those organisations that face high compliance and/or litigation costs would experience reductions in their competitiveness and profitability. This has the potential to be inequitable, given that some firms that do not comply might avoid detection. However, the level of competition in the wider economy is unlikely to be significantly affected by the general provisions of the DDA. DDA complaints are few, compared to the number of organisations covered, and seem to fall in a relatively *ad hoc* way. It is unlikely, therefore, that the percentage of organisations affected within a given industry would be sufficient to

[6] That said, Meager et al.'s results show that the probability of making adjustments increases when an establishment has employees with disabilities. Given that the chance of having employees with disabilities increases with establishment size, this may be regarded as an indirect effect of size.

lower competitive pressures in that industry. Nor are there indications that voluntary compliance affects competition between large and small organisations. Overseas evidence suggests that disability awareness is the main determinant of voluntary compliance by organisations. This would be unlikely to be the case if complying with disability discrimination legislation was detrimental for competition.

FINDING 6.5

The general provisions of the Disability Discrimination Act 1992 *impose an uneven and inequitable regulatory burden on organisations. This could lead to the competitiveness of individual organisations being affected. However, the restrictions on competition appear to be negligible.*

Effects of disability standards on competition

The impact of the DDA is likely to be felt increasingly through the implementation of industry-wide disability standards. By definition, standards apply to all organisations in an industry.[7] Standards should, therefore, be more competitively neutral than the general provisions of the DDA. As stated by Melinda Jones:

> … if all businesses make the same sorts of adjustments, then there's no competitive loss. (trans., p. 1522)

However, competition might still be affected by the implementation of disability standards if not all industries that compete with each other are subject to the standards. The transport standards, for example, do not apply to private motor vehicles or to small aircraft (Attorney-General's Department 1999). This means that, in some segments of the transport market, the standards might serve to alleviate the competitive pressures faced by organisations not covered by the DDA. For example, private transport might be at an advantage in the urban transportation market, compared to public transport. Or small regional aircraft operators might gain an advantage on large airlines.

The requirements of transport disability standards might also restrict competition by effectively imposing barriers to the (potential) entry of firms into the Australian transport market. For example, foreign airlines that do not comply with the standards are unable to compete in the Australian market with those that do.[8] On the other hand, new entrants might be advantaged by being able to enter the market with state-of-the-art accessible technology. By contrast, during the period of

[7] With some limited exceptions, such as school buses in the transport standards (see appendix C).

[8] Overseas carriers are subject to Australian disability transport standards if they fly within Australia. However, many such carriers would be subject to their own national access requirements, which might mean that they comply with Australian transport standards as well.

transition to a more accessible environment, retro-fitting or accelerated replacement of assets would impose higher costs on firms already in the market.

These observations notwithstanding, the transport standards are unlikely to have created significant restrictions on competition. These standards impose identical requirements on like organisations, and their implementation is subject to the defence of unjustifiable hardship (and the possibility of temporary exemptions).

Restrictions on competition could arise from disability standards where domestic organisations producing tradeable goods and services are subject to costs that overseas competitors are not. For example, Australian education providers might find their ability to attract overseas fee-paying students impaired if the proposed disability education standards were adopted. If this effect led to the exit of enough domestic providers from the market, Australian students might enjoy less choice in terms of quality, diversity and location. This would constitute a restriction on competition. However, the risk of such restriction occurring would be mitigated by a number of factors. First, many overseas education providers are subject to their own national access requirements. Second, domestic education providers have access to the unjustifiable hardship defence. Third, if the cost disadvantage were significant enough across the economy, the competitive position of local providers might be protected by exchange rate movements.

There is greater potential for restrictions on competition where the requirements of the standards differ between whole groups of domestic organisations within an industry. The draft access to premises standards, for example, would impose more stringent accessibility requirements on new than on existing buildings (ABCB 2004). Moreover, the unjustifiable hardship defence would only be available to existing buildings. Both provisions imply that the cost of new buildings would rise proportionately more than the cost of renovating existing buildings, leading to a rebalancing of the ratio of new to old stock in the economy, and to an increase in the rate of return on the existing stock of buildings (ABCB 2004).

As well as competition between new and existing buildings, the draft access to premises standards have the potential to restrict competition between groups of organisations of different sizes. Inflexible compliance requirements—such as installing a lift in buildings of two or more storeys—would raise construction/renovation costs relatively more for owners of small premises than for those of larger ones. For example, according to the RIS for the access to premises standards, the construction cost of a new two storey restaurant would increase by 41.5 per cent as a result of the standards. By contrast, accessibility requirements would only increase the costs of building a large, horizontal-spread shopping centre by 0.1 per cent (ABCB 2004).

The RIS suggests that differential cost increases that weigh more heavily on small shops and offices 'could significantly reinforce the long term shift away from local, "strip" shopping centres and toward large shopping and office mall complexes' (ABCB 2004, p. 69). Such a shift could have implications for competition in the retail sector. If enough smaller organisations exit the market or are discouraged from entry, the market power of the larger remaining organisations might increase, at least in a regional sense. Competition would be further restricted if smaller organisations were an important source of product innovation and dynamic efficiency.

On the other hand, enough large organisations might be left in the market to sustain effective levels of competition and innovation. The crucial question, according to Bickerdyke and Lattimore, is how the market is defined. They state:

> In some industries, markets are highly local—a particular region or even district of a city or town. In these contexts, while there may be many players across an aggregation of markets, there may be too few players to ensure effective competition in the micro-markets. (1997, p. 35)

It is not always easy to define what constitutes a market. Consumers might value the convenience of local businesses, and might not, for example, regard local restaurants as direct substitutes for those situated in shopping malls. However, they might not similarly distinguish between a local hardware store and one situated much further away in a regional shopping centre.

Given the uncertainties in defining markets, it is not possible to provide a definitive assessment of the extent to which the implementation of disability standards might impose restrictions on competition. Where the unjustifiable hardship defence is available, it will limit such restrictions and ensure that they produce net community benefits. Where it is not, the Productivity Commission considers that standards have the potential to reduce competitive pressures in some industries, and lead to less efficient outcomes.

FINDING 6.6

Disability standards introduced to date appear to have had a relatively even impact on the costs of affected organisations and hence to have been competitively neutral.

Other costs

Legislation or regulation that imposes duties on organisations and individuals can sometimes generate indirect/unexpected costs. The DDA is no exception, with many of its provisions and associated regulations having the potential to create costs

that are wider than at first thought. The following are examples in the areas of transport access, employment, education and premises.

- Requiring buses to be accessible to people with disabilities leads to a reduction in vehicle capacity and, thus, to an increase in operating costs per customer. This could have flow-on effects, such as fewer public buses, price rises, a decrease in public transport patronage and/or an increase in road congestion.
- Replacing standard taxis with wheelchair accessible ones might be to the detriment of people with other types of disability, such as vision impairments and mobility impairments, who might find such taxis impractical.
- Requiring employers to make costly adjustments to the workplace to accommodate the needs of employees with disabilities could result in reductions in the overall level of employment in the economy.
- Requiring educational institutions to include all children with disabilities could lead to disruption, and thus to lower educational outcomes for other children (although, as mentioned in section 6.4, there will be beneficial effects as well). Inclusion could also create more intangible costs, such as an increased incidence of stress related illnesses among teaching staff.
- Requiring new buildings to be fully accessible while allowing existing buildings to remain inaccessible (if not significantly renovated) could have unintended consequences. For example, it might mean that existing buildings remain unrenovated for longer periods, resulting in a loss of amenity for the general population.
- Requiring existing buildings undergoing extensive renovation to devote a greater amount of floor space to accessibility features (for example, accessible toilets) will lead to a loss in lettable space and, therefore, a fall in the return on such buildings.

Many of the costs above are diffuse and some are difficult to quantify.

6.6 Net benefits of the DDA

Summing up the costs and benefits that the DDA and associated instruments impose on the community as a whole is fraught with difficulty. This is particularly the case where compliance with the DDA is either voluntary or enforced through complaints. In these circumstances, the overall quantum of costs and benefits necessarily depends on the break-down between non-compliance, voluntary compliance and enforced compliance. Even if that break-down were known for organisations and individuals, the costs and benefits would vary significantly from one organisation to the next, with little scope for generalisation.

Quantifying the net benefits is somewhat easier where the DDA is enforced through disability standards. The costs of standards can be calculated more precisely, based on the number of organisations covered and the cost of compliance for each type of organisation. However, a number of difficulties arise when costing standards.

First, not all the costs imposed by standards are quantifiable. For example, the education standards RIS forecast that some private education providers would face increased litigation costs under the standards (see appendix B). However, those costs were not able to be quantified.

Second, as noted earlier, standards have the potential to restrict competition if they do not apply uniformly across organisations. Such restrictions could impose large costs on the economy, because they would mean that resources are not allocated in a way that maximises the value of the goods and services produced. However, such distortions are complex and not readily amenable to measurement.

Even if the costs of standards could be known precisely, they tell only part of the DDA compliance cost story, because they only include the *incremental* costs the standards create for organisations they cover. They therefore underestimate to a greater or lesser extent the total costs of complying with the DDA. Notwithstanding that the delineation between the costs of complying with the general provisions of the DDA and those of complying with the standards can be blurry, they are both costs of complying with disability discrimination legislation overall, as illustrated in the case of education (see appendix B).

For all the uncertainty governing costs, even greater uncertainty affects the measurement of the benefits of the DDA and its standards. As mentioned in section 6.3, inconsistent methodologies have been used to measure the benefits of some of the standards developed to date. This inconsistency means that different disability standards cannot be compared in terms of their costs and benefits, and there is a risk that a particular set of standards might be recommended on the basis of flawed methodology.

Taking all available evidence into consideration, however, the Commission considers that the DDA, as it currently stands, is likely to have produced a net community benefit. The only set of standards currently in operation (the transport disability standards) was estimated in its RIS to generate a net cost (except in its upper-bound benefits variant), but this estimate was based on suspect methodology.

Using the more valid approach that was subsequently used in the consultation RIS for the access to premises standards, the Physical Disability Council of NSW (PDCN 1998a) calculated benefits for the transport standards that were considerably higher than those appearing in the RIS ($1040 million per annum compared with

$263 million at most in the RIS), and significantly outweighed the costs of implementation ($187 million per annum, on average over twenty years). Even if the PDCN's estimate is overinflated, for reasons discussed in section 6.3, it is still likely that the benefits of the transport standards outweigh their costs. Organisations operating under these standards also have access to the unjustifiable hardship defence, which means that the potentially high costs that resource misallocation can impose on society would be constrained.

Moreover, the benefits of the current version of the DDA do not arise just from the transport standards. Indeed, it can be argued that the tangible and intangible benefits that arise from the general provisions of the Act are likely to outweigh those costs associated with applying, or complying with, the DDA (including adjustment and transactions costs). The sense of self-worth and inclusion that the Act affords to people with disabilities, although it defies conventional accounting, is undoubtedly of great value to people with disabilities, their carers, associates and the general community.

Therefore, it appears likely that the combination of the general provisions of the DDA and the transport standards satisfy the CPA requirements for legislation that is in the public interest. Any restrictions on competition that the Act imposes at present are most likely to be small or negligible, and outweighed by the net community benefits the current legislation produces.

FINDING 6.7

The Disability Discrimination Act 1992*, as it has been implemented to date, is likely to have generated a net community benefit.*

It is not possible to be equally confident about the capacity of the DDA to meet this aspect of CPA requirements if the two proposed disability standards were introduced. The proposed education standards would be unlikely to alter greatly the overall balance of benefits and costs. Although this has been disputed by some States and Territories, incremental costs created by these standards are likely to be small. Moreover, the standards are expected to produce benefits additional to the general provisions of the DDA, by making students with disabilities and their parents more aware of their rights and entitlements (see appendix B). The RIS concluded that 'the overall benefits of the standards exceed their associated costs' (The Allen Consulting Group 2003a, p. 57).

By contrast, the proposed access to premises standards have the potential to reduce the net benefits of the DDA. This is for several reasons. First, the costs of providing access to new and renovated buildings can be very high, both in absolute and relative terms. Unlike the public transport sector, these costs are imposed in full at

the time, not spread out over a period. Second, owners of new buildings would not be able to claim unjustifiable hardship, thus removing an important safeguard against costs outweighing benefits. Finally, the requirements of the proposed standards might lower competitive pressures in some sectors of the economy, with negative consequences on the efficiency with which resources are allocated.

FINDING 6.8

The future balance of costs and benefits generated by the operation of the Disability Discrimination Act 1992 *will depend on the way in which the Act is implemented and enforced. Net benefits could be reduced if disability standards are not subject to appropriate safeguards.*

6.7 Conclusion

The application of the requirements for legislation reviews under the CPA is difficult in the case of the DDA. Many of the Act's benefits are intangible. Even when benefits and costs are amenable to quantification, there are important methodological issues that frustrate a traditional benefit–cost analysis. This, combined with the difficulty in measuring the effectiveness of the DDA in the eleven years of its operation means that any conclusion on the net benefits of the Act must inevitably be qualified.

Nonetheless, taking a broad view of all costs and benefits flowing from the Act, the Productivity Commission considers that the DDA is very likely to have produced a net community benefit in the period since its introduction. In the Commission's view, the restrictions on competition that arise from the operation of the current version of the Act are not sufficient to reverse this conclusion. Complaints are somewhat random and arbitrary in nature. One organisation might be forced to undertake costly adjustments or be involved in litigation, while another is able to avoid these costs. However, there are only a small number of complaints. Although the costs they impose might be inequitable (or 'unfair') and affect the competitiveness of the individual organisation involved, they are not likely to lower the overall level of competition. Regarding the only disability standards operating to date, the competition effects of the transport standards are minimised by the timetable for reaching full accessibility, and by the availability of the unjustifiable hardship defence to providers.

Whether the DDA continues to maintain a positive balance of benefits and costs into the future will depend on the way in which any new standards are implemented. The proposed access to premises standards could impose very large costs on the economy. The relative cost impacts of these standards would vary depending on

whether the premises are new or existing, large or small. Where whole groups of organisations are treated differently from others, restrictions on competition can arise. Such restrictions would be minimised by making the DDA apply as uniformly as possible across and within all industry sectors, particularly with regard to safeguards.

This raises the question of whether alternatives to the general provisions of the DDA and its (proposed) standards exist, that would meet the objectives of the Act while imposing lesser (potential) restrictions on competition. This, the third and final question raised in CPA legislation reviews, is examined in the next chapter.

7 Necessity and focus of the DDA

The previous chapter (chapter 6) addressed the first two questions raised in Competition Principles Agreement (CPA) legislation reviews: Does the *Disability Discrimination Act 1992* (DDA) restrict competition? and What are the costs and benefits of the DDA? This chapter addresses the third question of the review: Can the objectives of the DDA only be met by restricting competition, or are there alternative approaches which would place fewer restrictions on competition and efficiency?

This chapter begins with a review of the social and economic reasons for government action to address disability discrimination (section 7.1). The following sections examine whether non-regulatory alternatives can take the place of anti-discrimination legislation (section 7.2); and discuss two broad regulatory alternatives—relying on State and Territory anti-discrimination legislation (section 7.3) and introducing an omnibus federal anti-discrimination Act (section 7.4). Section 7.5 examines the current objectives of the DDA and what, if any, changes are required.

Finally, section 7.6 addresses the third element of the CPA test and summarises the Productivity Commission's conclusions on applying the CPA to the DDA. The remaining chapters of this report address improvements to the current regulatory structure and other issues.

7.1 Reasons for government intervention

This section examines the social and economic reasons for government involvement in combating disability discrimination.

Social reasons

Three groups of 'social arguments' support government action to tackle disability discrimination. At the broadest level, a set of social values or principles underpin government actions to ensure equal treatment. The second group of arguments supports government action to implement the 'social model' of disability. The third

group is based on the Australian Government's obligations under international agreements.

Underlying values or principles

Over time, legislatures and courts in many jurisdictions around the world have considered the practical pursuit of 'equality'. Fredman (2002, pp. 17–22) examined international attempts to articulate a set of values or principles informing the 'equality principle', and identified four intertwined themes.

First, she found general agreement with the principle that human dignity is inherent in the humanity of all people, regardless of characteristics such as race, gender or disability. All individuals, including people with disabilities, are entitled to equal dignity, and this implies that they are entitled to equal concern and respect. This is summed up in the UN Declaration on the Rights of Disabled Persons (1975), which explicitly states:

> Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible. (s.3)

However, the nature of 'equal concern and respect' is subject to debate. It clearly encompasses concepts such as 'equality before the law' and 'formal equality' (see chapter 2). But limiting 'equal concern and respect' to formal equality could result in wide disparities in outcomes. There is debate over whether this is consistent with 'the right to enjoy a decent life'.

Second, she found that social and political recognition of injustice stemming from previous discrimination can lead to a restitutionary notion of redressing past disadvantage. Traditionally, the restitutionary functions of law have been based on finding individual fault and ordering individual restitution—for example, providing a mechanism for resolving individual complaints of discrimination. The enactment of the DDA explicitly endorsed the creation of:

> … a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringement of their rights ... (Australia 1992a, p. 2754)

Moving beyond restitution for specific acts of discrimination to a more general restitutionary principle based on redressing past disadvantage is more controversial, and overlaps with Fredman's third principle—'redistributive justice'.

The principle of redistributive justice argues for government action to achieve a 'fairer' distribution of benefits. Fredman found some support for redistributive policies where wide disparities in outcomes were regarded as incompatible with 'equal concern and respect'. There are some 'redistributive' elements to the DDA; for example, disability standards can direct substantial community resources towards activities that primarily benefit people with disabilities.

However, debate surrounds principles of redistributive justice. How should a 'fair' distribution of benefits be defined—does it mean equality of opportunity or equality of outcome? How should redistribution be achieved—by supplying additional resources or through preferential treatment?

Finally, Fredman found general agreement that where past discrimination has blocked political participation by particular minorities, legal rights might be needed to compensate for this absence of political voice. Otherwise, minorities are vulnerable to having their interests overlooked and their entitlement to equal concern and respect violated. The Office of the Public Advocate noted the lack of political power of people with disabilities:

> People who have a disability are not politically strong and their capacity to claim a sufficient share of government resources to improve their quality of life is very limited. (sub. DR310, p. 3)

Jack Frisch provided a reasoned explanation for this lack of political voice:

> … the median voter in the median electorate dominates the political agenda. People with impairments are ignored because they are dispersed through all electorates, are marginal in every electorate, and are heterogeneous as a group and therefore do not have a single voice. (sub. 196, pp. 1–2)

Overall, these social arguments reflect strong support for government intervention to require, at a minimum, formal equality. Formal equality would assist those who can participate on an equal basis once stereotyping and stigma are removed. But, as Fredman notes, formal equality will not improve the position of the most disadvantaged:

> For those whose capacities are either innately limited or have themselves been limited by the effects of cumulative disadvantage, an equality conditional on merit might well be a false promise. (2002, p. 19)

The redistributive and participative principles discussed above imply a role for government beyond formal equality. However, there is no clear consensus on the nature or extent of that role—that is, whether it implies substantive equality or equality of outcome. This might be because these principles are drawn largely from discussions of race and sex discrimination. Although many race and sex anti-discrimination Acts imply requirements to make 'reasonable adjustments' to avoid

discrimination, there is a lack of agreement on the extent to which differential treatment is justified. This is a significant issue for disability discrimination, where the nature of disability makes a clear articulation of the role of differential treatment in anti-discrimination legislation essential.

The redistributive and participative principles raise issues about government responses that go beyond anti-discrimination legislation, such as the direct provision of resources and disability services, and affirmative action policies that require preferential treatment of people with disabilities. Mandating preferential treatment involves difficult decisions about equity and the allocation of resources.

Implementing the social model

The social model is based on the principle that all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community. Rather than focusing on the disabling effect of an impairment, the social approach views disability as arising from barriers erected by society that exclude people with disabilities from participation. The Disability Council of NSW noted:

> According to the social model, a person has a disability because the society in which they live does not recognise disability-related requirements, and does not assist their access to and/or participation in society. Disability thus results from the response of a society towards impairment. (sub. 221, p. 2)

In effect, the social model requires substantive equality—differential treatment for people with disabilities where this is necessary to achieve equal access to opportunities. This can require government action to dismantle physical and attitudinal barriers. The development of anti-discrimination legislation was largely due to the widespread acceptance of the social model of disability (see chapter 2). Legal Aid Victoria, for example, noted:

> The enactment of the DDA is both a consequence and a cause of changing attitudes towards disability discrimination in Australian society. These attitudinal changes reflect an underlying expectation that people with disabilities should be entitled to participate equally in society. (sub. DR290, p. 4)

The pursuit of substantive equality is also consistent with the 'capability' approach endorsed by Nussbaum and Sen (Robeyns 2003 and see chapter 2). The capability approach emphasises improving people's 'capabilities' that is, their effective opportunities. These opportunities are expanded by removing barriers to participation (although supporters of the capability approach might also call for greater resources to be devoted to allow people to take advantage of those opportunities). Implementation of the social model does not require equality of

outcome. Differential treatment is limited to overcoming barriers, after which individuals are treated on merit.

International agreements

Australia is a signatory to several United Nations and International Labour Organization (ILO) declarations and conventions that promote equal rights and opportunities for people with disabilities (see chapter 4). These agreements reflect an international consensus on the role of governments in protecting and enhancing human rights.

As a matter of law, international agreements do not automatically apply in Australia; once ratified by the Australian Government they must be incorporated into domestic legislation to take legal effect. However, as noted by Mason CJ and Deane J in the Teoh case:

> … ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273)

On signing declarations and conventions that promote the rights of people with disabilities, Australia undertook to give them effect in Australian law. The second reading speech for the Disability Discrimination Bill specifically noted that the DDA was a 'significant step in fulfilling Australia's international obligations' (Australia 1992a, p. 2751).

Conclusion

The Productivity Commission considers that the social arguments outlined by Fredman provide clear support for government action to achieve formal equality for people with disabilities. However, Fredman's principles provide only limited guidance on the extent to which governments should go beyond formal equality to pursue a 'fairer' distribution of resources.

In contrast, the social model of disability is premised on achieving substantive equality for people with disabilities. Acceptance of this model requires government intervention to ensure that disadvantaged groups have equal access to the opportunities that are available to others. However, once equality of opportunity is achieved, the outcome achieved by each individual still depends on merit. The social model of disability does not require equality of outcome.

Finally, the Australian Government is a signatory to international agreements that promote equal rights and opportunities for people with disabilities. The Australian Government therefore has accepted a moral (if not legally enforceable) obligation to ensure those agreements are given force in domestic law.

Economic reasons

The social arguments outlined above provide the main grounds for government action to tackle disability discrimination. However, several authors argue that government intervention also can be justified on economic grounds. There is considerable debate about the economic merits of such intervention, and it is useful to start with a discussion of the 'pure' neoclassical economic model, before examining how far this theory applies to disability discrimination in the real world.

The neoclassical model

The neoclassical model assumes that, in most circumstances, a freely operating market will result in socially optimal outcomes. The discussion below focuses on the neoclassical view of the employer/employee relationship, but analogous arguments apply in many other areas of activity, such as the provision of goods and services.

Neoclassical economic theory assumes that employers are solely driven by profit maximisation. 'Rational' employers will always hire the candidate with the highest expected productivity, taking guidance from characteristics such as qualifications, experience and enthusiasm. To discriminate on the basis of a person's characteristics that are apparently unrelated to productivity (such as race, gender or disability) would be irrational, because it would not maximise the benefits the employer derived from that employee's labour. The theory further assumes that workers will be paid according to their productivity and economic efficiency will result.

This analysis does not change if some potential employees have disabilities that require adjustments to the workplace or to work practices. Employers whose sole motivation is profit will compare the potential costs and benefits associated with each job applicant and select the person whose net contribution to the firm's profit is greatest. Adjustments will be undertaken voluntarily if their cost is more than offset by the improvement in productivity that they allow. In this scenario, expenditure by employers on adjustments would be efficient, because it would allow production of goods and services of greater net value than could otherwise be achieved.

In the neoclassical model, discrimination would be driven out of the market by competitive pressures. For example, prejudice might lead to some employers paying workers without disabilities more than workers of equal productivity who happen to have disabilities. But employers who discriminate would incur higher costs than non-discriminators. Over time, competition would lead to an efficient outcome, where only non-discriminators remain.

The neoclassical model of the economy suggests that discrimination is 'irrational' and will be automatically stamped out by the market in the long run. The market will also ensure that adjustments are made voluntarily in response to special needs, where it is efficient to do so. There is nothing that governments could do which would improve on the outcome generated by well functioning markets.

Moreover, authors such as Epstein (1992) argue that, where the conditions for such markets exist (itself a highly controversial area of debate), disability discrimination legislation is not only unnecessary, it is also harmful. For example, legislative requirements that 'reasonable adjustments' be made for workers with disabilities where a firm would not voluntarily have made the adjustments is inefficient, because it 'requires social expenditures that could be avoided if the firm refused to hire the handicapped worker' (Epstein 1992, p. 491). A market-driven solution would see only some firms provide adjustments, and only for some types of disability. These firms would be able to reap economies of scale from making adjustments that benefit a specific type of disability. In effect, the employment approach recommended by Epstein extends the current 'business services' model (supported employment services) to all employees that require disability adjustments. (This model has parallels in education and housing, where it could be argued that it is more efficient to concentrate people with disabilities in special schools and institutions).

A market solution would also allow workers with disabilities to accept lower wages than their counterparts with no disability, as a tradeoff for adjustment costs. Such a tradeoff would be 'efficient' because each worker's wages would reflect their net contribution to the firm. Setting wages at a level that reflected each individual's net contribution to the firm could also result in more people with disabilities being in employment than at present. Epstein's views have found echoes amongst critics of the employment effects of the US Americans with Disabilities Act 1990 (see chapter 5 and appendix A).

The neoclassical analysis above is based on several assumptions about the nature of the market. If those assumptions apply, there is no *economic* argument for governments to intervene to address disability discrimination (although the social arguments outlined above continue to apply).

However, several authors argue that some of the assumptions underpinning the neoclassical model do not apply in the real world. At the simplest level, the neoclassical model is based on 'rational' behaviour. However, in dealing with emotive issues such as discrimination, a degree of 'irrationality' is likely. If that irrationality is biased in one direction (for example, widespread prejudice against people with disabilities), the assumptions underlying the neoclassical model do not hold, and there may be benefits from government intervention.

Even within the neoclassical paradigm, there can be market failures that make anti-discrimination legislation both necessary and efficient (Verkerke 2002; Stein 2003). Some possible sources of market failure are outlined below.

Information failure

The neoclassical model assumes that all relevant parties have equal access to adequate information on price, quantity, quality, timing, etc. This is rarely the case, because of the uncertainty inherent in any transaction, and because uncovering information can be costly.

Information failures can include situations of 'imperfect information', where neither party to a transaction has adequate information. For example, in the absence of prior experience, employers might assume that the costs of accommodating disability are higher, and the likely productivity of people with disabilities lower, than is actually the case. If they believe their assumptions are correct, they might not seek better information, even if it would be in their interests to do so. Similar arguments could apply to people with disabilities, who might be deterred from seeking employment in the first place.

Information failures can also take the form of 'asymmetrical information', where parties to a transaction do not have access to the same information. Jack Frisch, for example, argued that information failures meant that there was no market for insuring against the additional costs due to long-term and permanent disability (sub. 120, p. 1).

Verkerke (2002) and Stein (2003) have argued that information asymmetry detracts from the efficiency of the labour market for workers with disabilities. According to these authors, information asymmetry in the labour market for people with disabilities takes a number of forms.

- Workers with disabilities have more information than potential employers about the nature of their disability and the way in which it affects their productivity. They also have better knowledge than employers about how particular adjustments would improve their productivity.

- Employers have more information than employees about the feasibility of some adjustments, for example, a change in work schedules. Moreover, they also know better than anyone else how much such adjustments would cost.
- Both employers and employees with disabilities have less information than governments about the public subsidies and programs that exist to facilitate workplace adjustments.

Such information asymmetries mean that, if left entirely to the market, the matching of employees with disabilities with jobs will not be efficient. Verkerke (2002) argues, for example, that the presence of information asymmetries about hidden disabilities can lead to forms of market failure known as 'churning' and 'scarring' (see chapter 6). Both he and Stein (2003) view disability discrimination legislation as a corrective device which coerces information from the relevant parties, and thus leads to greater labour market efficiency. During preliminary negotiations, conciliations or court proceedings, employers and employees are forced to reveal information that only they hold. Governments assist in this exchange of information by offering free mediation, counselling and advice about adjustments and subsidies. This helps reduce the transaction costs associated with the uncovering of information. Without legislation imposing and assisting such information disclosure, inefficient outcomes would result: workers with disabilities who could be employed productively would remain unemployed, and the productivity of those who are employed would be impaired by inappropriate or non-existing adjustments.

The existence of information failures does not mean that government intervention to correct them will always be efficient. Imperfect and unevenly distributed information is a feature of most markets, wherever the costs of obtaining additional information exceed its benefits. This explains why employer strategies such as statistical discrimination, which economise on the need to uncover information, have emerged (box 7.1). This form of discrimination could be regarded as an efficient response to information failure if the costs imposed on organisations and individuals by the information revealing process (enforced conciliation, etc.) outweighed the efficiency gains generated by, for example, better job matches.

Box 7.1 **Statistical discrimination**

The theory of statistical discrimination argues that where it is difficult or expensive to gather full information about an individual's productivity, it is in the employer's interests to identify 'cheap' indicators of productivity that may be used when choosing new employees. Common indicators in employment decisions include years of schooling and relevant experience. Statistical discrimination results when employers use an indicator, such as disability, to predict an individual's performance. That is, perceptions of the average person with a disability are used to predict an individual's performance.

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

Constant rejections can also lead to 'scarring', where a potentially productive employee becomes less attractive (even to non-discriminating employers) as a result of an apparent poor employment history or lack of references.

Source: Phelps 1972.

Discrimination by employees and customers

The neoclassical model predicts that employers who are prejudiced against a particular group will be driven out of the market by competitive pressures. However, the market might only drive out discrimination that derives from the prejudices of employers themselves. In cases where an employer discriminates to satisfy the prejudices of his employees or customers, discrimination can be self-perpetuating (Schwochau and Blanck 2000). Not to discriminate in such circumstances would expose employers to industrial unrest and/or loss of market share and would thus be irrational. Where this is the case, government intervention to prohibit discrimination and change attitudes can result in greater economic efficiency.

Externalities

In the neoclassical model, individuals are motivated only by self-interest and guided exclusively by price signals. This means that, in deciding who to employ or what to produce, firms generally do not factor in the effects of their decisions on people not directly involved in the transaction. These effects, commonly called externalities, can be beneficial (positive externalities) or detrimental (negative externalities) to those third parties. When transactions generate externalities, the private costs and benefits to those involved in the transaction do not match the costs and benefits to society as a whole. This results in market failure, whereby less (or more) of a commodity is produced than is efficient. Jack Frisch (subs 120, 196) argued, for example, that three types of externalities disadvantaged people who use wheelchairs (box 7.2).

Box 7.2 Externalities affecting wheelchair users

According to Frisch, three main types of externality need to be taken into account when deciding on the efficient provision of wheelchair access ramps:

- Direct externalities—without a ramp, a wheelchair user might not be able to attend an interview for a job or might have to spend time overcoming an obstacle.
- Network externalities—without a reliable accessible transport system, an accessible ramp to an amenity is less valuable because of the difficulties of getting to where the ramp is located.
- Associate externalities—in the absence of either a ramp or an accessible transport system, an associate will need to assist the person with the disability and thereby spend time that could be used in employment.

Sources: Jack Frisch, subs 120, 196.

The existence of positive externalities (benefits to third parties) means that, on its own, the market might not produce sufficient quantities of the goods and services that are important to people with disabilities, such as accessible transport and buildings. Because this allocation of resources in the economy would not lead to society's welfare being maximised, this is an inefficient outcome.

Conclusion

The Productivity Commission considers that, while government intervention to address disability discrimination might primarily be based on social arguments, there are also good economic reasons for government action. Neoclassical assumptions about 'rational' behaviour are unlikely to hold when dealing with

emotive issues like discrimination, and the existence of market failures means that relying on markets will not deliver efficient quantities of accessible goods, services, employment or education.

However, the existence of market failures does not imply that government intervention will always improve efficiency. Government intervention can be costly and it might create distortions of its own. This is known as 'government failure'.

Governments have a range of policy tools from which to choose when considering how to intervene to address disability discrimination. These include deregulation, education and moral suasion, the provision of resources and services, as well as legislation such as the DDA that creates enforceable rights. These instruments are not mutually exclusive, but they can be characterised along a spectrum from least interventionist to most interventionist. The following section examines various non-regulatory alternatives to addressing disability discrimination.

FINDING 7.1

Both social and economic arguments provide support for government intervention to address disability discrimination.

7.2 Are there non-regulatory alternatives to the DDA?

The third element of the CPA test asks whether the objectives of the DDA can only be met by restricting competition. This section examines non-regulatory approaches which could place fewer restrictions on competition and efficiency.

Three non-regulatory alternatives to the DDA are examined below: deregulation, moral suasion and education, and increased public funding.

Deregulation

As noted earlier, the main critic of anti-discrimination legislation in general is Epstein (1992). He argued that—like other anti-discrimination prohibitions—legislation prohibiting disability discrimination should be repealed. His view is based on a combination of libertarian and free market arguments. Libertarian arguments promote the 'rights' of employers, customers and co-workers to have discriminatory preferences. Free market arguments are based on the potentially negative effect of anti-discrimination legislation on economic efficiency.

Epstein recommends that disability discrimination legislation be replaced with a system of government subsidies aimed at alleviating the cost of employing people

with disabilities. This, he argues, would introduce fiscal discipline into the disability accommodation process, and ensure that scarce public funds are used where they are most beneficial. He foresees such a system resulting in *de facto* specialisation, whereby governments would fund adjustments selectively, so that some workplaces would be accessible to wheelchair users, others to the sight impaired, and so on. Under this system, employers would only have to employ people with disabilities and make adjustments for them if they chose to do so (with or without government financial support).

Epstein's views have been refuted on both moral and economic grounds. First, as argued by Stein, it is unusual, in any analysis of social welfare, to 'give weight to preferences arising from socially undesirable criteria', such as illegal tastes or objectionable preferences (2003, p. 121). Thus, the fact that some members of society prefer to discriminate against people with disabilities should carry no more weight in deciding what is socially beneficial than, say, the views of racial supremacists on race equality.

Second, there are sound economic reasons for imposing disability discrimination legislation to address the market failures outlined in section 7.1. Not only can such legislation improve social welfare, it can also promote the private interest of organisations themselves.

Moreover, one participant argued that, even in the absence of market failures, Epstein's arguments in favour of employee segregation are flawed in that they do not account sufficiently for the diversity of the population with disabilities (Jack Frisch, sub. DR331). As noted earlier, Epstein assumes that it would be efficient to concentrate, for example, all wheelchair users in a few specialised firms. This ignores the fact that wheelchair users' skills differ as much as those of other employees. It cannot be assumed, therefore, that a concentration of wheelchair users within one firm would produce the appropriate mix of skills. Epstein's model also ignores the fact that any economies of scale enjoyed by the firm might be offset, from society's point of view, by the increased transport costs incurred by employees with a disability travelling over longer distances.

Moral suasion and education

Governments can use moral suasion and public education to change attitudes and behaviours (see chapter 10). This was the position in Australia between the passing of the *Human Rights Commission Act 1981* and the passing of the DDA in 1992.[1]

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

The Human Rights Commission Act did not create any legally enforceable rights, only a power for the Human Rights Commission to investigate complaints, seek to resolve them by conciliation, and report to Parliament on matters that could not be resolved. There was no recourse to the courts if conciliation was ineffective.

Moral suasion and education can appeal to the sense of fairness of employers, educators, and other organisations. They tend to rely on schemes that recognise organisations that give people with disabilities 'a fair go'. One such scheme—the Prime Minister's Employer of the Year Awards—recognises the achievements of employers of people with disabilities (box 7.3). Another Australian Government initiative, the Gold Medal Disability Access Strategy, operated between 1998 and 2000 with the aim of encouraging business in the four target areas of employment, premises, tourism and transport to improve access for people with disabilities. The use of such schemes could be extended to other areas of life, such as education, sport and entertainment. It could also apply to whole industries or activities, in an attempt to encourage the adoption of voluntary codes of conduct and industry self-regulation. Such schemes would complement the educative role of the Human Rights and Equal Opportunity Commission (HREOC), which could be expected to remain even in the absence of the DDA.

Greater emphasis on education and persuasion was the approach favoured by some inquiry participants representing employers. The Australian Chamber of Commerce and Industry stated:

> The administration of anti-discrimination law should not be solely or even substantially based on regulation and prosecution. Effective education, problem solving and voluntary compliance can and must play an important role in the administration of this law. … Prosecution, prohibition and enforcement based approaches cannot change attitudes and expectations of employers. (sub. DR288, p. 9)

The Australian Industry Group agreed:

> HREOC should devote more resources to working with [Australian Industry] Group and other employer groups to educate their member companies about the issues in a positive way, rather than just focusing on legal obligations. … Education and awareness programs which are channelled through respected industry bodies, such as [Australian Industry] Group, are likely to be more effective than 'broad-brush' approaches. (sub. DR326, p. 5)

Box 7.3 **The Prime Minister's Employer of the Year Awards**

The Prime Minister's Employer of the Year Awards scheme was launched in 1990. The scheme gives recognition to employers of people with disabilities in several categories: national corporations, small business, medium business, large business, higher education institution and government agency. Employers can be state-based or operate nationally.

Employers can self-nominate or be nominated by others. Entrants are judged against the following criteria by an independent panel including business, disability, community and government representatives:

- conditions of employment
- length of employment and nature of work
- inclusive practices within the workplace
- initiatives undertaken by the employer to assist employees, and
- promoting and encouraging the employment of people with disabilities.

In 2003, more than 350 employers were nominated for the Awards. All winners are flown to Canberra to attend the Awards ceremony and all participating employers and nominators are invited to attend the Awards ceremony. All participating employers and nominators receive certificates of recognition.

Sources: FaCS 2003a, 2003b.

Although moral suasion and community education can play an important part in reducing disability discrimination (with or without an associated system of rewards), this approach is unlikely to succeed without legislative backing, for two reasons. First, the existence of primary legislation prohibiting discrimination is itself a crucial educational tool. The DDA and associated instruments symbolise society's commitment to the eradication of disability discrimination, and so raise awareness in a way that public campaigns alone might be unable to achieve (see chapter 10).

Second, on its own, an education strategy is only effective for certain individuals and organisations. According to Kagan and Scholz (1984), education is the most effective way of convincing 'political citizens' of the merits of a law or regulation. 'Political citizens' are those organisations and individuals that are initially unconvinced that the law is a sensible one and are inclined to disobey it. However, education will not change the behaviour of 'rational calculators' who defy the law because they decide that the benefits of non-compliance exceed the expected costs of being detected. Experience in the area of equal opportunity for women in the workplace has shown that 'naming and shaming' is not sufficient to get some organisations to comply with anti-discrimination legislation. For this group,

legislation involving deterrence and penalties represents the best strategy for inducing compliance. As the Equal Opportunity Commission Victoria commented, there will always be employers 'who aren't convinced by educative measures and who aren't convinced to comply proactively' (trans., p. 2599).

Increased public funding

Governments have a number of instruments at their disposal with which to alleviate disability discrimination and its manifestations. They can provide resources or services directly to people with disabilities, or indirectly through organisations ranging from advocacy services to employers and educators. Current government aids include income support, disability services, taxi vouchers, companion cards, and wage, accommodation and operating subsidies. Broadly speaking, their aim is to compensate people with disabilities for any disadvantages they suffer and help them achieve equal participation in the community.

Undoubtedly, the combined effect of the panoply of government measures in this area results in improvements in the quality of life of people with disabilities, both materially and psychologically. These measures might also mean that people with disabilities are better placed to fulfil all their capabilities for 'being and doing' (see chapter 2).

It might be argued, therefore, that increased government funding of disability services could replace disability discrimination legislation. In employment, for example, governments could provide all employees with disabilities with the kind of intensive human and financial assistance that is currently provided by open and supported employment services (see chapter 15).

However, such an approach has a number of shortcomings. First, it does not address discriminatory behaviours and attitudes, thus doing little to remedy situations where people are discriminated against because of pure prejudice.

Second, although subsidies might improve access in some situations, they are not always sufficient. For example, providing subsidies to individual people with disabilities is unlikely to lead to improved access to mainstream public transport. Providing subsidies to service providers directly could improve access in some circumstances but, if there are many providers, it might be difficult to tailor subsidies to each situation. And where there are strong network effects (for example, where the benefits are dependent on coordinated action by several parties) subsidies might have to be underpinned by regulation to prevent 'hold out' problems (where one party refuses to cooperate).

Third, substantial funding might be required to compensate people with disabilities for the consequences of discrimination. This could potentially cost the community more than removing discriminatory barriers. People with disabilities would also continue to bear the personal costs of discrimination.

Fourth, increased reliance on subsidies could also lead to a situation of 'moral hazard', whereby employers and employees take advantage of information asymmetries to exaggerate their needs and claim excessive subsidies from the government.

Finally, such an approach is likely to be considered a return to disability policy as 'welfare' or charity, rather than enhancing equality.

Funding issues are examined in more detail in chapter 15.

Conclusion

As noted in chapter 6, disability discrimination legislation such as the DDA has the potential to restrict competition. In accordance with its terms of reference for this inquiry and the requirements of CPA reviews, the Productivity Commission therefore has considered possible non-regulatory alternatives that would place fewer restrictions on competition and efficiency.

In essence, non-regulatory alternatives would rely on a combination of market forces, community education, self-regulation and increased funding. These may or may not be augmented by a system of government awards and subsidies, designed to create incentives for organisations to refrain voluntarily from discriminating.

The Commission considers that these alternatives are not adequate substitutes for anti-discrimination legislation such as the DDA. There are sound human rights and economic reasons for having some form of legislation prohibiting disability discrimination, and requiring the parties concerned to negotiate efficient solutions. Complementary policies have an important role to play in reducing disability discrimination and its effects, but they cannot entirely substitute for the symbolic and material benefits of an Act.

FINDING 7.2

The objectives of the Disability Discrimination Act 1992 *can only be met by legislation that potentially could restrict competition. Non-regulatory approaches can complement the operation of anti-discrimination legislation, but cannot substitute for it.*

7.3 Federal or State responsibility?

Section 7.2 concludes that anti-discrimination legislation is necessary. However, such legislation could take different forms. A fundamental issue is determining the appropriate level of government responsibility—a regulatory alternative to the DDA would be to rely solely on State and Territory anti-discrimination legislation to address disability discrimination.

All jurisdictions have adopted similar complaint-based anti-discrimination legislation, but their Acts have important differences. This report touches on many of these differences, including the definitions of disability and discrimination, the coverage of organisations, and the wording of exemptions. This section looks at the advantages and disadvantages of having both national and State and Territory legislation covering the same field, along with options for a national approach.

Disadvantages of the current arrangements

There are several disadvantages to the current arrangements, many related to their lack of uniformity.

First, many inquiry participants stated that there was confusion about the respective roles of each level of government (The National Disability Advisory Council, sub. 225, p. 3; The Equal Opportunity Commission Victoria, sub. 129, p. 36; Disability Rights Victoria, sub. 95, p. 3; Carers Australia, sub. 32, p. 5). The Northern Territory Disability Advisory Board, for example, argued that:

> … this creates unnecessary confusion for people with disabilities. It provides an avenue for the passing on of responsibility by levels of government. It is hard to imagine why we need separate Commonwealth and Territory/State legislation when we are dealing with the same target group. (sub. 121, p. 4)

Many people are not aware that they have a choice of jurisdiction in which to make a complaint. Those who are aware of their options might not appreciate the differences between the laws of different jurisdictions. This lack of awareness can cause serious problems for complainants, as a complaint inappropriately initiated under State or Territory Acts cannot be reheard under the DDA. This creates potential for complaints to go unheard, if a State or Territory body accepts a complaint, and then realises that the complaint should be handled by HREOC. Such situations have arisen in Tasmania (Anti-Discrimination Commission Tasmania, trans., p. 311).

Second, lack of uniformity can add to the compliance costs for organisations. In any one State or Territory, organisations must comply with two potentially conflicting

statutes and deal with different complaint processes. This issue is exacerbated greatly for businesses that operate in more than one State. National organisations are required to comply with nine different Acts (eight different State and Territory Acts and the DDA). The Australian Industry Group stated:

> … employers are required to comply with anti-discrimination legislation which differs between the Commonwealth and the States and differs from State to State. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst anti-discrimination laws. (sub. DR326, p. 20)

Third, the administrative costs of nine separate agencies administering nine parallel Acts are likely to be more substantial than those of a nationally uniform approach. Other costs arise from educating the public and training advocates about the different Acts. However, a national approach would not be costless. Negotiating a uniform approach among the jurisdictions would take time and effort, as would efforts toward improving that common approach over time.

Fourth, the current lack of uniformity means that people in different Australian jurisdictions are afforded different levels of protection. Complainants (or respondents) in one State might suffer injustice compared to complainants (and respondents) in other States or when compared to protection existing under the DDA. Nolan (2000) noted practical examples of such situations in Australia, and argued that something as fundamental as human rights should not vary from jurisdiction to jurisdiction, and it is the responsibility of the Australian Government to uphold those rights, not the States and Territories. A nationally uniform approach would better articulate and demonstrate the international obligations of the Australian Government. As Nolan (2000) observes, it accords better with the essence of our human rights obligations.

Finally, lack of uniformity means that case law in one jurisdiction is not necessarily applicable in other jurisdictions. Given the relatively small number of disability discrimination cases taken to court (see chapter 13), uniform legislation in each jurisdiction would help to establish useful precedents more quickly.

The Anti-Discrimination Board of NSW summarised many of the issues in a submission to an Australian Law Reform Commission inquiry:

> Uniformity or, at a minimum, greater harmonisation of federal, State and Territory anti-discrimination legislation is crucial to an effective legislative regime to provide protection against genetic discrimination. It would ensure that people are afforded equal protection under the Australian law, regardless of which State or Territory people reside [in] and where the conduct occurs within Australia. Uniformity would reduce the complexity of jurisdictional decisions about whether to proceed under State/Territory or federal legislation for the would-be complainants. It also supports greater certainty about people's rights and responsibilities under anti-discrimination law, rather than

such understanding being undermined by uncertainty which arises when there are inconsistencies between different federal, State and Territory laws. Uniformity of anti-discrimination legislation would enhance certainty by increasing the likelihood that case law from one jurisdiction is applicable in another and for precedent to be applied. (ALRC 2003, p. 317)

Advantages of the current arrangements

There are some significant advantages in both the Australian Government and States and Territories having anti-discrimination legislation. First, the States arguably have clearer Constitutional power to legislate in this area than is possessed by the Australian Government. The Australian Government has no specific Constitutional power in this area, but relies on various heads of power such as the external affairs and corporations powers in the Commonwealth Constitution. For example, as noted in chapter 11, doubts about the Australian Government's constitutional power could limit its ability to legislate to address disability vilification. State and Territory legislation provides a valuable 'second line' of protection if the DDA were to face Constitutional challenge.

Second, the national DDA supports State and Territory legislation by providing a national framework, and by providing coverage of federal departments and agencies. These were cited as two important reasons for introducing the DDA (see chapter 4) and remain valid.

Third, the current arrangements have important symbolic value. State and Territory governments play a major role in many facets of people's lives, and anti-discrimination legislation is an important statement about the human rights principles that underpin their view of society. Many federal systems of government have human rights protections at different levels of government (Degener and Quinn 2002a).

Fourth, in some areas, State and Territory legislation might be superior to the DDA—for example, in relation to senior State government appointments and complaints of discrimination on multiple grounds (including grounds that are not covered by federal discrimination legislation). As jurisdictions review their legislation over time, there is an opportunity for regulatory benchmarking and learning by example. These processes can encourage innovative solutions.

Finally, the presence of two legislative processes enables users to choose the Act that best suits their needs. HREOC argued that choice of jurisdiction might give complainants more options or different coverage:

> HREOC is not convinced that choice of jurisdiction presents a major barrier to people lodging complaints, any more than consumer choice in markets should be viewed principally as presenting confusing barriers rather than opportunities. (sub. 219, p. 25)

Currently, the large majority of complaints are made under State and Territory Acts—perhaps because the tribunal-based State processes are more accessible to people with disabilities (see chapter 13). However, a significant group prefer to make complaints under the DDA, especially where the action to which they object relates to a federal agency or has a national dimension (such as for interstate transport).

A national approach

The Productivity Commission has considered whether a uniform national approach might address some of the above disadvantages. There are several ways of establishing such a national approach: the States and Territories could adopt a 'legislative compact', under which identical mirror or template legislation is passed in each jurisdiction; the States and Territories could refer their powers in this area to the Australian Government; or the Australian Government could unilaterally move to take over the field. None of these approaches would be easy to implement.

A legislative compact

Australian governments could agree to adopt a legislative compact—this approach has been adopted in other areas to introduce uniform legislation at the State and Territory level, most recently in relation to uniform gun laws. This option would have to be complemented by an abbreviated DDA that covers the federal level. However, it is likely to be very difficult to negotiate agreement on such sensitive legislation for several reasons.

- Despite some convergence of the various Acts, they still contain notable differences. This is an historic accident in part, but differences might also reflect the genuine desires of some jurisdictions to tailor otherwise similar legislation to their own purposes. The fact that some State and Territory Acts rely on a comparator for defining direct discrimination and some do not presumably reflects real differences in opinion about which approach is best suited to the needs of that jurisdiction.

- The State and Territory Acts are all omnibus Acts that cover discrimination on a number of grounds. It would be impossible to negotiate a uniform approach to disability without including those other grounds. As this report has illustrated, there are some substantial differences in the way in which the different federal anti-discrimination Acts approach similar issues.

- Most State and Territory Acts significantly predate the DDA, some having been introduced during the 1970s. Achieving consensus in this environment would be

difficult as some jurisdictions are likely to be reluctant to give up hard won rights for disadvantaged groups.

- The Australian Government does not have the same bargaining strength in this field as it has had in others. It was able, for example, to obtain the agreement of the States and Territories to implement (relatively) uniform disability service Acts through the broader Commonwealth State Disability Agreement (CSDA) negotiations, which also included federal funding for disability services.

Referral of powers

Under section 51(xxxvii) of the Commonwealth Constitution, the Commonwealth Parliament may make laws on matters 'referred' to it by the Parliament or Parliaments of any State or States. However, the difficulties in negotiating a legislative compact between governments discussed above also apply to the option of the States referring their powers in this area to the Australian Government.

Federal law 'covering the field'

The third option is based on the operation of section 109 of the Constitution, under which federal laws displace the operation of State and Territory laws to the extent of any inconsistency between the two (assuming the Australian Government has Constitutional power to legislate in an area). Inconsistency can arise either directly—where the two laws would lead to different results—or through the federal law being found to be intended to 'cover the field' and not leave any room for State laws to operate. This makes it (theoretically) possible for the Australian Government to 'take over the field' and extinguish the role of the State and Territory governments in this area.

The DDA was never intended to 'cover the field'. It expressly states that it is not intended to displace State or Territory laws that deal with disability discrimination that are capable of operating concurrently with the DDA (s.13). Although the Australian Government might be able to act unilaterally, this approach would unnecessarily strain government relationships in an area in which cooperation and goodwill are essential ingredients of effective anti-discrimination policy. In addition, this approach would also put more reliance on the Constitutional power of the Australian Government to legislate in this area—an ability that is not as clear cut as it is for the States.

Conclusions

The problems of trying to negotiate a uniform national framework and the disruption that this effort would cause suggest that the best course of action is for both levels of government to continue to legislate in this area.

Convergence of anti-discrimination legislation in different jurisdictions is likely to reduce the disadvantages of current arrangements over time. HREOC stated:

> … overlapping coverage of the DDA and State and Territory discrimination have lessened in recent years with most jurisdictions now having coverage and definitions very similar to those of the DDA. (sub. 143, p. 42)

The development of DDA disability standards and industry codes in an increasing number of areas will drive further convergence of the DDA and State and Territory anti-discrimination legislation (see chapter 14). Over time, people with disabilities and organisations will benefit from increasing uniformity and certainty. It is possible, therefore, that a uniform national approach will emerge by default, as the disability standards become the overarching regulatory framework governing compliance by organisations. There is nevertheless some confusion about the impact of DDA disability standards on State and Territory legislation (this issue is discussed in chapter 14).

There is also scope for government action to reduce confusion and to improve cooperation. Clarifying the relationship between the federal and State/Territory approaches to anti-discrimination, and improving cooperation across jurisdictions, will improve the efficiency and effectiveness of anti-discrimination laws and programs, and lead to better outcomes for people with disabilities.

The Productivity Commission has addressed some of the areas in which further cooperation could pay dividends. Given that all jurisdictions have similar goals, working together in education and awareness initiatives is encouraged (see chapter 10). The Productivity Commission recommends that the Australian, State and Territory governments improve cooperative arrangements at the 'shopfront' level, to provide a single point of contact for members of the public (see chapter 13). This approach would help address the unnecessary confusion among complainants about where to direct their complaint.

FINDING 7.3

State and Territory anti-discrimination legislation can complement the operation of the Disability Discrimination Act 1992, *but cannot substitute for it.*

7.4 A separate Act or omnibus legislation?

The Australian Government has legislated separately for different grounds of discrimination (sex, race, disability and, under a recently passed Act, age). This occurred partly because the Government progressively introduced various anti-discrimination Acts as it signed related international agreements. Linking each Act to specific agreements gives it greater protection from constitutional challenge.[2] As noted, the States and Territories have no such constitutional limits in the area of anti-discrimination law, and all have chosen to introduce omnibus legislation that covers discrimination on a number of grounds.

The advantages of an omnibus Act might include a reduction in the volume of material that businesses and their advisers have to apply, and the removal of inconsistencies in the approach of discrimination laws passed at different times. These inconsistencies could include differences in definitions, coverage and defences, and in the functions or powers available to HREOC. There are also some advantages in administrative handling of cases involving discrimination on a number of grounds. However, inquiry participants tended not to support an omnibus anti-discrimination Act (box 7.4).

HREOC argued that many advantages of the omnibus approach can be gained without the need for a single Act. An amending Act, for example, could harmonise provisions in separate anti-discrimination laws to whatever extent is justified, while leaving separate laws (sub. 143). This approach has occurred in relation to complaints, with the consolidation of complaints provisions into the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act).

HREOC also noted that the State and Territory omnibus laws, in most cases, are structured with separate divisions for the different grounds of discrimination. Further consolidation of federal anti-discrimination Acts would be likely to follow a similar structure, which would not necessarily make using and understanding federal anti-discrimination laws significantly clearer (sub. 143).

Although difficult to quantify, the symbolic importance of the DDA should not be underestimated. Many inquiry participants emphasised this point, and their views are well represented by the comments of Elizabeth Hastings, the first Disability Discrimination Commissioner:

> People who are accustomed to segregation into specialised services and facilities may not believe that a mainstream general anti-discrimination law actually is intended for

[2] The Australian Government does not have explicit power to legislate on human rights, but largely relies on the external affairs power to legislate to implement international agreements (see chapter 4).

their use. In this sense having a specifically named Disability Discrimination Act may serve in a way analogous to the access symbol on the door of a structure ... (Hastings 1997, p. 10)

Box 7.4 **Inquiry participants' views on an omnibus Act**

The Equal Opportunity Commission Victoria stated that community members had mixed views. An omnibus Act would:

- more clearly acknowledge that some people experience discrimination on various grounds concurrently, and better reflect the intersection of types of discrimination and disadvantage as they impact upon people's lives; and
- be consistent with jurisdictions such as the United Kingdom and Northern Ireland, which have moved or are moving from distinct age, sex, race and disability discrimination legislation to a single equality statute.

However, strong views were expressed … in favour of retaining the DDA as specific disability discrimination legislation. These views were mainly based on the perception that the existence of disability-specific legislation is empowering for many people with disabilities. (sub. 129, p. 38)

The Anti-Discrimination Commission Queensland supported the current approach:

> The Commonwealth legislation has a high public recognition factor because it is individually titled. This is particularly important for many people with disabilities who may have less access to information than others. In State and Territory anti-discrimination legislation, disability is just one ground amongst many—often more than a dozen. (sub. 119, p. 5)

The Physical Disability Council of Australia saw no benefit in omnibus legislation:

> Sex, race, disability, age and other forms of discrimination may share some antecedents and characteristics. But there are subtle (and not so subtle) differences. … we feel strongly that federal law should continue to apply the principle of horses for courses. Anti-discrimination laws should remain distinct and separate but share a common commitment to eradicate discrimination in whichever way it is made manifest. (sub. 113, pp. 8–9)

The Public Advocate in Victoria supported a stand-alone DDA:

> The DDA is better known and understood precisely because it is not part of omnibus legislation. (sub. 91, p. 2)

The Disability Services Commission supported the current approach:

> There are concerns that the disability specific focus and mechanisms of the DDA, which are so effective in redressing discrimination, would be lost if the Commonwealth adopted omnibus legislation similar to that used by the States. (sub. 44, p. 6)

The Productivity Commission considers that there are good reasons to retain the present suite of Australian Government anti-discrimination Acts. Perhaps most significantly, a stand-alone Act is a powerful symbol of the Government's commitment to people with disabilities. In addition, redrafting the Acts would require considerable resources for perhaps little gain. It is possible that the process of redrafting might lead to some watering down of rights contained in the individual

pieces of legislation. However, it is also possible that some rights might improve. Finally, the Australian Government's powers to legislate in this area are not as clear as those of the States, and consolidating all grounds into one Act might make it more vulnerable to constitutional challenge.

7.5 What should be the objects of the DDA?

The CPA states that a legislation review should 'clarify the objectives of the legislation' (CPA p. 20). Although the terms of reference for this inquiry do not explicitly require the Productivity Commission to clarify the objectives of the DDA, it is still important to assess whether they adequately reflect the social and economic reasons for government involvement (section 7.1), and whether any changes are required.

The DDA has three stated objects: to eliminate disability discrimination; to ensure equality before the law; and to promote community acceptance (see chapter 4). Most inquiry participants said these objects are clear and appropriate, or did not comment on them. The Mental Health Legal Centre echoed the words of several inquiry participants in declaring 'the objects of the Act are clear and concise' (sub. 108, p. 2). The Queensland Anti-Discrimination Commission noted:

> The objects of the DDA are obviously aspirational, verbalising a desired community standard, as is appropriate for legislation of this kind. (sub. 119, p. 11)

Other inquiry participants raised issues regarding the objects of the DDA. First, HREOC said the current objects are appropriate and workable (sub. 143, p. 35), but suggested that 'the object of eliminating discrimination could be supplemented with a more positive equality object' (trans., p. 1148). The Equal Opportunity Commission WA (sub. 236, p. 2) also 'suggested the object "equality" be promoted' in the DDA.

The first object in the DDA—to eliminate discrimination (as far as possible) in the areas to which the DDA applies—aims to remove the barriers that impede equality of opportunity for people with disabilities. The DDA appears to imply a requirement for limited differential treatment to remove such barriers (substantive equality), but it does not go so far as to require equality of outcomes.

Substantive equality is the appropriate goal for anti-discrimination legislation. Improved outcomes for people with disabilities are important, and should ultimately flow from the improved opportunities made possible by the DDA. However, the nature of some people's disabilities may be such that they cannot take advantage of the opportunities created by the DDA, without additional disability services or preferential treatment. The establishment, funding or eligibility criteria of disability

services should not be subject to the DDA (see chapter 15). Similarly, any attempt to improve outcomes through preferential treatment should be pursued directly, not through the DDA (see chapter 8).

A second issue regarding the DDA's objects was raised by the Darwin Community Legal Service. It questioned the qualifications that appear in the first two objects:

> We question why the objects (a) and (b) contain the words 'as far as possible' and 'as far as practicable'. We believe those words perpetuate stereotypes of persons with disabilities as 'different' and that there is some qualification to the absolute right to be treated in a non-discriminatory fashion and equally before the law to be afforded to people with disabilities. (sub. 110, p. 3)

These qualifications reflect the 'aspirational' quality of the objects, while also recognising that the elimination of all disability discrimination in all circumstances is not achievable in practice. They are reflected throughout the DDA, through devices such as the requirement to meet the 'inherent requirements' of employment, the 'unjustifiable hardship' limits on the provision of adjustments, and the 'reasonableness' test for indirect discrimination (see chapter 8). In addition, there are practical limits to achieving equality before the law for some people with cognitive disabilities (see chapter 9). Similar qualifications are featured in the objects of the Age Discrimination Act recently passed by both houses of Parliament.

A third issue was raised by the New South Wales Council for Intellectual Disability, which said 'the objects of the DDA need to be broadened' to acknowledge the special needs of people with intellectual disabilities in the legal system (sub. 117, p. 5). The DDA seeks to eliminate discrimination and promote equality before the law for all people with disabilities. It clearly includes people with intellectual disabilities in its broad definition of disability (see chapter 9). It would be inappropriate for the objects to single out the special needs of one group of people with disabilities, however valid they might be.

Fourth, the Aboriginal and Torres Strait Islander Commission (ATSIC) wanted the objects of the DDA to acknowledge the special needs of Indigenous people with disabilities:

> While ATSIC considers that the objects of the DDA (s.3) are of sufficient scope, it wants the section to specifically recognise the situation of Indigenous people with disabilities. It therefore proposes that section 3 of the DDA should include the specific aim of ensuring that Indigenous people with disabilities are fully able to exercise their rights, recognising that, in the case of Indigenous people, disadvantage associated with disability is compounded by highly adverse social conditions involving a range of negative factors concerned with matters such as health, education, employment and infrastructure services. (sub. 59, p. 3)

HREOC agreed that Indigenous people with disabilities face greater disadvantage than other people with disabilities, but argued that these disadvantages should be addressed directly through improved delivery of health, education, employment and other services, rather than indirectly through the DDA. HREOC further suggested that it might be beneficial to include a provision in relevant laws:

> … requiring powers and functions to be exercised having regard to the needs and rights of Indigenous people with disabilities. … HREOC is also currently considering possible areas for inquiry regarding particular disadvantages experienced by Indigenous people with disabilities. (sub. 219, pp. 3-4)

The Productivity Commission agrees with HREOC on this issue. The disadvantages faced by Indigenous people with disabilities in Australia are significant and require redress. However, amending the objects of the DDA is unlikely to be an effective method of ensuring improvements in the provision of health, education and other services for Indigenous people with disabilities. As noted by HREOC, the DDA could be used, for example, to improve assistance and adjustments for the education of Indigenous children with hearing loss, but it cannot be used to prevent the hearing loss in the first instance (sub. 219, p. 4). Such deficiencies in the provision of crucial services need to be addressed directly.

The DDA addresses discrimination against all people with disabilities, including Indigenous people with disabilities and other people with multiple disadvantages. In some instances, where an incidence of discrimination is based on race and/or disability, the *Racial Discrimination Act 1975* might be a more direct and appropriate avenue for addressing discrimination against Indigenous people with disabilities.

A fifth issue raised by some inquiry participants was a desire for the DDA to address discriminatory attitudes and behaviour in an 'holistic manner', to promote a truly inclusive community. For example, Dorothy Bowes (trans., p. 1987) said the DDA should focus more on 'social conscience' and 'social issues' as well as business and economic issues. In a related vein, Val Pawagi (sub. 191, p. 1) said the DDA should also address the personal sphere by encompassing 'dignity and respect, self-determination (decision making and choice), personal relationships, sexuality, marriage, parenthood, financial management, culture and religion'.

These concepts could be regarded as aspects or examples of achieving full community acceptance. There are risks in seeking to spell out aspects of the objects of the DDA in too much detail, particularly when they encompass aspects of private life that are not (or cannot be) addressed by the substantive provisions of the DDA. As noted, the DDA is about eliminating discrimination and promoting substantive equality of opportunity. It is not practical—and probably not feasible—for an anti-discrimination Act to go beyond these objects.

FINDING 7.4

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

7.6 Competition Principles Agreement conclusions

Chapter 6 addressed the first two questions of a CPA legislation review. It concluded that:

- The DDA appears likely to have produced net benefits for the Australian community to date. But care needs to be taken in the way the DDA is implemented through standards if it is to continue to produce net benefits in the future. This will require an appropriate balance be kept between requirements and safeguards.
- Although the DDA has the potential to restrict competition in the Australian economy, current restrictions on overall levels of competition appear negligible.

This chapter addressed the third and final question of the review, and concludes that:

- The objectives of the DDA can only be met by such legislation. Non-regulatory approaches can complement the operation of anti-discrimination legislation, but cannot substitute for it.
- State and Territory anti-discrimination legislation can complement the operation of the DDA, but cannot substitute for it.

Overall, the Productivity Commission is satisfied that the DDA has, to date, met the requirements of CPA legislation reviews and, with appropriate amendments, will provide net community benefits into the future. The remaining chapters of this report examine ways of enhancing the benefits of the Act and minimising its costs, in order to ensure it continues to provide net benefits to the Australian community as a whole.

FINDING 7.5

The Disability Discrimination Act 1992 *meets the Competition Principles Agreement legislative review requirements.*

8 Eliminating discrimination

The first objective of the *Disability Discrimination Act 1992* (DDA) is concerned with eliminating discrimination. In chapter 7, the Productivity Commission argued that this can require substantive equality between people with and without disabilities. This chapter looks at the case for including a duty to make reasonable adjustments that would give effect to this principle. Making adjustments to create substantive equality involves important efficiency and equity issues. The chapter accordingly looks at the major safeguards in the DDA, and at issues concerning who pays for adjustments. (The second and third objects of the DDA are addressed in chapters 9 and 10 respectively.)

The DDA currently contains many provisions to promote the rights of people with disabilities not to be discriminated against on the grounds of their disability. For example, it makes it unlawful to discriminate on the ground of disability in a number of different areas, such as employment, education, and access to premises. The DDA also contains provisions to introduce disability standards which can elaborate on the way the Act should apply to particular areas; it encourages organisations to prepare action plans; and while it includes some penalties, its emphasis is on conciliation and attitudinal change.

All of these features need do no more than underpin its role as an instrument for upholding formal equality. But the DDA goes further than this, or at least it appears to. Although it does not contain an express obligation to make adjustments, it contains features that imply that reasonable adjustments should be made under certain circumstances. These features imply that the DDA is at least in part concerned with creating substantive equality based on reasonable adjustments.

8.1 Reasonable adjustments

No issue caused as much comment during this inquiry as ‘reasonable adjustments’. The many comments the Productivity Commission received on this subject shows that reasonable adjustments can mean different things to different people. To many people, reasonable adjustments embody the very essence of disability discrimination legislation—that the disabling barriers in the community should be

addressed through a duty to make adjustments. To some others, the term meant affirmative action.

In this section, the Commission looks at what the DDA currently says about a duty to make reasonable adjustments; what the Parliament might have intended the DDA to say; how the courts have interpreted the DDA; and how a duty to make reasonable adjustments might be incorporated into the Act. Inquiry participants' views and the way reasonable adjustments are addressed in some other countries are also examined. Finally, consideration is given to whether an additional anticipatory duty on employers is required.

What the DDA says about adjustment

There is no explicit statement in the DDA that says that adjustments must be made to meet the needs of people with disabilities. For example, the term 'reasonable adjustments' (sometimes also called 'reasonable accommodations') does not appear anywhere in the DDA. However, various sections of the Act seem to imply, or have been interpreted, to require that 'reasonable adjustments' be made in certain circumstances. These include the definition of discrimination (s.5(2)), the reasonableness component of the definition of indirect discrimination (s.6(b)), the unjustifiable hardship defence (for example, s.15(4)(b) in relation to employment), and the section 15 prohibitions on discrimination in employment. Drawing on some of these sections, the Human Rights and Equal Opportunity Commission (HREOC) claims that employers are required to make reasonable adjustments (HREOC 2003f, p. 10).

The definition of direct discrimination

The DDA states that circumstances are not considered to be 'materially different' if 'different accommodation or services' are required by a person with a disability (s.5(2)).

There is a long history of debate over whether or not this section implies an obligation to make adjustments by providing different accommodation or services. The meaning of this section has been considered variously by HREOC Commissioners, the Federal Court, and most recently the High Court. In one of the most influential cases, *A School v HREOC and Anor*, Mansfield J rebutted the respondent's argument that the DDA did not impose a positive obligation to treat a person with a disability more favourably than a person without a disability. His Honour commented that:

> … it is not necessarily the case that, where the DDA applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services. ((1998) FCA 1437)

Subsequently, HREOC Commissioner McEvoy said:

> … the substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing … so that in truth the person with a disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances. (McEvoy (HREOC unreported 2000), quoted in HREOC 2003b, p. 75)

By contrast, the opposite view—that section 5(2) does not impose a duty to provide the different accommodations required by a person with a disability—was found in *Clark v Internet Resources* (Commissioner Mahoney, HREOC 2000) and *Commonwealth of Australia v Humphries* ((1998) 1031 FCA).

This issue came to a head when the High Court considered the Purvis case involving alleged discrimination against a student in a NSW school (*Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62). As noted by Lee Ann Basser, although the majority of judges in this case 'did not consider the duty to make reasonable adjustments in any detail, the minority considered the issue in some detail' (sub. DR266, p. 2). Justices McHugh and Kirby, in the minority, concluded, among other things, that s.5(2) does not impose an obligation to make adjustments and that failure to provide adjustments is not a *per se* breach of the Act. They found that the 'failure to provide the required accommodation goes to the issue of materially different circumstances, not obligation.' ([2003] HCA 62) According to Lee Ann Basser, the view of McHugh and Kirby JJ is that:

> … in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to McHugh and Kirby JJ there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination. (sub. DR266, p. 2)

Although this might not be the end of the matter (a majority of the High Court could presumably take a different view in a subsequent case), the Productivity Commission is satisfied that section 5(2) of the DDA cannot be relied upon to imply a duty to make adjustments.

Unjustifiable hardship

A discriminator may escape a finding of unlawful discrimination if he or she can demonstrate that to comply with the DDA would impose an unjustifiable hardship. This seems to imply an obligation to make adjustments where they would not result in unjustifiable hardship, although as noted in the Purvis case by the minority, this

obligation might only be enforceable in the breach. Thus, if a person makes no adjustments or insufficient adjustments and a complaint is made against them, they might not be able to use this defence. In some senses, the unjustifiable hardship defence can be regarded as the inverse of a duty to make reasonable adjustments. If there is a range of adjustments that could be made in a particular case, those that do not impose an unjustifiable hardship could be considered to be reasonable and those that do might be considered unreasonable. However, as noted, it applies in the breach and is not as explicit or as proactive as a duty to make reasonable adjustments might be.

Indirect discrimination

Indirect discrimination can occur where a person is required to comply with a requirement or condition which is not reasonable having regard to the circumstances of the case (s.6(b)). HREOC has argued that the DDA's obligation to make reasonable adjustments is principally based on this section and not section 5 (HREOC 2003f, p. 12). An example might be where it would be considered unreasonable for the owner of a public premise to only provide steps as the means of accessing those premises, because this would discriminate against people who use wheelchairs. A reasonable adjustment in such a case might be to install a ramp, but this would depend on the circumstances.

Conditions of employment

HREOC notes that although not called as such, the concept of reasonable accommodation has been used to support two findings by the Federal Magistrates Court of discrimination in employment under s.15(2)(b) (HREOC 2003b, pp. 76–77). This subsection makes it unlawful to discriminate against an employee by denying or limiting their access to opportunities for promotion, transfer or training, or to other benefits associated with employment. In essence, these cases turned on the Court deciding that the respective employers had not offered the persons concerned sufficient support in the workplace.

Draft standards

The draft disability standards for education introduce the concepts of 'reasonable adjustment' and 'unreasonable adjustment'. These two concepts are not defined in the draft standards, except as being 'not the same as unjustifiable hardship' (s.10.1(2)) (see chapter 11 and appendix B). This approach appears to differ from the draft disability employment standards that say a 'reasonable' or 'appropriate' adjustment is simply one that does not cause an unjustifiable hardship (see below).

In negotiating the draft disability standards for education, some States warned that confusion and problems might arise from this interpretation of 'reasonable adjustment' (see chapter 14 and appendix B).

Summing up

Although there is no explicit provision in the DDA requiring (reasonable) adjustments be made to accommodate the needs of people with disabilities, it is implied in various sections of the Act. However, the net effect is that the degree of obligation is uncertain, especially given the recent Purvis decision in the High Court.

FINDING 8.1

Various sections of the Disability Discrimination Act 1992 *imply that reasonable adjustments must be made in order to avoid discriminating against people with disabilities. However, a recent High Court decision has questioned this presumption and appears to have narrowed significantly the protection that the Act was thought to provide.*

What the Australian Government said when the DDA was introduced

Although the DDA does not contain an explicit duty to make reasonable adjustments, the Australian Government appears to have had such a duty in mind when the DDA was introduced. The explanatory memorandum and second reading speech both use the equivalent term 'reasonable accommodation' in the context of the unjustifiable hardship test (box 8.1).

Participants' views

Many inquiry participants supported the general principle that the DDA should include an obligation to make reasonable adjustments. For example, the Equal Opportunity Commission Victoria, stated that it:

> … considers that the inclusion of a duty to make reasonable adjustments is central to effective disability discrimination legislation. Without modification to premises, equipment, practices or job design, for example, the duty not to discriminate against people with disabilities will have minimal effect. (sub. 129, p. 30)

The Anti-Discrimination Board of New South Wales commented similarly that:

> … there could be a clear duty to 'reasonably accommodate' a person with a disability in order to enable them to carry out the inherent requirements of a position, access

services, facilities, premises and accommodation. What amounts to 'reasonable accommodation' should require a consideration of all the circumstances including those which are presently considered under the defence of unjustifiable hardship. (sub. 101, p. 12)

The Physical Disability Council of New South Wales said it:

> … believes strongly that the concept of 'reasonable adjustment' should be clearly articulated and defined within the DDA. (sub. 78, p. 15)

Box 8.1 What the Australian Government said about reasonable adjustments

The outline of the explanatory memorandum to the *Disability Discrimination Act 1992* stated that:

> The Bill also provides that only reasonable accommodation needs to be made for people with disabilities, and persons against whom complaints are made will be able to argue that the accommodation necessary to be made will involve unjustifiable hardship on that person. In relation to employment an employer will be able to argue that a person with a disability is unable to carry out the inherent requirements of the job.

In explaining unjustifiable hardship, the explanatory memorandum stated that:

> When determining whether or not a person should be required to make a reasonable accommodation for a person with a disability, if the person making the accommodation provides some evidence that the provision of such accommodation will cause unjustifiable hardship, HREOC and if required the Federal Court will have to decide whether or not requiring a person to make the accommodation will involve that person in unjustifiable hardship.

In addressing the definition of direct discrimination the explanatory memorandum states that:

> … circumstances will not be regarded as being materially different because the discriminator has to provide different accommodation or services to the aggrieved person. Whether, in fact, the discriminator will be required to provide the different accommodation will be determined when the issue of unjustifiable hardship is dealt with.

From the second reading speech:

> … employers, providers of accommodation, education, goods and services, clubs and sporting groups would be able to argue that action necessary to accommodate the needs of people with disabilities would impose unjustifiable hardship.
>
> …. there is an exemption which does not prohibit discrimination if the person is not able to perform adequately the inherent requirements of the job, even where reasonable accommodation has been made.

Sources: Australia 1992a, pp. 2751–53; *Disability Discrimination Act 1992*, Explanatory Memorandum.

The Northern Territory Disability Advisory Board said:

> It is essential that reasonable adjustment be clearly defined within the DDA. Currently there does not appear to be any requirement within the Act for reasonable adjustment.

> In not doing so the DDA provides a loophole for all providers and developers of goods and services. The DDA needs to enforce the duty of care providers have in relation to the Act. (sub. 121, p. 2)

People with Disabilities Australia were strongly supportive of including a duty to make reasonable adjustments in the DDA, to be consistent with the intentions for the Act. Commenting on the High Court Purvis case, it said that the DDA needs amendment:

> … if it is to have the effect intended by Parliament of providing substantive equality for people with disability in the areas covered by it. The inclusion of such an obligation would clarify and give effect to the intended position at law, and would result in real and practical changes to the current, inadequate state of compliance.
>
> … Indeed, People With Disabilities Australia considers that the Productivity Commission's various findings to the effect that the DDA has a 'mixed report card,' so far as its effectiveness is concerned, are linked directly to the failure of the DDA to expressly require such adjustments. … it is now hard to see how the DDA's objective "to eliminate, as far as possible, discrimination against persons on the ground of disability" in certain areas, can ever be achieved without such an obligation. (sub. DR359, p. 8)

Comments about a duty to make reasonable adjustments from the business community were very limited (though some commented on the related issue of an anticipatory duty on employers (see below)). It is significant that no strong opposition to the concept of reasonable adjustment was evident in submissions to this inquiry.

Reasonable adjustments in other countries

Disability discrimination legislation in other countries typically embodies an obligation to make adjustments, sometimes much more explicitly than in the DDA, other times in equally opaque ways. Models of some relevance to the Australian context include the United Kingdom, the United States and Canada.

In the UK DDA, subsection 6(1) places a duty on employers to identify arrangements and physical features that place the disabled person concerned at a substantial disadvantage, and to take reasonable steps to prevent such disadvantage. Subsection 6(2) gives examples of ways in which the employer can comply including:

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

(e) assigning him to a different place of work;

(f) allowing him to be absent during working hours for rehabilitation, assessment or treatment;

(g) giving him, or arranging for him to be given, training;

(h) acquiring or modifying equipment;

(i) modifying instructions or reference manuals;

(j) modifying procedures for testing or assessment;

(k) providing a reader or interpreter;

(l) providing supervision.

A test of reasonableness applies.[1] The UK DDA and supporting legislation[2] similarly require providers of goods, facilities and services and educational authorities to make reasonable adjustments.

The Americans with Disabilities Act 1990 (ADA) also is more explicit about the obligations placed on employers. It states that the failure to make reasonable accommodation amounts to discrimination (subsection 102(5A)). Like the UK DDA, it gives examples of what is meant by reasonable accommodation, and is bounded by an 'undue hardship' test. Subsection 101(9) states that reasonable accommodation may include:

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

By comparison the Canadian Human Rights Act 1976-77 does not contain an explicit obligation to make adjustments. It is however implied. Thus, discriminatory practices are only permitted in employment if there is a *bona fide* occupational requirement and in other areas if there is *bona fide* justification but:

1 Interestingly, the test requires, among other things, that regard be had to the 'availability to the employer of financial or other assistance with respect to taking the step' (s.6(4)(e)). As this implies that the absence of such financial assistance might make it unreasonable to make the adjustment, the funding of such schemes would appear to be an important determinant of firms' exposure to the Act.

2 The UK DDA was amended by the Special Educational Needs and Disability Act 2001 to include education within its provisions.

> … it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost. (s. 15(2)

The Productivity Commission's view

The Commission considers that the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages. For example, an employer who is concerned only with the productivity of employees and the costs of employment will have a commercial incentive to overlook candidates with disabilities if he or she can recruit someone who might be no better qualified but does not require additional workplace adjustments. This might sometimes be an efficient response from the employer's perspective, but it might not be either efficient or equitable from a broader community perspective.

A duty to make reasonable adjustments would be an important means of creating more substantive equality between people with and without disabilities (see chapter 7). Adjustments are sometimes necessary to allow people with disabilities to achieve more equal access to opportunities. In the employment example above, substantive equality would be achieved if the employer were prepared to make the adjustments to enable the person with the disability to compete on merit for the job. Substantive equality is consistent with the social model because it addresses the environmental barriers that are so disabling to people with impairments.

The concept of reasonable adjustments in an employment context was well summed up by Val Pawagi, who noted that in an employment context it is:

> … any form of assistance or adjustment that is necessary and reasonable to counter the effects of an employee's disability in the workplace. It is intended as a means of bringing people with disability to the point at which they can compete against others without the disadvantaging effects of the disability, i.e. to compete on their merits and to perform effectively in the workplace. (sub. 209, p. 5)

This reflects the widely held view that a duty to make reasonable adjustments is meant to get people with disabilities to the same notional 'starting line' as people without disabilities. It is not meant to give an advantage to people with disabilities, but to remove a source of disadvantage that arises from their disability. Thus, for example, the provision of a screen reader for a person with a visual impairment might address the disadvantage faced by that person, but does not amount to preferential treatment because the screen reader would be of little or no use to a person without a visual impairment. The Productivity Commission considers that

reasonable adjustments can be distinguished from affirmative action, which is explicitly based on assigning preferences to one group at the expense of another.

The Commission notes that a duty to make reasonable adjustments is consistent with the intentions of the Australian Government when the DDA was introduced and can be implied from some existing sections of the DDA. However, two judges in a recent High Court decision concluded that the definition of direct discrimination does not contain an obligation to make adjustments. Although the remaining sections of the Act might continue to imply some obligation to make adjustments, they offer at best an incomplete approach. Remedial amendment is required.

There are two broad ways of proceeding. First, the definition of direct discrimination could be amended to include a requirement to provide the 'different accommodation or services' already mentioned in section 5(2). Second, a specific reasonable adjustments obligation could be introduced.

Amending the definition of direct discrimination would address the weakness in the DDA that has been revealed by the High Court, but would mean that the duty would continue to be expressed in a piecemeal and indirect manner. It also does not lend itself well to lay interpretation.

Many inquiry participants favoured including a specific obligation to make reasonable adjustments, and not just because this would make explicit what had previously been presumed. The Equal Opportunity Commission Victoria noted that the duty:

> … would serve a useful educative function. Many respondents remain focussed on an understanding of non-discrimination as meaning refraining to act in particular ways. The concept that compliance with the DDA also requires more active steps can be difficult to convey. (sub. 129, p. 30)

The Physical Disability Council of New South Wales similarly noted that the duty would make the DDA a 'genuinely enabling piece of legislation' (sub. 78, p. 15).

Commenting on the duty to make reasonable adjustments in the UK's DDA 1995, Marrickville Council said:

> There is also a subtle yet importance difference, with reasonable adjustment the focus is on the responsibility of all the society to remove barriers as opposed to a focus on what is considered unjustifiable to alter. (sub. 157, p. 5)

The Commission agrees: an explicit duty to make reasonable adjustments should be included in the DDA. This would not only clarify the DDA but also subtly reposition it as a more positive force for change. The duty would reinforce the roles

played by the prohibitions on direct and indirect discrimination. Thus, failure to provide a reasonable adjustment could itself be unlawful discrimination and the subject of a complaint. This would put the Act on a more proactive basis, by focusing on what needs to be done to avoid charges of direct or indirect discrimination.

The Commission has considered how the duty might be included: generally; or in each area of activity. There are advantages and disadvantages in each approach. A general statement would be clear but might not be able to capture the subtle nuances that might be possible by tailoring the duty to meet the specific circumstances of each area of the Act. The Commission favours a combination of the two approaches, with the duty expressed as a stand alone provision with examples of how it might be met in each substantive section. The examples contained in the UK DDA employer's duty, and the various (actual or proposed) standards and guidelines (for example, HREOC's Frequently Asked Questions on employment; HREOC 2003f) already drafted under Australia's DDA might be drawn on for this purpose.

Other drafting issues might concern whether the duty should be described in terms of reasonableness or not; and the need to identify who might be required to make adjustments.

Whether the duty is described as requiring 'reasonable adjustments' or just 'adjustments', the defence of unjustifiable hardship would apply. As long as reasonable adjustments are defined to exclude adjustments that would lead to unjustifiable hardship, confusion between what is reasonable and what is not unjustifiable should be avoided (unjustifiable hardship is addressed in section 8.2). Blind Citizens Australia agreed with this view:

> If the DDA was amended to include a positive obligation to provide reasonable adjustments then the term would need to be defined and should include adjustments which do not result in an unjustifiable hardship. (sub. 72, p. 8)

The Commission favours expressing the duty in terms of 'reasonableness' as this would immediately convey to the reader of the Act that the duty is not an unlimited one and hence would aid interpretation. It would also emphasise that, where a range of possible adjustments could be made, affected organisations are only required to make those that are reasonable in the circumstances. That is, there is no obligation to provide complex and expensive adjustments if simpler and cheaper alternatives are available.

The issue of who might be required to make adjustments would have to be addressed in the DDA. In some cases, there is likely to be some confusion about who the responsible party might be. In areas like public premises, accommodation

or sport it might be the person who engages in the relevant conduct, for example, the person who refuses entry to the building, or the coach who excludes a person from the sporting team. The alternative preferred by the Commission would be to place the responsibility on those with the authority to change practices or the environments, such as the building owner or the club that conducts the sport.

RECOMMENDATION 8.1

The* Disability Discrimination Act 1992 *should be amended to include a general duty to make reasonable adjustments.

- ***Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.***
- ***The person or persons on whom the duty would fall should be identified.***
- ***Examples of how the duty might apply should be included in each area of the Act.***

Eliminating discrimination in employment: are additional measures needed?

One of the driving forces for introducing disability discrimination legislation here and overseas was to address discrimination in employment.

Non-discriminatory participation in the labour market is an important social and economic issue. Employment not only provides income to facilitate other forms of social participation, but also contributes to an individual's sense of self-worth and to others' perceptions of that individual. It is an important source of social interaction and networking. The Intellectual Disability Services Council, for example, commented that employment is an important means to many ends, including a better lifestyle and greater opportunities for socialising and integration (sub. 162). Ronnit Redman emphasised the importance of work in defining a person's identity (sub. DR348).

In chapter 5, the Productivity Commission examines the effectiveness of the DDA in achieving its objects, concluding that disability discrimination in employment remains a significant issue, and that the DDA appears to have been relatively ineffective in this area (see chapter 5 and appendix A). However, if the many recommendations that the Commission is suggesting are adopted, the Commission considers that the DDA will become a much more effective instrument. Questions then arise as to the need for additional measures to address employment and, if so, whether the DDA is the appropriate place for them.

The case for addressing employment of people with disabilities is accentuated by the increasing acceptance of the notion of 'mutual obligation', and by the Australian Government's proposed tightening of the conditions for obtaining the Disability Support Pension. Mutual obligation might result in fewer people being eligible for that pension and more people with disabilities looking for employment. This increases the pressure to find ways to improve employment prospects for people with disabilities. The OECD has noted that mutual obligation offers a way of breaking the link between disability benefits and permanent withdrawal from economic activity. It cautions, however, that its implementation, while placing obligations on benefit recipients, also requires society to do more to help people with disabilities achieve reintegration (OECD 2003).

Affirmative action

As discussed in chapter 2, there are different views on the meaning of affirmative action. The International Labour Organization says that affirmative actions 'may consist of giving some advantage to members of target groups, where there is a very narrow margin of difference between job applicants, or of granting substantial preference to members of designated groups' (ILO 2003, p. 64).

Larry Laikind addressed the difference between discrimination legislation and affirmative action. Affirmative action, he said:

> … simply means policies, practices or laws to favour persons with disabilities (for example). It has been called many things in the past such as positive action, special measures or even reverse discrimination. Whereas anti-discrimination legislation is equality legislation designed to remove barriers for more equal participation, affirmative action directly favours a particular group because of the attribute or quality. (sub. 70, p. 2)

Affirmative action can therefore include a range of policies such as:

- a commitment by employers to recruit more widely or to meet voluntary employment targets for minority groups
- mandatory planning, reporting and auditing techniques to ensure employers implement complying policies
- a legislative requirement to recruit/employ fixed quotas of minority group members.

Some inquiry participants expressed support for various forms of affirmative action. For example, the Disability Council of New South Wales (sub. 64) and the New South Wales Council for Intellectual Disability (sub. 117) supported the use of quotas. Other participants supported more flexible forms of affirmative action, such

as voluntary targets applying to either the public sector or throughout the economy (New South Wales Office of Employment Equity and Diversity, sub. 172; Council for Equal Opportunity in Employment, trans.; Dennis Denning, trans.; Mark Hunter, trans.).

Some participants recommended the adoption of an employment equity approach, inspired by recent developments in Canada, Northern Ireland and the United Kingdom (box 8.2) (Equal Opportunity Commission Victoria, sub. 129; New South Wales Anti-Discrimination Board, sub. 101; Anti-Discrimination Commission Queensland, sub. 119). The essence of this approach is that designated (usually public sector) employers are required to develop plans for greater employment of the target group, and that regulators have powers to audit these plans and direct employers. An administrative model already operates in the New South Wales public service (New South Wales Anti-Discrimination Board, sub. 101; New South Wales Office of Employment Equity and Diversity, sub. 172).

At their most extreme, affirmative actions take the form of mandatory quotas that require designated employers to employ a certain percentage of people with disabilities. The Commission does not favour mandatory quotas. Quotas are distortionary, blunt instruments, susceptible to problems in definition and administration, and to the extent they override the merit principle of selection, would be detrimental to workplace productivity. The diverse range of disabilities in the community would make it difficult to specify the target group. If it were all people with disabilities, employers might be biased towards those types of disabilities with the highest productivities. On the other hand, if targets were expressed in terms of particular disabilities, tradeoffs between groups become a problem.

There are also data problems. Some disabilities are apparent, or might need to be divulged to the employer if they are relevant to the job, but in many cases they are not. Employers therefore could never be sure about the precise number of people with disabilities present in their workforce at any point in time and hence might not know if they are complying with the quota. The OECD (2003, p. 105) has noted that quota fulfilment in all countries that have quotas is ‘relatively low’, due to problems with eligibility criteria, quota specifications and administration (see appendix E).

Affirmative action policies need not extend to quotas. Other more subtle approaches are possible. Noting the absence of evidence that quota systems work effectively, HREOC saw the employment equity approach ‘as more promising’ (HREOC, sub. 219, p. 34) However, the Productivity Commission notes that these programs also lack many of the features of good regulation. Although potentially less distortionary than quotas, and well intentioned, they impose vague obligations on the target firms, are bureaucratic in nature, and rely more on coercive measures than incentives.

Box 8.2 **Employment equity measures in Canada, the United Kingdom, Northern Ireland and South Africa**

In **Canada**, the Employment Equity Act 1995 aims to address disadvantage in employment experienced by women, visible minorities, Aboriginal people and persons with disabilities. The legislation imposes on federally regulated private and public employers of more than 100 persons a duty to achieve proportional representation of minority groups (that is, a quota), through the adoption of employment equity plans designed to remove barriers to employment participation. The Canadian Human Rights Commission has the power to audit employer performance to ascertain whether an employer is complying with the legislation. If the employer is not in compliance, then the commission can issue a compliance notice or, if non-compliance persists, ask a tribunal to issue an order of compliance.

In the **United Kingdom**, the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, places a general statutory duty on a wide range of public authorities to promote racial equality and prevent racial discrimination. The Commission for Racial Equality, any other organisation or an individual can apply to the High Court for judicial review of a public authority's failure to comply with the general duty. If the commission is satisfied that a public authority is not complying with its specific duties, it has the power to serve a compliance notice requiring the authority to take action. If, after three months, the authority has not taken action as directed, the commission can apply to a court to order compliance.

Affirmative action provisions in **Northern Ireland** are based in the Fair Employment and Treatment (Northern Ireland) Order 1998 and the *Northern Ireland Act 1998,* which legislate affirmative action to combat discrimination against racial and religious minorities in the private and public sectors. Employers have to adopt 'equality schemes' and review their employment policies periodically. Public authorities are also required to publish equality impact assessments detailing whether the work of the authority has had any adverse or positive impacts on the promotion of equality. The Equality Commission has the power to monitor compliance and to issue a legally enforceable direction in some cases.

In **South Africa**, the Employment Equity Act of 1998 requires designated employers to take affirmative actions. Affirmative actions are defined broadly but are meant to 'ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer' (article 15).

Source: ILO 2004.

Like other affirmative actions, to the extent that these measures favour people with disabilities over other applicants, they may create resentment and prove counterproductive. This was the view of both the Australian Chamber of Commerce and Industry (ACCI) and the Disability Discrimination Legal Centre of NSW. ACCI opposed affirmative action in general:

> Largely because, in terms of the examinations we've seen, we are not convinced they work, for a range of reasons. Now, by 'work' I mean in terms of across the entire workforce, and whether in fact there are actually negative implications of doing this sort of arrangement or not. (trans., p. 694)

The Disability Discrimination Legal Centre of New South Wales was concerned about the message that affirmative actions can convey:

> If we start saying, 'Employ people with disability as a positive duty' and with less emphasis on merit, you will find society becoming resentful of the fact that a person with a disability, who perhaps doesn't quite have the ability to do the job, is being given the job over and above others who do have the qualifications. Then we are breeding resentment against people with disability. We promote equality, in terms of equality of opportunity. If our merits are equal, and we are able to do the job as a person with a disability, and what we then need to assist us to do it is a bit of reasonable accommodation, then that's what we want. (trans., p. 2523)

It is also arguable that affirmative action policies, with their emphasis on outcomes and not discrimination, exceed the scope of discrimination legislation. To the extent that they may be considered appropriate in the circumstances, they should be considered through other policies.

An employers' duty

The Productivity Commission's draft report for this inquiry canvassed the introduction of an 'employers' duty' in the DDA. This duty would require employers to take 'reasonable steps' to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities. Such a duty would be different from the duty to make reasonable adjustments. The duty to make reasonable adjustments would require that adjustments be made as the need arises, whereas the employers' duty would oblige some action to be taken irrespective of what subsequently happens.

In practice, 'reasonable steps' could include:

- examining recruitment practices for potential indirect discrimination
- looking at characteristics of current staff and reasons for any underrepresentation of people with disabilities
- considering access issues or undertaking an access audit
- developing a voluntary action plan.

Such a duty could be enforced through the complaints process, with HREOC and the courts required to have regard to the steps taken by the employer before the complaint arose.

This duty would have some parallels with existing occupational health and safety duties that require employers to provide a safe workplace, but its *ex ante* nature also means there are important differences. The benefits of the duty from the point of view of potential employees is that it would place a greater onus on employers to be disability aware and have a complying workplace. To the extent that employers became aware of the duty and implemented it, it could help lessen discrimination in recruitment, which is where the Commission suspects the problems are greatest.

There are some parallels between this idea and that proposed for inclusion in the UK DDA by the Disability Rights Commission (DRC 2003a). The DRC has proposed, among other things, that:

> … employers should be subject to a duty to anticipate the requirements of potential disabled employees and applicants, and to take reasonable action to remove barriers in advance of individual complaint. (DRC 2003a, p. 27)

Compliance with the duty would be 'considered when an individual requires a particular reasonable adjustment' (DRC 2003a, p. 30). However, there are some important contextual differences between the UK and Australian Acts that must be considered. The UK DDA, for example, does not contain a prohibition on indirect discrimination, whereas the DDA does. The DRC acknowledges that a prohibition on indirect discrimination (in relation to race and gender) is a means of addressing 'systemic' discrimination and encouraging 'employers to proactively examine their policies and practices to determine if they inadvertently disadvantage particular types of employee' (DRC 2003a, p. 28). Why it did not advocate for an indirect discrimination prohibition instead of, or in addition to, the employers' duty is not clear.

The employers' duty raised in the draft report struck a sympathetic chord with some participants. For example, ACE National Network (sub. 361) and Ability Technology Limited (sub. DR295) supported its adoption.

However, the Productivity Commission acknowledges that there are some major problems with this type of duty. For example, it would often be difficult to anticipate how an employer should respond and the costs of compliance for small firms could be substantial. The Australian Industry Group noted that:

> It is unreasonable for employers to be required to identify and develop strategies to remove barriers to the employment of people with disabilities when the employer does not know what form of disability a potential employee may have. It is equally unfair to expect an employer to develop strategies to remove barriers when a person with a disability may never apply for a job with the employer. (sub. DR326, p. 26)

The Australian Chamber of Commerce and Industry (sub. DR288) and the Department of Employment and Workplace Relations (sub. DR299) commented

similarly. For example, the Department of Employment and Workplace Relations stated:

> Given the range of disabilities, it would be very difficult and costly for an employer to be prepared to eliminate the barriers to employment proposed by every form of disability. (sub. DR299, p. 21)

The Australian Chamber of Commerce and Industry was more broadly critical of the employers' duty regarding it as costly and unjustified. It said that such regulations carry 'the prospect of being inimical to the interests of persons with disabilities' (sub. DR288, p. 6).

The Productivity Commission acknowledges that there are problems with operationalising such a duty and has decided not to recommend this approach. Many of the recommendations it has made should make the DDA more effective, in particular that there be an explicit duty to make reasonable adjustments. And as many participants have commented, there is much to be gained by educating employers about their responsibilities (see chapter 10). The Commission notes too that, unlike the UK DDA, the presence of a prohibition against indirect discrimination in Australia's DDA provides some assistance in addressing systemic discrimination in work arrangements.

8.2 What checks and balances are required?

The Commission accepts the argument that there are good reasons for treating people with disabilities differently by creating a duty to make reasonable adjustments. But duties like these are not costless. To some extent they involve tradeoffs between the rights of different groups. People with disabilities benefit but only by putting a corresponding duty on the employer, the shopkeeper or whoever it is who must provide the accommodation. As illustrated elsewhere in this report many adjustments are relatively simple and inexpensive, but it is also true that some are not. A mechanism is needed to ensure that adjustments are reasonably proportionate to the situation. This is also sensible in a broader sense. The community has a limited capacity to supply adjustments, hence it is important to ration them across all possible adjustments to achieve the best overall outcome. Ways of spreading the cost burdens are addressed in section 8.3.

The Commission has recommended that the adjustment duty be expressed in terms of reasonableness and that reasonable adjustments be explicitly linked to unjustifiable hardship. However the unjustifiable hardship test does not currently apply universally across the DDA, and may be overridden by standards.

The other major safeguard in the Act is the inherent requirements test contained within the employment provisions. The effect of the inherent requirements test is that employers can lawfully discriminate against a person with a disability if they are unable to carry out the inherent requirements of the particular employment.

Of course, other features of the DDA also provide safeguards of one form or another, for example, the reasonableness component of the indirect discrimination definition, and the various exemptions (see chapters 11 and 12).

Unjustifiable hardship

Many of the DDA's prohibitions on discrimination in particular activities—including those that address employment, education, access and goods and services—are subject in whole or in part to the defence of 'unjustifiable hardship' (see chapter 4). Section 11 of the DDA specifies that:

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

Rationale for an unjustifiable hardship defence

The unjustifiable hardship defence has the effect of capping the obligation to make adjustments so that the response is reasonably proportionate to the circumstances of the case. Thus, the benefits and detriments to all persons concerned must be considered, but even if this comes out favourably, a court could find that unjustifiable hardship existed because of the financial effects on the person who has to provide the adjustments.

In the second reading speech for the Disability Discrimination Bill 1992, the then Minister said that, in recognition of the potential adjustment costs the Act would impose, an unjustifiable hardship defence in the DDA would be:

> … very significant in terms of the overall effects of this legislation on service providers, businesses and employers. (Australia 1992a, p. 2751).

The intention was to provide a balance to the Act's obligation to make adjustments.

There were many views on including an unjustifiable hardship defence in the DDA. Some inquiry participants questioned the validity of an unjustifiable hardship defence (for example, Carers Australia, sub. 32). Others said it 'undermines the objectives of the DDA' (New South Wales Council for Intellectual Disability, sub. 117, p. 8). The National Ethnic Disability Alliance said the unjustifiable hardship clause does not encourage discriminators to think more innovatively about what they can do to accommodate people with disabilities, or how they can address systemic discrimination problems (sub. 114). Some of these comments would be addressed through the duty to make reasonable adjustments.

Other inquiry participants pointed out that the federal racial and sex discrimination Acts do not have equivalent unjustifiable hardship clauses (Disability Council of New South Wales, trans. p. 1097). The *Age Discrimination Act 2004* also lacks such a clause.

However, the DDA differs subtly from these Acts. Though they may also imply some obligation to make reasonable adjustments, any such adjustments can be readily identified and addressed, and for the most part are unlikely to cause great hardship. The sorts of adjustment sometimes needed to accommodate people with disabilities in work, education or other situations would not be required for a person of a different race or sex or age only.

Internationally, other disability discrimination Acts contain provisions similar to the DDA's unjustifiable hardship provisions, and for similar reasons. The equivalent defence in the Americans with Disabilities Act 1990 (ADA) is 'undue hardship' (s.101(10)), which is defined as 'an action requiring significant difficulty or expense'. In the Canadian Employment Equity Act 1995, 'efforts to accommodate' individuals with disabilities 'are required up to the point where the person or organization attempting to provide accommodation would suffer undue hardship' (LDAC 2003, pp. 1–2). The UK DDA similarly puts a limit on the duty of employers to make reasonable adjustments requiring that regard be had to costs, the effectiveness of the adjustment and the employer's financial resources, among other things (s. 6(4)).

Some inquiry participants who disapproved of the unjustifiable hardship defence in principle, nevertheless acknowledged the variable and occasionally high costs of making adjustments for people with disabilities. They agreed that 'the exemption may need to remain in certain 'justifiable circumstances', such as where the costs of adjustment are too great for the person or business on whom they fall (New South Wales Council for Intellectual Disability, sub. 117, p. 8). Others said that an unjustifiable hardship defence is necessary and appropriate (Robin and Sheila King, sub. 56; HREOC, sub. 143; Australian Taxi Industry Association, sub. DR311;

Public Interest Advocacy Centre, sub. 102; Anti-Discrimination Commission Queensland, sub. 119, sub. DR335; Larry Laikind, sub. 70).

On balance, an unjustifiable hardship defence is important to facilitate the efficient and equitable application of the DDA. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting adjustments that impose unjustifiable costs or other hardships on individual providers or others in the community.

FINDING 8.2

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

Scope of unjustifiable hardship

The defence of unjustifiable hardship is limited to particular areas in the DDA. As noted by HREOC, 'unjustifiable hardship defences in substantive provisions do not cover all situations where such a defence might be relevant' (sub. 143, p. 20). The areas in which it does not currently apply are:

- in education, after enrolment
- in employment, between hiring and dismissal
- administration of Commonwealth laws and programs
- sports
- land.

Limits in the coverage of unjustifiable hardship have caused problems and created uncertainty for organisations dealing with people with disabilities, particularly in the education sector.

Education

Under section 22(4) of the DDA, it is not 'unlawful to refuse or fail to accept a person's application for admission as a student' if the student would require services or facilities, 'the provision of which would impose unjustifiable hardship on the education authority'. However, the DDA is silent on post-enrolment situations, which has been interpreted to mean that the unjustifiable hardship defence applies only to initial enrolment and not to other, post-enrolment situations

that might require an adjustment (see, for example, *Kinsela v QUT* (1997) HREOCA 5).

Inquiry participants from the education sector regarded this gap as a major flaw in the DDA. HREOC said the gap should be regarded as 'an oversight' or 'drafting error' (trans., p. 1147).

Inquiry participants from the education sector said the extension of the unjustifiable hardship defence to post-enrolment situations is desirable because students' educational needs can change significantly over time. The Association of Independent Schools of South Australia said:

> Some Independent schools have found themselves in the dilemma of offering a place and then over time finding via ongoing review that they do not have the sufficient resources to meet the needs of the individual student as they develop and mature or their condition deteriorates. (sub. 135, p. 14)

In such circumstances, the current arrangements might create incentives for educators to avoid or discourage the enrolment of students with disabilities, in case those students might need adjustments that would impose an unjustifiable hardship later in their education. The Association of Independent Schools of the Northern Territory said 'schools should be encouraged to "have a go" rather than claim unjustifiable hardship' as their first option (Alice Springs visit notes).

The availability of the unjustifiable hardship defence in post-enrolment situations might help to reduce this undesirable incentive. Where students' circumstances change, schools would be encouraged to find the best educational solution for the student—including the possibility of transferring the student to a more appropriate educational setting—without fear of contravening the DDA.

Employment

Although it is unlawful to discriminate in all aspects of employment (including job interviews, job offers, wage offers, training, promotion, transfers and termination), the unjustifiable hardship defence is available only with respect to job offers and employment termination (s.15(4)).

The absence of the defence for situations within employment, such as a person's rights to training and opportunities for promotion (s.15(2)(b)), creates the perverse incentive to discriminate at the recruitment stage. If an employer expects the costs of adjustment for a prospective employee to increase over time, for example in response to a subsequent promotion, they might not want to take them on in the first place.

The Commission is not aware of any reason for treating situations within employment any differently to the hiring and dismissal stages. It appears that the absence of this defence is not well known among employers, and hence it might not be having much effect. But its uncertain application does not help. If it were amended, it would help create greater certainty about the way the DDA applies to employment, and remove an obstacle to lessening discrimination in the workplace.

Administration of Commonwealth laws and programs

The unjustifiable hardship defence is not available in relation to the administration of Commonwealth laws and programs. Virtually all Australian Government departments and agencies can be characterised as administering Commonwealth laws and programs. Other organisations, including State, Territory and local governments and private sector businesses, are also often involved in some way in administering Commonwealth laws and programs.

The confusion over what is or is not a Commonwealth program, and hence whether this defence is denied to government service providers, concerned the New South Wales Government which said:

> Specifically, it is not clear whether unjustifiable hardship applies to social housing, as the exemption applies to public premises but not to the administration of Commonwealth programs. Social housing programs occur under the umbrella of the Commonwealth State Housing Agreement. Consequently, some advocate that 100 per cent of public housing should be accessible. This is not achievable in public housing stock without significant efficiency and cost impacts. (sub. 220, p. 2)

Although the unjustifiable hardship defence is unavailable to Australian Government departments and agencies with respect to administration of laws and programs, it is available to them as employers and potentially as providers of goods and services.

The omission of an unjustifiable hardship defence in the administration of Commonwealth laws and programs is often cited to be a special case. First, it is sometimes assumed that the revenue raising powers of the Australian Government give it unlimited ability to fund all adjustments, regardless of their cost. However, the Australian Government manages resources on behalf of the whole community and not for itself. It must decide where the community's resources should best be deployed. Resources spent on adjustments that benefit only some individuals will mean that fewer resources are available for Australian Government programs that may benefit others, including other people with disabilities. The efficiency and equity implications of these choices need to be considered in a balanced manner and in relation to the whole community.

Second, it is often said that the Australian Government should set an example for the whole community in its conduct towards people with disabilities. But the Australian Government can demonstrate this commitment in a variety of ways, most directly through its laws and programs, and broad policies such as the Commonwealth Disability Strategy (see appendix E). Denying the possibility of an unjustifiable hardship defence under the DDA may not be the most effective or efficient vehicle for demonstrating the Australian Government's commitment to administering its laws and programs in a non-discriminatory way, particularly if it might mean that fewer resources are available to implement Australian Government programs that benefit people with disabilities, carers and other people in the community.

In addition to these arguments of principle, HREOC noted some practical reasons for allowing an unjustifiable hardship defence in the administration of Commonwealth laws and programs. First, the Australian Government might face a high burden of proof to show there is unjustifiable hardship in any particular case. Second, competing public purposes would be considered equally on their merits, rather than some public purposes receiving a blanket exemption from the unjustifiable hardship provisions of the DDA, but not other purposes (HREOC, sub. 143).

Disability standards and unjustifiable hardship

As well as featuring in the DDA, the unjustifiable hardship defence can be included in disability standards. Unjustifiable hardship appears in the disability standards for accessible public transport (the only standards yet introduced; see chapter 14), and the draft disability standards for education (see below and appendix B) and access to premises (see appendix C).

As explained in chapter 14, disability standards can both clarify and alter the way in which the DDA applies. The standards introduced or proposed to date illustrate how the unjustifiable hardship defence has variously been clarified (transport), amended (education) or annulled altogether (access to premises with respect to new buildings).

Public transport

The disability standards for accessible public transport include an extensive list of criteria that may be taken into account, where relevant, in determining unjustifiable hardship. Among other things the criteria include the benefits reasonably likely to accrue to people with disabilities, other passengers and other persons concerned,

and a host of other operational and financial considerations (Disability Standards for Accessible Transport 2002, s.33.7(3)–(4)).

HREOC explained that these detailed criteria were necessary to clarify the application of unjustifiable hardship in public transport cases, because 'there have not been any court decisions under the DDA specifically regarding the application of unjustifiable hardship to transport issues' (sub. 143, p. 65). HREOC added that the unjustifiable hardship defence was necessary as a trade-off to enable a shorter timetable for the standards' implementation and to avoid 'adopting a lowest common denominator set of obligations and/or providing for extensive detailed exceptions' (sub. 219, p. 27). It thus enabled a shorter timetable and higher requirements to be set elsewhere in the standards (see chapter 14 and appendix C).

Draft disability standards for education

The current draft of the disability standards for education proposes to alter the application of unjustifiable hardship in two significant ways. First, it would extend unjustifiable hardship to post-enrolment situations. Second, it would augment the concept of unjustifiable hardship with the additional concepts of 'reasonable adjustment' and 'unreasonable adjustment', which are similar but 'not identical' (see appendix B).

The Productivity Commission supports the idea of extending the unjustifiable hardship defence to post-enrolment situations. However, for reasons of transparency, consistency and clarity, the Commission considers that amending the DDA is preferable to attempting to address such an anomaly in the disability standards alone (see chapter 14).

The introduction of the concepts of reasonable and unreasonable adjustment in the standards raises other issues. The Commission supports the standards' use of the term 'reasonable adjustment'. It is for the most part consistent with the approach outlined earlier in this chapter, though it is unhelpful in creating a divergence between unreasonable adjustment and unjustifiable hardship. Defining reasonable adjustment as all adjustments that do not cause unjustifiable hardship would resolve this issue.

If the DDA were amended to extend unjustifiable hardship to post-enrolment situations, an appropriate role for the disability standards might be to clarify the criteria for determining unjustifiable hardship in education, in much the same way as the disability standards for accessible public transport have done for that area.

Access to premises

If implemented, the draft access to premises standards would deny the owners of new buildings access to the unjustifiable hardship defence. Marrickville Council argued that this was appropriate because 'the developer of a new development fully enters into a development site knowing that there are these regulations to adhere to, and there should be no excuse for not keeping to those'(trans., p. 2414). This point was also made by HREOC (trans., p. 2877).

The Commission disagrees: the views of Marrickville Council and HREOC might be appropriate if the adjustments needed are always inexpensive and easy to adapt to the circumstances. However, to require the same level of adjustments in all circumstances, irrespective of the costs or the likely benefits, is not good policy. The draft Regulation Impact Statement (RIS) for the access to premises standards has revealed that many adjustments can be made at little cost, but that some have the potential to increase the costs of some types of new buildings by approximately 60 per cent. As noted in chapter 6, these standards have the potential to restrict competition and distort resource allocation.

The draft standards would permit owners of existing buildings to claim unjustifiable hardship when undertaking major renovations, and administrative protocols have been proposed for addressing accessibility issues, including interpretation of unjustifiable hardship. In many cases, it is easier to build accessibility in at the outset, than it is to amend existing premises. And, as noted, the costs are often quite moderate. It is therefore likely that unjustifiable hardship might be difficult to prove in the case of many new buildings. However, the defence should be available.

Conclusions on the scope of unjustifiable hardship

The Productivity Commission considers that there are good reasons to extend the unjustifiable hardship test to all areas of the DDA. As a duty to make adjustments might be implied from existing provisions, an across the board unjustifiable hardship defence is required as the Act stands now to provide the necessary balance. It would seem that the Australian Government intended it to apply it universally in the first place. According to HREOC:

> The second reading speech introducing the Disability Discrimination Bill indicated an intention to apply the concept of unjustifiable hardship as a general limitation on the legislation, although the drafting of substantive provisions did not fully reflect this. (sub. 143, p. 28)

If the Commission's proposal for a duty to make reasonable adjustments were adopted, an accompanying unjustifiable hardship defence would become even more important as an across the board safeguard to balance rights and obligations.

FINDING 8.3

The unjustifiable hardship defence does not cover all areas of the Disability Discrimination Act 1992. *Major areas not covered include education post-enrolment, employment between hiring and firing, and administration of Commonwealth laws and programs. If the draft disability standards for access to premises were adopted, the unjustifiable hardship defence would be denied to developers or owners of new buildings.*

RECOMMENDATION 8.2

The* Disability Discrimination Act 1992 *should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

Determining unjustifiable hardship

The DDA does not define unjustifiable hardship. Instead, all relevant circumstances including the four criteria listed earlier are to be taken into account in determining what constitutes an unjustifiable hardship (s.11). Unjustifiable hardship has consequently been interpreted on a case-by-case basis by HREOC and the courts.

The case law approach

Inquiry participants had mixed views on the workability of the current case-by-case approach to determining unjustifiable hardship under the DDA.

Some inquiry participants said case law provides insufficient guidance on the meaning of 'unjustifiable hardship' in employment, education and other areas (see for example, Disability Action Inc., sub. 43; Mental Health Coordinating Council, sub. 84; National Ethnic Disability Alliance, sub. 114; New South Wales Council for Intellectual Disability, sub. 117; Association of Independent Schools of South Australia, sub. 135). One issue with the case law approach is that it can take time for useful precedents to be established. Disability Action Inc. for example, stated that:

> … the costs and risks associated with Federal Court action means that there is not adequate case law on many aspects of the DDA such as 'unjustifiable hardship' to give clarity to the DDA. (sub. 43, p. 4).

On the other hand, the Public Interest Advocacy Centre said there have been few problems in determining unjustifiable hardship in practice:

> … a significant body of jurisprudence has developed in relation to the principle of 'unjustifiable hardship' and the methodology whereby courts and HREOC evaluate the evidence required to apply section 11. In particular, the case law gives guidance to complainants and respondents on the type of evidence required, the format of the evidence and the weighting process involved in determining if 'unjustifiable hardship' arises. Courts are experienced at interpreting the weighing provisions and evaluating the type of expert evidence raised in these cases. Neither HREOC nor the Federal Court have had undue difficulty in applying section 11, proving it to be far from unworkable. (sub. 102, pp. 3–4)

ACROD said it preferred the courts to decide how unjustifiable hardship should be interpreted, because 'case-based reasoning is much safer than codified and inflexible rules of compliance and reprimand' (sub. 45, p. 2). HREOC expressed a similar view on the importance of flexibility (sub. 143, p. 22), but pointed out that unjustifiable hardship has 'been interpreted and fallen where we would have expected' in the courts (trans., p. 1138). Blind Citizens Australia said unjustifiable hardship 'does not require clarification' (trans., p. 1677).

The Productivity Commission considers that delays in waiting for case law to develop for certain applications of the DDA may mean that some clarification is required of how unjustifiable hardship might apply in the interim. Indeed, as mentioned previously one reason the transport disability standards address unjustifiable hardship in detail is because there had not been sufficient case law on that particular application of the DDA.

FINDING 8.4

There is a lack of guidance as to how unjustifiable hardship might apply to particular areas of the Disability Discrimination Act 1992. *This could be addressed through disability standards or guidelines.*

Criteria for determining unjustifiable hardship

Although case law might be helpful in developing a workable approach to applying unjustifiable hardship, the question remains of whether the criteria are adequate in the first place. The benefits and detriments and financial circumstances criteria (ss.11(a) and 11(c) respectively) have attracted the most attention.

Jack Frisch raised a number of concerns with the way unjustifiable hardship can be interpreted, arguing that its ambiguity has undermined the effectiveness of the DDA (sub. 196, pp. 28–33). His concerns relate to: the incidence of the costs; the measurement of benefits; whether the detriments and benefits to persons other than

the complainant and respondent are to be considered and what weights they should be given; and how the financial circumstances of the respondent are to be defined. Among other things, he recommended that the DDA needs to be explicit in defining unjustifiable hardship as a cost-benefit exercise and that the ultimate incidence of costs needs to be considered.

The Productivity Commission generally agrees with Frisch's views on the importance of these matters. Ideally, unjustifiable hardship should be considered within a social welfare framework that looks at all costs and benefits, and includes all persons who are likely to accrue a benefit, bear a cost or suffer a detriment. Quantifying all of the costs and benefits will not always be possible, inevitably requiring the courts to exercise their discretion in making a qualitative assessment.

HREOC and the courts appear to have adopted a broad approach to defining detriments and benefits. For example, financial and non-financial issues have been emphasised in education cases, especially regarding the effects on other students. In the case of *Finney v Hills Grammar School*:

> … the decisions make clear that consideration of unjustifiable hardship issues in education is by no means restricted to financial issues and in particular that any issues of educational benefits or detriments have to be considered. (HREOC, sub. 143, p. 62)

The High Court has emphasised that the safety considerations of other students and teachers should be considered in determining unjustifiable hardship:

> The nature of the detriment likely to be suffered by any persons concerned, if the student was admitted, would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides. Any negative impact that may be caused by the presence of a student with a disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted. Thus, the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff. (*Purvis v State of NSW (Department of Education and Training)* (2003) HCA 62, para 94)

The courts and HREOC have also taken a broad approach to what is meant by 'any persons concerned'. For example, *Maguire versus SOCOG* (2001) HREOC 93-123, considered the benefits of an accessible website to the complainant and other visually impaired people. Further, in its Frequently Asked Questions on employment, HREOC has indicated that consideration should also be given to the benefits or detriments to 'other employees or potential employees, customers or clients or other persons who would reasonably be affected' (HREOC 2003f, p. 17). The Productivity Commission considers that these are appropriate considerations as they permit an overall assessment to be made of the net social benefit of the adjustment concerned.

Frisch's point about cost incidence brings in the importance of examining financial circumstances. A cost–benefit analysis might conclude that an adjustment has net social benefits, but if the organisation concerned operates in a competitive industry, its ability to pass on the costs will be limited. If an adjustment with the same net benefit were made by an organisation operating in a less competitive sector of the economy, a completely different conclusion might be reached, because that organisation might be able to pass on the costs. In an increasingly competitive and open economy, Frisch argued that an increasing number of firms might be able to claim unjustifiable hardship because they cannot pass on the costs and do not have any economic surplus to pay for them (sub. 120).

These arguments indicate that a large degree of flexibility is needed in determining unjustifiable hardship in different circumstances. Financial and non-financial factors, such as tradeoffs between the rights of different groups and safety considerations, will be relevant on a case-by-case basis. There is also a need to take a broad view of who is affected by the adjustment. In all cases, potential costs and benefits should be examined from both a communitywide and an individual or business perspective. As many costs and benefits may be intangible, the assessment will need to examine both quantitative and qualitative factors.

Nevertheless, there may be a case for giving the courts better guidance on the nature of those costs and benefits and how to identify the persons or groups affected. In particular, it should be made clear that in all cases, the first step is to make a communitywide cost–benefit assessment to determine whether the different 'facility or service' required by the person with a disability should be provided. This would require some consideration of the benefits and detriments to the community as a whole, not just those to the person or persons that are immediately affected. If there is no social net benefit, then the adjustment should not be made (for example, if the adjustment will seriously inconvenience more people than it assists).

If the proposed adjustment would produce a net community benefit, then the financial and other circumstances of the individual or business who is being asked to make the particular adjustment (or provide the 'different accommodations') should be examined. These two questions should not be regarded as alternatives, but rather, as a two-step test.

Assessing unjustifiable hardship is likely to involve looking at different factors in each case, depending on the area of activity and the circumstances in which the adjustment is being requested. For example, a claim of unjustifiable hardship from a small school will involve very different considerations to a claim from a large employer. Trying to incorporate all of these in the DDA could prove cumbersome and would be better relegated to standards or guidelines.

FINDING 8.5

Unjustifiable hardship is best determined through broad criteria that can be applied flexibly to individual cases.

In section 8.3 the Productivity Commission examines the issue of who should pay for adjustments. It has been presumed until now that the organisation that is required to make the adjustment, pays for the adjustment. But this might not be the most equitable or efficient arrangement. Furthermore, if the organisation concerned can prove that it cannot afford the adjustment, the community might have to forgo otherwise worthwhile opportunities.

The Commission considers that an additional clause to the list of 'relevant circumstances' may help to recognise the role of the broader community in funding adjustments. The UK DDA provides an example. In defining the reasonableness of steps an employer might take to meet the duty to make reasonable adjustments, that Act requires that, among other things, regard should be had to 'the availability to the employer of financial or other assistance with respect to taking the step' (s.(6)(4)(e)). The advantage of such a clause is that it recognises the mutual obligations of the various parties concerned. It puts an onus on the organisation providing the adjustment to become aware of potential sources of funding, and it puts pressure on government and others to provide such assistance. The clause allows for the assistance to come from any source, not necessarily from government. This could include non-government organisations and entities affiliated with the organisation concerned. The Productivity Commission considers that a similar clause should be drafted to suit the circumstances of Australia's DDA.

There is one more amendment that should be made to unjustifiable hardship provisions. This concerns subsection 11(d), treatment of action plans. In chapter 14 the Commission notes the unusual way that service providers are defined for the purpose of making an action plan under Part 3. 'Service providers' are defined as government departments, educational institutions and persons who 'provide goods or services; or makes facilities available whether for profit or not' (s.59). It is unclear whether other organisations can register plans or whether plans can cover other areas of activity such as employment. In considering unjustifiable hardship, an action plan must be taken into account (s.11(d)), but only 'in the case of the provision of services, or the making available of facilities'. This would seem to imply that some organisations and persons might not be able to have their action plans considered (suppliers of 'goods' for example) in assessing unjustifiable hardship.

Further, both these interpretations of the term 'service providers' could be confused with the DDA's coverage of organisations that provide 'goods, services and facilities' (s.24). Although all of these descriptions could be interpreted broadly to cover virtually all persons and organisations, they create inconsistencies and confusion. The Commission is not aware of action plans not being considered in assessing unjustifiable hardship because they were prepared by an organisation or person that did not fit the description in subsection 11(d). However, this vague and seemingly restrictive approach does not help interpretation of the Act. The DDA should make it clear that any person covered by the Act can register their action plan, and can expect to have it considered in assessing unjustifiable hardship.

RECOMMENDATION 8.3

The criteria for determining unjustifiable hardship in the* Disability Discrimination Act 1992 *(s.11) should be expanded to:

- ***require consideration of the costs and benefits to* all *persons and an assessment of the net benefit to the community***
- ***include as a relevant circumstance, the availability of financial and other assistance***
- ***clarify that any respondent to a complaint (not just 'service providers') can expect to have their action plan considered.***

Inherent requirements

The 'inherent requirements' provision of the DDA applies to employment only. The term appears repeatedly in the Part 2 provisions concerning 'Discrimination in work'. A similar concept applies to sports, whereby discrimination is lawful if a person 'is not reasonably capable of performing the actions reasonably required in relation to the sporting activity' (s.28(1)(a)) (see chapter 4).

Inherent requirements form the basis of an important exemption or safeguard in the DDA. They mean that discrimination in employment on the ground of disability is not unlawful if a person is 'unable to carry out the inherent requirements of the particular employment' (s.15(4)(a)), even after the employer has provided different facilities or services (that do not cause unjustifiable hardship).

The inherent requirements provisions of the DDA are similar to a provision of the *Workplace Relations Act 1996* which does not make it unlawful for employers to dismiss an employee due to a disability (or other attributes) if that disability means the employee cannot meet the inherent requirements of the position (s.170CK(2)).

Defining inherent requirements

The DDA does not define the term 'inherent requirements'. Based on its context, the term appears to refer to the activities that are essential to the satisfactory completion of the tasks required to do a job. It can also extend to the manner in which the tasks are completed.

Various court decisions have highlighted aspects of 'inherent requirements' in different employment contexts (box 8.3). HREOC (2003f) summarised the relevant factors for determining inherent requirements in employment, as identified in *Woodhouse v Wood Coffill Funeral P/L* (1998) HREOCA 12:

- the work required in practice for the particular position
- duties that might be required in an emergency or at periods of high workload
- the results to be achieved in the position (as opposed to the means for achieving the results)
- the circumstances in which the work must be performed
- applicable awards and competency standards and mandatory requirements arising from other laws (such as occupational health and safety laws).

Considerations of speed, precision, workplace harmony and safety can thus form part of the inherent requirements of a job.

HREOC raised the additional point that 'requirements contained in another law'—such as those arising from the Workplace Relations Act or occupational health and safety Acts—and qualification requirements 'may well be recognised as inherent requirements or at least recognised as reasonable requirements for indirect discrimination purposes' (sub. 143, p. 34).

HREOC added that 'the terms of applicable awards and agreements will be relevant to, but not necessarily decisive of, the inherent requirements of a job' (sub. 219, p. 33). The *Human Rights and Equal Opportunity Commission Act 1986* specifies procedures for complaints of discrimination that arise under an industrial award (see chapter 9).

Some inquiry participants said the courts' interpretations of inherent requirements have been clear and appropriate. The Darwin Community Legal Service said it is 'reasonably comfortable with the interpretation the courts have given of inherent requirements' (trans., p. 17). It noted that a fairly narrow interpretation has been made to date, because:

Box 8.3 **Defining inherent requirements**

X v The Commonwealth HCA (1999) 63

A soldier, discharged in 1993 after testing positive for HIV, lodged a DDA complaint with HREOC. HREOC upheld the complaint because it considered that the ability to 'bleed safely' in a combat situation was an 'incident of employment' rather than an inherent requirement of a soldier's job. On appeal, the Full Court of the Federal Court rejected HREOC's determination. The court interpreted 'inherent requirements' to include the health and safety of fellow employees and the physical environment in which the employee may occasionally find himself (the battlefield). X's appeal of the Federal Court's decision was dismissed in the High Court.

Cosma v Qantas Airways Ltd. FCAFC (2002) 425

The defendant was injured in the course of his job as a cargo handler for Qantas. Following a lengthy period of alternative duties and vocational training, the employee was retrenched because no alternative positions were available. The defendant took action in the Federal Court under s.15 of the DDA but was unsuccessful. The Full Court subsequently rejected his appeal of that decision.

In its ruling, the Full Court of the Federal Court made a number of points in relation to the definition of 'inherent requirements'.

- When assessing a person's capacity to fulfil the inherent requirements of a position, only the requirements of pre-injury employment are to be considered, not those of alternative duties.
- 'A practical method of determining whether or not a requirement is an inherent requirement … is to ask whether the position would be essentially the same if that requirement were dispensed with'.
- The DDA should not be interpreted as requiring that an employer modify a job's inherent requirements in order to accommodate an employee with a disability. Rather, workplace adjustments are designed to allow a worker to meet those requirements.

> … to allow the requirements to extend to whatever an employer declares to be necessary or convenient or efficient for its operation would be basically to take any of the teeth out of the Act. (trans., p. 17)

Other participants said that inherent requirements should be made clearer and easier to understand for the general public and employers. Distinguishing between the inherent and the non-essential requirements of a position can be difficult and requires a close examination of the duties involved in a job. The ability to perform certain duties in an emergency may be an inherent requirement for airline cabin personnel, for example, but not for the ticket sales staff who work for the same company.

The definition of inherent requirements can be elusive in many cases. The Attorney-General's Department said each job must be considered carefully and individually:

> The reference to 'inherent' requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral … the requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work. (sub. 115, p. 8)

This approach requires a detailed knowledge of the nature and duties of each position in a business. Margaret Kilcullen said it is difficult for people seeking employment to identify the inherent requirements of a particular job:

> … part of the problem with the concept of inherent requirements is that it … imposes a hardship upon employees because it's not in fact standard practice for them to know what the inherent requirements of a job are before the interview. (Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 40)

This problem of limited knowledge (or 'knowledge asymmetry') in applying for employment arises for all job applicants and not just those with disabilities. Duty statements typically mention which selection criteria are 'essential' and which are 'desirable', but such distinctions will not necessarily correlate with what the courts might deem to be inherent requirements. It is possible, also, that a court might find that the position has inherent requirements that are not in the duty statement.

Margaret Kilcullen added that, like the job applicant, the prospective employer may not always have a clear and definite knowledge of the inherent requirements of a new or unfilled position, depending on the business and the circumstances (Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 40).

Uncertainties could also arise from the trend towards 'credentialism' in the Australian and international labour markets, whereby employers ask for formal qualifications that are not required to do the job, or that are at a higher level than needed, as a screening method in recruitment (see, for example, Buchel et. al. 2003; Eraut 2001; Buon 1998).

Clarifying inherent requirements

There are several options for improving guidance on the meaning of inherent requirements in the DDA. One option is to define the term in the Act. The Intellectual Disability Services Council said it would be 'advantageous' to define inherent requirements because 'every effort needs to be made to clarify the provisions' (sub. 162, p. 4). However, unless the definition were long and detailed,

this approach might not provide practical guidance on what is, and is not, an inherent requirement in employment. A practical, simple, single definition that covers all eventualities may prove difficult to develop.

A more practical approach could be to define the factors to be taken into account in determining whether a requirement for a job is an 'inherent requirement'. A list of criteria would be more helpful than a single fixed definition for identifying inherent requirements in practice. These criteria could be based on those already identified by the courts and HREOC as being relevant (see above and box 8.3). There are three ways to implement such a list of criteria.

First, the DDA could list the criteria to be taken into account in identifying inherent requirements, as it does for some other important concepts (such as unjustifiable hardship) (section 8.2). Criteria listed in the DDA (as opposed to disability standards, guidelines or elsewhere) would be more accessible and provide greater legal certainty. Examples of inherent requirements in different types of employment could be included to illustrate the criteria, much like the examples provided in the explanatory memorandum for the Age Discrimination Bill 2003.

Second, the criteria could be included in disability standards for employment, or for aspects of employment such as recruitment practices. However, there have been problems in developing disability standards for employment, and the standards appear unlikely to proceed soon (see chapter 14). Further, the protracted negotiations during previous attempts to draft disability standards for employment illustrate the potential difficulties of attempting to draft disability standards for inherent requirements.

Third, the criteria could appear in explanatory material from HREOC, such as advisory notes or guidelines, based on case law and other material. HREOC already publishes such information in a number of formats, such as its 'frequently asked questions' on employment (HREOC 2003f). Jobwatch (sub. 215) and Janet Hope in conjunction with Margaret Kilcullen (sub. 165) recommended inherent requirements as a suitable subject for guidelines. The Office of the Director of Equal Opportunity in Public Employment suggested such guidelines could 'draw heavily on resources arising from successful conciliation cases' (sub. 172, p. 5).

The Productivity Commission considers that the most practical and effective approach would be to address, in guidelines, the factors that might be taken into account when identifying inherent requirements. This would enable a reasonably detailed approach to be taken in providing background material that could be applied on a case by case basis. It would also be flexible to allow for changing circumstances. Elsewhere the Productivity Commission recommends that guidelines on employment be developed for the DDA and updated as needed (see chapter 14).

In relation to inherent requirements, these guidelines could draw on the 'frequently asked questions' that HREOC has published (HREOC 2003f), conciliation agreements (anonymously) and case law.

The Commission concludes that the inherent requirements provisions in the DDA are important from the perspectives of employers and employees (and prospective employees). From the employers' perspective, inherent requirements provide an important safeguard that underpins the merit principle in employment decisions. For employees, inherent requirements mean that employers cannot discriminate against them by using failure to meet non-essential requirements as a reason. Guidelines would help employers and employees to identify the inherent requirements for particular jobs.

There is, however, one legislative amendment that should be made to address an apparent anomaly in the way inherent requirements apply to some employment situations and not others. Currently, like the unjustifiable hardship defence, the inherent requirements defence is not available between the hiring and dismissal stages of employment. It does not apply, for example, in relation to promotions. No good explanation has arisen for why this is so, nor to the Commission's knowledge is it a major issue with employers. The current lack of this defence would appear to have the unusual result, for example, that failure to meet the inherent requirements of a more senior position could not be used by an employer to refuse to promote a person. Although not a seemingly urgent issue, this matter should be addressed.

FINDING 8.6

The inherent requirements defence does not currently apply to within-employment situations. This might discourage employers from employing people with disabilities because it limits their ability to train, transfer and promote whom they choose.

RECOMMENDATION 8.4

The defence of inherent requirements should be available to employers in all employment situations.

8.3 Who should pay?

The DDA, like most other disability discrimination legislation, places the responsibility for funding adjustments solely on organisations covered by the Act. No corresponding obligation exists on people with disabilities, on governments,[3] or on consumers generally. This implies that, should an organisation successfully

[3] Except in their role as employer, provider of goods and services, educator, etc.

argue that an adjustment would cause them an unjustifiable hardship (as it is currently defined), no alternative source of funding need be considered under the Act. In these circumstances, the proposed adjustment might not go ahead, even if it would be to society's overall benefit.

The question of who should pay for adjustments can be analysed from both a theoretical and a pragmatic standpoint. Both approaches are now adopted in turn.

Theoretical approach

Stein (2003) provides a formal framework within which to compare the costs and benefits of workplace adjustments, and to decide which adjustments should be: funded by employers; funded by taxpayers; or not be undertaken. Stein identifies a range of possible adjustments, ranging from wholly efficient to wholly inefficient, depending on the ratio of quantifiable costs to benefits (box 8.4). From Stein's analysis, a clear delineation of adjustment funding responsibilities emerges.

In essence, Stein's funding rule is that employers should pay for any adjustments that allow them to maximise profit. This rule applies even in cases where disability discrimination legislation is required to show employers that they would benefit from employing and/or accommodating a person with a disability (see chapter 7).

More controversially, Stein argues that employers should be made to pay for adjustments that, while benefiting them in absolute terms, do not benefit them as much as the alternative of employing a person without a disability who needs no adjustments (example 2a in box 8.4). Stein argues that such adjustments therefore 'extract a differential cost from employers' (2003, p. 143).

Finally, when employers stand to gain no net benefit—or risk incurring a loss—from employing/accommodating a person with a disability, two possibilities arise.

- If hiring and/or accommodating produces a net social benefit, then employment should go ahead, with adjustments to be funded by government. To impose this cost on the employer would be unreasonable.
- If employment of a person with a disability would result in a net social loss, then employment should be discouraged and replaced with social security benefits (Stein 2003, pp. 176–77).

Implications and limits of Stein's approach

Stein's approach helps clarify some of the efficiency and equity considerations that might guide the apportioning of disability adjustment costs. It might also inform the

application of the DDA's unjustifiable hardship defence (and the Commission's proposed duty to make reasonable adjustments).

Box 8.4 **Stein's taxonomy of employer accommodations**

Hiring and/or accommodating a person with a disability generates costs and benefits for the employee, the employer and society in general. Some of these costs and benefits are quantifiable. Based on a comparison of all assessable costs and benefits, Stein distinguishes five types of accommodation, grouped into three broad categories.

1. Wholly efficient (Pareto optimal) accommodations

(a) *Voluntarily made accommodations*: these are undertaken voluntarily by the employer, without the need for government compulsion or intervention. Even after allowing for adjustment costs, the employee with a disability is the most profitable person to employ. In this scenario, the employer, the employee and society reap maximum benefits from the adjustment.

(b) *Quasi-voluntary accommodations*: these would be made voluntarily by the employer, but for the existence of market failures such as information asymmetry. Disability discrimination legislation remedies these failures, for example, by coercing information exchanges between employers and employees. This leads to the most profitable person for the job—the employee with a disability—being hired, even if adjustments are necessary. The employer, the employee and society again enjoy maximum benefits.

2. Socially efficient (Kaldor-Hicks welfare enhancing) accommodations

(a) *Semi-efficient (ADA) accommodations*: these would not be made voluntarily in the absence of disability discrimination legislation. While both the employee and the employer benefit from the decision to hire and/or accommodate, the benefit accruing to the employer (after possible adjustments) is less than that which would have been generated by the employment of a person without a disability.

(b) *Social benefit gain accommodations*: these result in zero profit or even a loss for the employer, yet yield a net social benefit. For this type of accommodation to be efficient, the value of the overall benefit generated should at least equal the cost to the employer of employing the person with a disability (including adjustments). Stein states that 'this is an area where the state has the potential to compensate losing employers and should do so out of self-interest' (p. 174).

3. Wholly inefficient accommodations

In this scenario, employing and/or accommodating a person with a disability would create a net cost not just for the employer, but for society also. It would be more efficient not to make the adjustments and exclude that person from the workplace, in exchange for welfare benefits.

Source: Stein 2003.

- Where disability discrimination legislation only serves to clarify the benefits for employers of hiring and/or accommodating people with disabilities

(quasi-voluntary accommodations, example 1b in box 8.4), employers should pay for adjustments because it is in their interest and efficient to do so. Thus, where the only obstacle to the greater employment of people with disabilities is the lack of knowledge by employers and other organisations—for example, about cost-effective adjustments or the availability of government subsidies—then government funding of adjustments is unwarranted.

- At the other extreme, there are those adjustments that are not beneficial from the perspective of employers or the community and should not be required. This is consistent with the Commission's recommended approach to making the unjustifiable hardship defence encompass a community-wide approach to estimating the costs and benefits.
- In between these two is a grey area where social benefits exceed social costs, but there is insufficient benefit from the employer's perspective to make the adjustments voluntarily. Under the Commission's revised unjustifiable hardship defence, these adjustments would pass the first hurdle of providing a net social benefit. Using Stein's approach, some of these adjustments would be funded by the employer and some by the community.

Stein's classification system provides only limited guidance in this socially but not privately optimal world. First, his distinction between semi efficient and social benefit accommodations is essentially arbitrary. Both involve an opportunity cost to the employer (that being that profit would be maximised by not employing the person with the disability who needs accommodations). Further, it is not as clear as Stein suggests that semi efficient accommodations should be funded entirely by employers and social benefit accommodations should be funded entirely by government.

Second, the ways in which costs are distributed among firms can affect competition and resource allocation (see chapter 6). Restrictions on competition could arise if firms with different characteristics have a differing ability to successfully claim unjustifiable hardship) because, for example, of size or their inability to pass on the costs of adjustments to their customers. In the Australian context, these issues assume an extra dimension because disability discrimination legislation can be enforced either through complaints or through disability standards.

A third limit to the Stein approach is that it focuses exclusively on employment issues. Yet disability discrimination legislation mandates adjustments in many other areas. When adjustments are made in, for example, goods and services, or transport, they can benefit people other than the person with a disability and the organisation making the adjustment, such as parents with prams and elderly persons who may benefit from more accessible transport.

In summary, the possible competition effects and wider costs and benefits of adjustments raise issues of efficiency and equity (fairness) in funding, which cannot easily be resolved by reference to Stein's approach. It nevertheless focuses attention on the general group of adjustments which both governments and organisations should be funding, and paves the way for a more pragmatic approach to policy options.

Pragmatic approach

There are two ways of answering the question of who should bear the costs of social policies and community objectives (such as the elimination of discrimination against certain groups) that are more pragmatic than Stein's.

The first possible argument relies on the proposition that if the community, through the government, decides that a particular social objective is worth pursuing, then the community should pay for it through taxes. Under this 'community pays' approach, governments should use taxpayer funds to compensate organisations for any costs imposed on them by the community's objectives contained in disability discrimination legislation.

The second argument treats social objectives as just another 'cost of doing business'—similar, for example, to the costs of providing employees with a safe workplace or ensuring a product meets safety standards. Any costs imposed on the organisation by its obligation to be non-discriminatory (including the costs of adjustments) would thus be regarded as a social cost of production that should appropriately rest with the organisation (and its customers and suppliers if the organisation can pass on some of the costs). If the cost of removing discrimination can be spread sufficiently broadly across an industry—for example, through disability standards—then its incidence is little different to an industry-based tax.

Neither of these two approaches precludes some sharing of costs between government and other groups within the community, including individual organisations. Even where government can be expected to bear most of the costs imposed by legislation, some measure of financial involvement by producers and consumers would be justified. Conversely, under a 'social cost of production' approach, there would be reasons for government to bear part of the cost burden.

The factors influencing the distribution of costs between government and individual groups within the community are examined below, in relation to disability standards and complaints-based enforcement of the DDA.

Funding implications of disability standards

The pattern of costs and benefits associated with disability standards and, therefore, the implications for equity and efficiency in funding, differ somewhat from those associated with complaints-based enforcement. While disability standards rely, to an extent, on individual complaints for their enforcement, they impose widespread compliance requirements that are usually clear, precise and well publicised. Moreover, they can be linked to independent monitoring and compliance regimes—for example, through such bodies as Local and State Government planning authorities. As a result, organisations that do not comply with disability standards are at greater risk of litigation than those that do not comply with the general provisions of the DDA.

This greater risk suggests that organisations are more likely to carry out the adjustments imposed by the disability standards.[4] The costs of these adjustments are thus more likely to be faced by all organisations in the industry, rather than by a few organisations subject to complaints. A 'social cost of production' approach to funding the costs of disability discrimination policies could apply in this circumstance, whereby all organisations in an industry would face the costs of making their product accessible. Moreover, costs faced by an entire industry will be passed on by organisations to their customers (except, arguably, overseas customers). This will result in an efficient distribution of the cost burden, because consumers will receive price signals reflecting the benefits that they derive from consuming accessible goods and services. This point can be illustrated by reference to the transport disability standards, but it applies equally to all standards that impose relatively uniform costs across an industry (box 8.5).

The distribution of costs and benefits under standards might lead to the conclusion that it is sufficient to let the burden of compliance fall solely on a particular industry and its customers. However, a case for some government funding might remain in three sets of circumstances.

First, governments may want to speed up the implementation of the standards, or ensure that organisations meet more than the minimum targets set in standards. This might be desirable to bring forward the benefits of implementing the standards for people with disabilities or for the government.

4 Disability standards in some areas, such as employment, would be unlikely to have the same widespread effect—for example, a person with a disability would still need to apply for a job before the employer could comply with the standards' requirements concerning hiring practices.

Box 8.5 **Incidence of costs and benefits under the transport disability standards**

By imposing accessibility requirements on all public transport providers, the transport disability standards have the potential to affect four distinct groups: providers, customers with disabilities (and their carers), other customers and governments.

In the Regulation Impact Statement prepared for the transport disability standards, consultants Booz Allen & Hamilton estimated that the costs of implementing the standards would be faced by producers in the first instance. Although some increase in overall patronage was predicted to follow the implementation of the standards, it was not expected to offset costs. Benefits were forecast to accrue to both customers with disabilities (in the form of reduced travel costs) and those without disabilities (in the form of greater accessibility for elderly people and people with prams or luggage). Booz Allen & Hamilton also predicted that some benefits from the standards would accrue to government—for example, in the form of reduced expenditure on aged and health care, and on the Disability Support Pension.

Assuming that the costs of implementing the transport standards are faced equally by all organisations in the industry, these costs will be passed on, in part, to all the customers of that industry, including customers with disabilities. This arrangement is arguably equitable, given that most customers are expected to benefit from an accessible transport system. It is also mostly efficient, because the division of the cost burden between producers and consumers will be determined by alternative opportunities for resource use by each group.

Source: Attorney-General's Department 1999.

Second, governments may want to ensure the implementation of disability standards does not cause the levels or quality of service to drop in ways that would be socially undesirable. If, for example, exemptions and unjustifiable hardship provisions under the standards meant that specific services could not reasonably be expected to be provided by organisations (for example, accessible school buses in rural areas), governments might consider stepping in to fund these adjustments.

Third, governments might contribute where 'externalities' arise—that is, where benefits or costs accrue to sectors of the economy other than where disability standards are implemented. For example, the greater ability of people with disabilities to travel independently due to the transport disability standards might widen employment opportunities for them and their carers. Governments might also consider subsidising some segments of the transport industry to avoid undesirable outcomes. For example, fare increases generated by the disability standards could result in decreased public transport usage and increased road congestion. Such external benefits would not usually be considered in the decisions of public

transport providers regarding how much they charge for their services. This could lead to public transport provision that does not maximise benefits to society.

Funding implications of complaints-based compliance

The costs and benefits produced by the complaints mechanism, although they arise in all areas covered by the DDA, are best illustrated in terms of the adjustments that the DDA imposes on employers. Under that compliance enforcement mechanism, employers make workplace adjustments either voluntarily or when forced to do so in response to a complaint. This means that not all employers make adjustments, even when they employ people with disabilities who might benefit from them.

Depending on an organisation's degree of market power, the organisation may or may not be able to pass on part of the costs of adjustments to its customers and suppliers. In an increasingly competitive economy, few organisations would be able to pass on the costs. This would make it difficult to rely on a social cost of production approach to justify making organisations pay for adjustments.

The unpredictable or arbitrary imposition of adjustment costs under a complaints-based system raises important equity issues. In a given market, firms, employees, consumers and suppliers selected at random will be required to fund workplace adjustments. The inequitable distribution of the costs of adjustment is likely to detract from the DDA's objectives. Employers, for example, may seek undetectable ways of discriminating against employees with disabilities if they feel unfairly penalised by the provisions of the DDA. And employees and customers without disabilities might object to subsidising (in effect) the costs of adjustments through lower wages and higher prices respectively. This could encourage resentment.

As well as equity concerns, efficiency might be affected if the arbitrary distribution of the adjustment burden under a complaints-based system leads to restrictions on competition. Resource allocation throughout the economy would be distorted if the production costs of some firms within an industry reflected the social cost of production, while those of their competitors did not.

Given these possible drawbacks, and given that the duty to make adjustments stems from the community's desire to remove barriers to people with disabilities, a 'community pays' approach would be more appropriate in the case of complaints-based compliance. It may also be more appropriate in areas such as employment where the costs of adjustment are inherently arbitrary, depending on where people with disabilities apply for jobs. This approach would avoid distortions and is already in use in many other areas of government social policy. Governments

offer some compensation to organisations when, for example, their employees are called for jury duty or are members of the army reserves. HREOC's proposal for a national paid maternity leave scheme recognised that government funding is justified if government imposes wider social objectives on organisations that will increase their costs (HREOC 2002b, 2002i). Another example is in the education sector, where governments fund schools for at least part of the accommodation costs required by students with disabilities in non-government schools (see chapter 15 and appendix B).

In the area of employment, some government funding of disability aids and equipment used for employees with disabilities is already available (see chapter 15). Although it might be expected that organisations absorb most of the cost of equipping staff as a normal cost of doing business, this should not necessarily be the case when additional costs arise from wider social objectives.

The adoption of a 'community pays' approach to the funding of adjustments does not mean that the organisations covered by the DDA should not incur any of these costs. While it might be desirable for government to fund most of the 'lumpy' adjustments costs that the legislation imposes arbitrarily, these organisations should continue to incur some of the costs of removing discrimination, for two main reasons.

- Many organisations are willing to pay at least part of the costs, so government need only fund the incremental costs necessary to induce socially desirable adjustments. The difficulty is in deciding what proportion each should pay to achieve the desired result and may need to involve some experimentation (see chapter 15 for a discussion of funding issues).
- Paying for some of the costs of adjustments limits incentives for organisations to ask the government to pay for unnecessary adjustments. It also creates incentives for these organisations to develop low cost ways of meeting their duties under the legislation.

In conclusion, the two possible approaches to apportioning costs created by the DDA are not equally suited to the different methods of enforcing the Act. The 'social cost of production' approach is equitable and efficient in situations in which disability standards apply. This approach provides employers, producers and consumers with appropriate incentives and price signals. However, where complaints remain the main enforcement mechanism, the difficulty of applying uniform duties on all organisations (for example, in employment) means this approach would have undesirable equity and efficiency effects. A 'community pays' approach is justified in such cases, which implies a greater funding role for government.

Nonetheless, both approaches lead to the conclusion that the costs imposed by the DDA should be shared between governments and organisations directly affected.

People with disabilities might also be involved in funding adjustments. In practice, they already pay for many of the costs associated with their disability. While they should not have to fund adjustments mandated by the DDA, occasions may arise where they might wish to contribute to an upgrade in the specifications of those adjustments (for example, a better quality screen reader). This would be most likely to occur in areas such as education or employment.

FINDING 8.7

It is generally appropriate for the costs borne under the Disability Discrimination Act 1992 *to be shared between the organisations required to make adjustments and governments.*

As noted earlier, the Productivity Commission has recommended that the unjustifiable hardship defence be amended to include a new criterion that would require consideration of financial and other assistance available to organisations for making adjustments. This will help broaden the responsibility for funding adjustments to governments and other groups.

The Productivity Commission considers that it is appropriate for government to play a major role in funding adjustments in the workplace and elsewhere. This would serve to increase efficiency, equity and the opportunities for people with disabilities to participate as equals in society (see chapter 15)

8.4 Conclusion

This chapter has argued that substantive equality is a sound basis for disability discrimination legislation, and that an explicit duty to make reasonable adjustments be included in the DDA as a means to this end. This would remove the confusion over what is currently implied by the Act and is consistent with the principles of the Australian Government at the time the DDA was introduced.

The Productivity Commission recommends such a duty be included, provided it is always subject to the unjustifiable hardship defence, including in disability standards. ‘Reasonable adjustments’ should be defined to exclude adjustments that would cause unjustifiable hardship. This safeguard is necessary to ensure that adjustments are more likely to produce net benefits for the community, and do not impose undue financial hardships on the organisations required to make them.

The Commission is also recommending that the unjustifiable hardship defence be clarified to always require an assessment of the net benefits of making adjustments. This would require a quantitative and qualitative assessment of the community-wide impacts. Where possible costs and benefits should be quantified, but the broad framework envisaged would also allow consideration of trade-offs in the rights of the different groups concerned.

Imposing an obligation on organisations covered by the DDA to make adjustments has important efficiency and equity implications. There are good arguments for organisations and governments to share the costs. It is difficult to make hard and fast rules in this area. However, it appears that the Australian Government could play a more substantial role. The Commission is recommending a new criterion be added to the unjustifiable hardship test that would require the courts to consider the extent to which respondents had attempted to access available financial and other assistance. This would strengthen the bonds of mutual obligation between the organisations that must make the adjustments and the rest of the community.

9 Equality before the law

The second object of the *Disability Discrimination Act 1992* (DDA) is to ensure equality before the law for people with disabilities. This chapter examines the concept of equality before the law, its treatment under the DDA and the effectiveness of the DDA in four areas in which inquiry participants raised particular issues:

- ensuring quality accommodation for people with disabilities, particularly those living in institutions
- providing appropriate safeguards for decision making by (and for) people with cognitive disabilities
- removing barriers to fair and equal treatment in the justice system and in civic participation for people with disabilities
- challenging laws that deliberately or inadvertently discriminate against people with disabilities.

Many of these areas fall primarily within the Constitutional responsibility of the States. This has significant implications for the effectiveness of the DDA in ensuring equality before the law for people with disabilities. This chapter examines ways of strengthening the DDA and other policy responses to ensure equality before the law.

9.1 The Disability Discrimination Act and equality before the law

The DDA contains few, if any, substantive provisions that relate directly to the object of equality before the law. As the Human Rights and Equal Opportunity Commission (HREOC) stated '… the reach of the substantive provisions of the DDA is limited compared to this object' (sub. 143, p. 39).

Early drafts of the Disability Discrimination Bill contained specific provisions on equality before the law, but these were dropped before the Bill was presented to Parliament (section 9.5).

This section examines the following aspects of the DDA that have relevance to equality before the law:

- the 'equality before the law' object
- relevant HREOC functions.

Later sections cover other aspects of the DDA.

The object

The second object of the DDA is:

> … to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community … (s.3(b))

There has been little elaboration of this object. The explanatory memorandum to the DDA states in regard to all the objects of the DDA:

> [The objects clause] … is also designed to ensure that people with disabilities have, as far as possible, the same rights as other citizens. (Explanatory memorandum, p. 7)

Inquiry participants did not raise many concerns about this object.

Equality before the law is a fundamental human right. Australia is a signatory to the UN International Covenant on Civil and Political Rights, which states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. (article 26)

However, practical limits need to be taken into account in pursuing equality before the law for people with disabilities.

- Some people with disabilities are unable to make reasonable decisions about their personal circumstances or their financial and legal affairs (section 9.3).
- The DDA includes exemptions where the rights of people with disabilities are constrained, such as public health measures relating to infectious diseases, *Migration Act 1958* decisions, and combat and peacekeeping services (see chapter 12).

The UN Declaration on the Rights of Mentally Retarded Persons and the UN Declaration on the Rights of Disabled Persons recognise situations in which some people with disabilities are unable to exercise their rights in a meaningful way, or in which it is necessary to restrict or deny some rights.

Functions of the Human Rights and Equal Opportunity Commission

Section 67 of the DDA confers functions on HREOC that contribute to achieving equality before the law. First, HREOC can undertake research and educational programs for the purpose of promoting the objects of the Act (s.67(1)(h)). HREOC has undertaken several pieces of influential research in various areas of equality before the law, including on the sterilization of girls and young women with intellectual disability (HREOC 2003d).

Second, HREOC can report to the Minister on actions that the Australian Government should take on matters relating to discrimination on the ground of disability (s.67(1)(j)). HREOC does not appear to have used this function to date.

Third, HREOC is empowered to examine Commonwealth enactments (and, when requested by the Minister, proposed enactments) (that is, Australian Government Acts of Parliament) to determine whether they are inconsistent with the objects of the DDA, and to report to the Minister (s.67(1)(i)). HREOC has exercised this function on occasion. In 1996-97, HREOC commented on regulations restricting Medicare benefits for psychiatric services (box 9.1).

Box 9.1 **HREOC investigation of changes to Medicare benefits for psychiatric services**

Regulations introduced in 1996 meant the Medicare rebate for psychiatric consultations was halved after a patient's 50th visit in any one year. The Regulations were intended to address overservicing, but there were concerns about their effect on people with high support needs. HREOC investigated whether the Regulations were inconsistent with or contrary to the objects of the DDA.

HREOC considered the original restrictions on Medicare benefits for certain psychiatric services had a discriminatory impact on people with a psychiatric disability. However, the Regulations had been modified following further consultations, and HREOC concluded that they were no longer inconsistent with the objects of the DDA. The restrictions that remained were comparable to those that applied to Medicare benefits for other areas of medical treatment, rather than singling out psychiatric treatment and psychiatric patients. HREOC's involvement appears to have assisted in achieving these improvements.

Source: HREOC 2003d, p. 26.

However, HREOC noted that 'use of this function to date has been limited':

> … principally because issues of discrimination identified to HREOC as priorities for action whether through complaints or through other means have generally concerned discrimination in practice rather than discrimination embedded in laws. There is some

> scope however for HREOC to give increased attention to this function as and if it is identified as a priority including through this inquiry. (sub. 143, pp. 35–6)

Several inquiry participants raised concerns about laws with potentially discriminatory effects (although many of these were State or Territory rather than federal laws) (section 9.5). Other participants raised concerns about consistency between the DDA and other laws (Australian Airports Association, sub. 213; Association of Independent Schools of South Australia, sub. 135) (see chapter 12). The Productivity Commission considers that this function could play an important role in bringing concerns about federal laws to the attention of the Attorney General.

FINDING 9.1

There appears to be potential for the Human Rights and Equal Opportunity Commission to make greater use of its power to examine Commonwealth legislation and report to the Minister on its consistency with the Disability Discrimination Act 1992.

Fourth, where thought to be appropriate and with the leave of the court, HREOC can intervene in court proceedings that involve issues of discrimination on the ground of disability (s.67(1)(l)). HREOC stated that it has had little opportunity to use this power:

> So far, opportunities to appear as *amicus* or intervene in court proceedings under the DDA have been limited. In several cases where the Commissioner had indicated an interest in joining the proceedings the matter has settled before going to hearing. (HREOC 2003d, p. 15)

The Australian Human Rights Commission Legislation Bill 2003 (currently before Parliament) would require the renamed Human Rights Commission to obtain the leave of the Minister to intervene in court proceedings under the DDA or the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) (or, if the president of the new commission is a Federal Court judge, to notify the Attorney General).

In the explanatory memorandum for the Bill, the Australian Government argued:

> Requiring the new Commission to seek the Attorney General's approval for such an intervention before the new Commission exercises its function to seek leave to intervene will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account. (Explanatory Memorandum, p. 9)

A number of inquiry participants expressed concern that this proposal would undermine the new Human Rights Commission's independence (particularly in

situations where the Australian Government is a party to the matter). The Australian Human Rights Commission Legislation Bill 2003 is outside the terms of reference for this inquiry (see chapter 1). However, the Productivity Commission notes the concerns of inquiry participants and observes that independence is an important characteristic of organisations such as HREOC.

In a related issue, the Anti-Discrimination Board of New South Wales (sub. 101), the New South Wales Office of Employment and Diversity (sub. 172) and Women with Disabilities Australia (sub. DR318) suggested expanding HREOC's intervention powers to cover proceedings involving industrial relations issues, based on the New South Wales model.

Under the HREOC Act, complaints about discriminatory acts done under an award can be made to HREOC. If the president of HREOC considers that a discriminatory act has occurred, then the complaint must be referred to the Australian Industrial Relations Commission (AIRC) (s.46PW).

The AIRC is required to take account of the DDA (along with the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*) in performing its functions (*Workplace Relations Act 1996*, s.93). It is also required to ensure that a decision or determination affecting an award does not contain provisions that discriminate on the ground of 'physical or mental disability' (among other grounds), and must not certify an agreement if it thinks that a provision of the agreement discriminates against an employee on the ground of 'physical or mental disability' (*Workplace Relations Act 1996*, ss.143(1C)(f) and 170LU(5)). The DDA does provide a partial exemption for capacity-based wages in awards and agreements in some circumstances (s.47(1)(c)) (see chapter 12).

The Productivity Commission considers that current arrangements dealing with the interaction between HREOC and the AIRC appear to provide adequate protection in industrial relations matters for people with disabilities. Although discrimination in employment is an issue (see chapter 5), it does not appear to derive from discriminatory acts done in accordance with awards. If any such discriminatory acts do arise, dealing with them is properly the role of the AIRC, which has statutory responsibilities to take account of the DDA.

FINDING 9.2

Current provisions in the Human Rights and Equal Opportunity Act 1986 *(Part IIC) dealing with discriminatory acts done in accordance with Awards are appropriate.*

9.2 Accommodation

Under the Commonwealth State and Territory Disability Agreement (CSTDA), accommodation services for people with disabilities are the responsibility of the States and Territories (see chapter 15). Historically, many people with disabilities were institutionalised, particularly people with intellectual disabilities and some forms of mental illness. Since the 1970s, emphasis has been placed on integrating people with disabilities into the community—an approach commonly called de-institutionalisation. This section examines issues raised by inquiry participants relating to those people with disabilities who remain in institutions, the effects of de-institutionalisation, and the potential role for disability standards for accommodation.

People with disabilities in institutions

According to the ABS Survey of Disability, Ageing and Carers, 184 000 people with disabilities lived in 'cared accommodation' in 1998 (ABS 1999b, p. 21).[1]

People with disabilities living in institutional accommodation can face constraints on their choice, liberty and privacy, and are vulnerable to abuse or neglect (Stephanie Mortimer, sub. 13). The Office of the Public Advocate, Victoria stated:

> Many people with disabilities live in accommodation specifically provided for them by government or community-based agencies. Any disability specific support services are sometimes also often provided by the same agencies. This means that these people with disabilities are wholly reliant on the service provider to provide for them and lack real choices about how, when or even if such services are provided. In such situations many are vulnerable to being exploited, abused or neglected. (sub. 91, p. 3)

In addition, several inquiry participants raised concerns about the inappropriate placement of young people with disabilities in aged care nursing homes (Queensland Parents for People with a Disability, sub. DR325; UnitingCare Australia and UnitingCare NSW/ACT, sub. DR334; Hume Regional Forums; HREOC, sub. 143) (see chapter 15).

As discussed in chapter 15, the Productivity Commission considers that there is very limited scope to use the DDA complaints process to challenge government decisions about access to disability services or the quality of those services, although it should apply to the administration of those services.

[1] 'Cared accommodation' includes hospitals, homes for the aged (such as nursing homes and aged care hostels), cared components of retirement villages, and other 'homes' such as children's homes (ABS 1999b, p. 65).

However, there appear to be weaknesses in applying the DDA even to the administration of institutional accommodation. HREOC (sub. 143, p. 37) noted that 'the DDA has had limited impact to date on issues in institutional living' for several reasons. First, people living in institutions or their advocates are often reluctant to make complaints because they are concerned about the consequences. The accessibility of the DDA complaints process, including issues of victimisation, is discussed in chapter 13.

Second, HREOC stated that there are more effective mechanisms than the DDA to deal with complaints about institutional accommodation. Alternative mechanisms include internal complaints mechanisms for disability services under the CSTDA. The National Disability Services Standards have been adopted by all jurisdictions as the basis of quality assurance for disability services, and the CSTDA requires each jurisdiction to ensure these standards are 'upheld and monitored' (see chapter 15). However, many aspects of the CSTDA are 'aspirational' rather than mandatory, and do not have associated compliance mechanisms (see chapter 15). Complaints can also be made to specialist State and Territory bodies such as ombudsmen and public advocates (section 9.3). Serious allegations of abuse are more appropriately made to the police.

Inquiry participants questioned the usefulness of these alternative complaint mechanisms. Action for Community Living stated:

> Often these internal and other mechanisms are time consuming and it seems to be an undermining assumption that such people should be grateful for the services they receive and that people in 'institutional care' do not have the need nor right to any legal rights as such. (sub. DR330, p. 3)

The Productivity Commission considers that people with disabilities living in institutional settings appear to face particular barriers to achieving equality before the law. The quality of institutional accommodation for people with disabilities currently falls under the CSTDA, and arguably lacks sufficiently enforceable standards. It could be possible to improve the position of people with disabilities in institutional accommodation through the development of mandatory accommodation disability standards covering institutional accommodation. The possible development of accommodation disability standards is discussed below.

FINDING 9.3

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

De-institutionalisation

Growing acceptance of the social model of disability (see chapter 2) has led to a strong emphasis on the de-institutionalisation of people with disabilities, both internationally and across all States and Territories in Australia. The Equal Opportunity Commission Victoria stated:

> De-institutionalisation policies, which began in the early 1970s, coincided with and reflected a growing focus on individual human rights and dignity. The effects of these policies, which aim to enable people with disabilities to participate fully within the community, have become apparent in the last ten years. (sub. 129, p. 9)

The Australian Housing and Urban Research Institute (AHURI) noted 'a strategic emphasis on de-institutionalisation and the restructuring of housing assistance' over the past 15 years (AHURI 2001a). In particular, it noted the introduction of the Commonwealth State Disability Agreement (CSDA) (later replaced by the CSTDA), which set out the rights of people with disabilities to live within the community rather than in segregated settings. The CSDA stated:

> Accommodation support should not lock programs into one or two models. It should not be confined to group homes. It should be as flexible as the wide range of living options in the community generally and the ways that could be used to support individuals in those living options, for example, share houses or flats, co-tenancy or live-in arrangements or married living arrangements, or drop-in support models (Department of Community Services 1987, p. 1, *in* Hardwick et al 1987, p. 32)

Inquiry participants argued that the process of de-institutionalisation has raised several 'equality before the law' issues. Some inquiry participants argued that policies of closing institutions for people with disabilities are discriminatory because they deny choice to residents and families (Community and Institutional Parents' Action on Intellectual Disability, sub. 21; Kincumber Lodge Resident Advocacy Group, sub. 22; Robert Atkins, sub. 26; UnitingCare Australia and UnitingCare NSW/ACT, sub. DR334).

Many participants argued that de-institutionalisation has not been adequately supported by access to disability services. Chenoweth (2000) summarised many of these concerns, arguing that access to services and supports is essential for the wellbeing of those who have been moved into the community, and that the failure to provide sufficient resources could place people with disabilities in a more invidious position than they had in their previous institutional lives.

Inquiry participants' comments show little progress in this area since the 1993 Burdekin Report into de-institutionalisation of mental health care. That report found that savings from de-institutionalisation had not been directed into community-

based care and that such services were seriously underfunded (Burdekin 1993). However, HREOC noted that the scope of the DDA is limited in this area:

> Individuals (people with disabilities or parents) or organisations who consider that government policies regarding disability accommodation involve a discriminatory lack of choice are free to lodge complaints under the DDA. … However, … there would be a number of legal issues to address, including those of identifying appropriate comparators and assessing the applicability of the special measures defence for measures reasonably intended to address special needs. (sub. 219, p. 42)

The Productivity Commission recognises that de-institutionalisation can further the rights of people with disabilities. However, a policy of de-institutionalisation must recognise peoples' desire for choice and self-determination. De-institutionalisation also must be supported by access to disability services that allow people with disabilities to live in the community safely and with dignity. However, as noted above, the Commission considers that scope to use the DDA complaints process to challenge government decisions about access to disability services or the quality of those services is very limited (see chapter 15).

FINDING 9.4

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

Tenancy rights

Other inquiry participants argued that many people with disabilities in de-institutionalised accommodation lacked tenancy rights (Tony and Heather Tregale, sub. 30; Office of the Public Advocate, Victoria, sub. 91; Action for Community Living, sub. DR330). This can arise for several reasons.

First, many people with disabilities live in low cost private accommodation such as boarding houses and caravan parks, where there is very little tenancy law. They are regarded as licensees, rather than tenants, and have limited security of tenure. However, this is not a disability-specific issue. All residents of such accommodation share this problem.

Second, many people with disabilities in supported accommodation outside institutions are also not covered by residential tenancy laws. The Victorian *Residential Tenancies Act 1997*, for example, excludes 'health or residential services' from its coverage. In 2001, an independent working group in Victoria recommended extending tenancy rights to people in supported accommodation.

However, a 2003 Victorian Government review of disability legislation identified tensions in implementing these recommendations, including: the need to balance tenancy rights for people with disabilities with the need to provide support; concerns about the safety of other residents and staff; and concerns about the ability of some tenants to make informed decisions. For example, the right to notice before ending a tenancy might conflict with the need to move a disruptive individual. Although 'mainstream' tenancy law provides mechanisms for breaking a lease, these mechanisms were not designed with supported accommodation in mind. The review committee is currently reconsidering these issues.

The Productivity Commission agrees with the Victorian Government review that the extension of 'mainstream' tenancy rights to people with disabilities in supported accommodation could introduce tensions between the rights of tenants and the responsibilities of the service provider towards that tenant, staff and other residents. However, it might be possible to improve the position of people with disabilities in supported accommodation through the development of accommodation disability standards that clarified how such tensions should be resolved.

Accommodation disability standards

The DDA provides for the development of disability standards for accommodation (s.31(1)(c)). However, there has been little progress on the development of such standards. Although a number of disability peak bodies lobbied the DDA Standards Project in 2000 to begin work on accommodation standards, the Attorney-General's working group argued that priority should be given to work on other standards.

The DDA does not specify what areas of accommodation the disability standards were intended to cover. They could be limited to private rental accommodation or could address accommodation services specifically provided to people with disabilities, including those living in institutions and supported accommodation.

Disability standards for private rental accommodation?

As noted above, many people with disabilities live in low cost rental accommodation. Disability standards could provide greater clarity about the rights of people with disabilities in these forms of accommodation. However, the development of standards would raise several issues.

First, access to private rental accommodation is already addressed by the DDA provisions on access to premises, and goods, services and facilities. There are also draft disability standards on access to premises. Although inquiry participants such as Blind Citizens Australia (sub. DR269) noted the difficulty of proving

discrimination in rental decisions, it is not clear how accommodation standards would overcome these problems.

Second, people with disabilities are not the only residents in low cost accommodation. If regulation is required, it might be more appropriate for it to cover all residents. Otherwise, minimum standards for people with disabilities that do not apply to other residents might discourage landlords from renting to people with disabilities.

Third, tenancy rights are the responsibility of State and Territory governments. Accommodation standards would thus have implications for existing State and Territory arrangements. Victoria, South Australia and Queensland already have boarding house regulation. New South Wales has both licensed and unlicensed boarding houses, and has commissioned a review into the regulation of boarding houses licensed to provide accommodation for people with disabilities (The Allen Consulting Group 2003b, p. 1). However, national disability standards might provide uniformity in this area.

Fourth, although minimum standards covering areas of low cost housing might be desirable, their effect on affordability would need to be considered. There is already concern that the supply of low cost accommodation is rapidly shrinking, because of 'gentrification' in inner city areas, a decline in profitability and an increasingly complex client group (Department of the Premier and Cabinet, South Australia 2002). The Victorian Government stated:

> … 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. (sub. DR367, p. 3)

The Victorian Government noted that the Building Commission and the Australian Building Codes Board are about to commence research on the need for accessible forms of housing and options to stimulate appropriate supply. Research is planned to commence on 1 July 2004 and a draft report is planned to be available for public comment in mid 2005 (Victorian Government, sub. DR367, p. 25). The results of this research could provide the basis for the development of housing standards that could be applied throughout Australia (rather than specifically to private accommodation for people with disabilities).

The Productivity Commission considers that disability discrimination issues in private rental accommodation are largely addressed by the general provisions of the DDA. Issues about the supply and quality of low cost accommodation are better addressed by more general approaches such as the forthcoming Building Commission and Australian Building Codes Board research.

Disability standards for institutional and supported accommodation?

The Productivity Commission has noted above the limited application of the DDA complaints processes for institutional and supported accommodation. There appears to be potential for accommodation disability standards to overcome some of these limitations and provide greater equality before the law for people with disabilities living in these forms of accommodation.

As noted above, several inquiry participants supported improved tenancy rights for people with disabilities in supported accommodation. However, there was mixed support for accommodation standards for institutional accommodation, with one inquiry participant arguing that 'the standard should be that people with disabilities should not have to live in institutions' (Association for Community Living, sub. DR330, p. 3).

The Office of the Public Advocate, Victoria argued that disability standards would have to address a variety of settings:

> If an accommodation standard were to be developed, then care should be taken to ensure that minimum requirements are sufficient to meet the needs of all people with disabilities who might require such a standard in a variety of settings. Any accommodation standard needs to address both physical access and the quality of accommodation provided. (sub. DR310, p. 2)

But the Office also noted that it would be difficult for standards to address problems of supply or access to services:

> A lack of affordable, accessible, long term, secure accommodation of ALL types for people with disabilities in the open market as well as appropriate levels of support means that some people are forced into supported and/ institutional accommodation that may be physically accessible but at the same time such settings are not homes. (Office of the Public Advocate, Victoria, sub. DR310, p. 3)

The Disability Council of NSW argued that accommodation disability standards were unworkable:

> Council believes that an accommodation standard, as presently conceived, is unworkable given the broad range of issues it might attempt to address … (sub. DR291, p. 2)

The Productivity Commission notes the mixed support for disability standards in this area. This inquiry does not have enough information to recommend that standards covering institutional and supported accommodation be developed, or to determine what such standards should include. Separate consultative processes are necessary to set priorities for developing standards and to reach consensus on their content (see chapter 14).

9.3 Decision making by and for people with cognitive disabilities

Some people have a 'cognitive disability', which results in the person being unable to make reasonable decisions about their person or circumstances, or their financial and legal affairs. Included in this group are people with some forms of intellectual disability, acquired brain injury and acute mental illness.

There are practical limitations to achieving equality before the law for people with cognitive disabilities. For example, it is generally accepted that some restrictions on the rights of involuntary patients are justified; that some people with mental illness should not be permitted to own firearms; and that there are limits on the ability of some people with cognitive disabilities to make legally binding contracts.

In some circumstances, people with cognitive disabilities might not be in a position to understand or enforce their rights, although family, carers and advocacy organisations can sometimes act on their behalf (for example, in disability discrimination complaints—see chapter 13). However, given the risk that other people might make decisions that are not in the best interest of a person with a cognitive disability, legal rules have been developed to govern decision making by and for people with cognitive disabilities. Many of these limitations also give rise to issues in access to justice (section 9.4).

The States and Territories have primary responsibility for arrangements governing decision making by and for people with cognitive disabilities. Each State and Territory has institutional and procedural arrangements in place to cover:

- the rights of involuntary patients (including financial rights, privacy of correspondence, and restraint and seclusion practices)
- the admission, review of detention, and appeals against detention of involuntary patients
- consent for certain treatments
- the appointment of guardians and the provision of advocacy services
- financial administration, particularly choice of trust funds.

The role of the Office of the Public Advocate in Victoria in decision making by and for people with cognitive disabilities is summarised in box 9.2. All jurisdictions have similar arrangements. The Australian Guardianship and Administration Committee provides a national forum for all relevant State and Territory agencies associated with guardianship and administration. It aims to develop consistency and

uniformity; provide a collaborative focus; encourage research and dialogue; and advise governments on relevant issues (AGAC nd).

Box 9.2 **Office of the Public Advocate, Victoria**

The Office of the Public Advocate, Victoria is an independent statutory office, answerable to the Victorian Parliament. It represents the interests of Victorian people with disabilities. Its aim is to promote the rights and dignity of people with disabilities, and to strengthen their position in society. It can investigate and speak out about situations in which people are exploited, neglected or abused.

It works with the Guardianship List of the Victorian Civil and Administrative Tribunal, to ensure the rights and opportunities of people with disabilities are protected. Its services include:

- **advice**—information and assistance about the rights and services relevant to people with disabilities, including: complaints about services; care and treatment; information about guardianship, refusal of medical treatment, powers of attorney and treatment for patients who cannot consent
- **advocacy**—individual advocacy for people with disabilities; strategic advocacy to address systemic issues arising from individual advocacy work
- **guardians**—guardianship for people with disabilities when orders are made by the Victorian Civil and Administrative Tribunal.

The Guardianship List of the Victorian Civil and Administrative Tribunal protects persons aged 18 years or over who are unable, as a result of a disability, to make reasonable decisions about their person or circumstances, or their financial and legal affairs.

Sources: Office of the Public Advocate, Victoria 2001; VCAT 2003.

Despite these protections, a Victorian Auditor General's report on services for people with an intellectual disability noted that legislation relating to disability in Victoria has limitations in protecting and safeguarding the rights of people with a disability who cannot make informed decisions or provide legally effective consent (DHSV 2003, p. 55). The Victorian Government is currently reviewing its disability legislation (the *Intellectually Disabled Persons' Services Act 1986* and the *Disability Services Act 1991).* The discussion paper for this review raised several issues associated with decision making and consent for people with cognitive disabilities, in the context of developing a future legislative framework for disability (DHSV 2003).

The National Disability Advisory Council expressed concern about achieving equality before the law for people with cognitive disabilities:

> The general belief is that equality before the law for people with a cognitive disability is not achieved. In the body of the [draft] report an observation is made that there is no evidence to suggest that arrangements for protecting the rights of people with cognitive disabilities are *'inappropriate'*. Nevertheless, it is difficult to suggest that they are appropriate given the lack of research in this area. (sub. DR358, p. 3)

In all jurisdictions, legislative rules must balance competing claims about the best interests of a person with a disability. Many inquiry participants raised examples of conflict between legal requirements and the desires of family or carers. Particular concern was expressed about the administration of the financial affairs of people with cognitive disabilities, especially the lack of avenues for families or carers to challenge the decisions of trustees, and lack of choice of trustee (Dare to Do Australia, sub. DR308; ASEHA Queensland Inc., sub. 222; Stephanie Mortimer, trans., p. 2695; the Gippsland Carers Association, sub. 203; E Hutson, sub. 193).

HREOC considered that State and Territory rules governing decision making by people with cognitive disabilities are not subject to the DDA:

> Rules in other laws (including mental health and guardianship laws) governing decision making by or on behalf of people with impairments to decision making capacity are not addressed by the DDA. (sub. 143, p. 36)

However, HREOC clarified that the presumption that certain people are not competent to make decisions for themselves can be unlawful under the DDA:

> Constraints on ability to make decisions in other contexts, for example if it is simply assumed that a person with an intellectual disability lacks the capacity to enter into a transaction such as renting a flat or hiring a video—are capable of challenge through the DDA, although only a small number of complaints has been made in this area to date. (sub. 143, p. 36)

HREOC has undertaken limited research in the area of decision making by and for people with cognitive disabilities, but stated that it has been constrained by a lack of resources (HREOC 2003d).

The Productivity Commission considers that there are practical limitations to achieving equality before the law for people with cognitive disabilities, and that fair and transparent arrangements for governing decision making by and for people with cognitive disabilities are essential. This is largely an area of State and Territory government responsibility, and is outside the scope of this inquiry. However, the Commission notes that comments from inquiry participants suggest that there is some room for improvement.

The DDA has a limited role in this area, but there is a role for HREOC in researching issues of national importance and providing opportunities for the States and Territories to compare approaches and learn from each other. This could be

facilitated by consultation with the Australian Guardianship and Administration Council.

FINDING 9.5

There are practical limitations to achieving equality before the law for people with cognitive disabilities. However, there are major limitations on the use of the Disability Discrimination Act 1992 *in this area.*

9.4 Justice and civic participation

Equality before the law for people with disabilities extends to the right to fair and equal treatment in the justice system, and the right to participate in civic activities, particularly voting and jury duty.

Physical access

People with disabilities often face physical barriers to the justice system and civic participation, such as inaccessible premises and lack of information in accessible formats. The DDA provisions that cover access to premises and goods, services and facilities include access to courts and polling places, and the provision of information. The effectiveness of the DDA in eliminating discrimination in these broad areas of activity is discussed in chapter 5. The following section focuses on particular issues relating to equality before the law.

The justice system

Evidence suggests that people with disabilities face particular barriers to achieving equal treatment in the criminal and civil justice systems.

The criminal justice system

The Office of the Public Advocate, Victoria, noted that people with disabilities receive less favourable treatment in the justice system:

> The evidence strongly suggests that people with disabilities either as victims, witnesses or perpetrators of crime receive less favourable treatment because of their disability. (sub. 91, pp. 3–4)

The Office of the Public Advocate, Victoria, provided evidence that people with intellectual disabilities are overrepresented as victims of various forms of abuse,

particularly sexual abuse, and that victims of crime and/or witnesses with cognitive incapacities are generally viewed as unlikely to be reliable witnesses (sub. 91).

Some commentators have argued that this problem is compounded by the lack of recognition of many crimes against people with disabilities. According to Hauritz et al. (1997, p. 199), the use of euphemistic language disguises the nature of criminal acts by some care providers, professionals and even parents. Hauritz et al. argue that terms such as 'psychological abuse', 'threat', 'physical abuse', 'punishment procedure' and 'aversive treatment' are used to describe what would be regarded as assaults in other contexts, and that the terms 'abuse' or 'professional misconduct' can be used to describe rape or sexual assault.

There is little concrete data on the number of offenders and prisoners with disabilities (particularly cognitive disabilities), but evidence suggests that people with cognitive disabilities are overrepresented as offenders and prisoners (box 9.3).

The UN International Covenant on Civil and Political Rights, to which Australia is a signatory, sets out minimum guarantees for the determination of criminal charges, which include the rights:

- to be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against him [or her]
- to have the free assistance of an interpreter if he [or she] cannot understand or speak the language used in court. (UN International Covenant on Civil and Political Rights, article 14, s.3)

Several inquiry participants argued that people with disabilities (particularly people with cognitive disabilities) are often denied these rights, and that those charged with offences are thus more likely than people without a disability to be found guilty and to receive more severe sentences. Villamanta Legal Service noted:

> … research has shown that many people appearing before the courts and incarcerated in Australia's prisons would be diagnosed as having a cognitive impairment or borderline disability, low literacy levels, limited functional adaptability and are socially isolated. (trans., p. 1870)

The Disability Services Commission, Western Australia, stated:

> … people with disabilities are likely to receive more severe sentences and are less likely to receive parole or conditional release … (sub. 44, p. 3)

Box 9.3 People with cognitive disabilities in the criminal justice system

A literature review by the Office of the Public Advocate, Victoria, found that available evidence strongly suggests that people with cognitive disabilities face many barriers in dealing with the criminal justice system.

As offenders

Offenders with intellectual disabilities are most likely to commit crimes that reflect impulsive or unpremeditated behaviour (NSW Law Reform Commission 1996b).

People with intellectual disabilities are more likely to admit to offences, even if innocent, due to a desire either to please an authority figure or to conceal the fact that they do not understand the questions (NCOSS 2003; Petersilia 1997).

If apprehended, people with intellectual disabilities are more likely to be ignorant of, or unwilling to exercise their rights and more likely to confess or plead guilty (Glaser and Deane 1999). They are also more likely to be refused bail (NSW Law Reform Commission 1996b).

In corrective services

Prisoners with an intellectual disability in Australia are estimated to make up 12–13 per cent of the prison population in New South Wales (Hayes 2002), compared with a rate of 1–3 per cent in the community (Intellectual Disability Rights Service and the New South Wales Council for Intellectual Disability 2001).

Prisoners with a mental illness are estimated to make up 30 per cent of the prison population (NCOSS 2003).

People with intellectual disabilities are more likely to receive a longer sentence, be denied parole and be victimised in the prison system (than people without such a disability) (Glaser and Deane 1999). They may also receive more custodial sentences because of a lack of alternative placements in the community (NCOSS 2003; Glaser and Deane 1999; NSW Law Reform Commission 1996b).

Inability to follow prison rules can extend the sentences of people with a cognitive disability (Glaser and Deane 1999). Further, a lack of appropriate accommodation or other necessary supports means that parole is often delayed and occasionally denied (Victorian Adult Parole Board, pers. comm. nd).

Borderline and undiagnosed offenders with cognitive disabilities do not receive support services and are more likely to re-offend (The Framework Report, NSW 2001). Offenders with an intellectual disability are 78 per cent more likely than mainstream prisoners to return to prison. During 1990–1998, 68 per cent of inmates identified as having an intellectual disability were re-imprisoned within two years, compared with 38 per cent of the total prison population (Intellectual Disability Rights Service and the NSW Council for Intellectual Disability 2001).

Source: Office of the Public Advocate, Victoria, pers. com., 12 August 2003.

The Office of the Public Advocate, Victoria, stated:

> … people with cognitive disabilities are more likely to be over represented in the criminal justice system as offenders … they are less likely to have adequate legal representation and to have their disability-specific needs addressed in prison. (sub. 91, p. 4)

Some commentators have argued that policies of de-institutionalisation in practice have become policies of 're-institutionalisation' in prisons, because there appears to be a correlation between de-institutionalisation and the rising number of offenders and prisoners with cognitive disability (Armstrong 2002). As discussed in chapter 2, many disability issues involve difficult balances. De-institutionalisation and protections against involuntary commitment to an institution protect the rights of people with disabilities but they can also reduce access to mental health services and make people more vulnerable to being caught up in the criminal justice system.

Further, some inquiry participants argued that many people with disabilities in prisons do not have access to appropriate services and face punishments for behaviours that are related to their disability (Office of the Public Advocate, Victoria, sub. 91).

The Productivity Commission considers that even the limited evidence canvassed here on the experience of people with disabilities in the criminal justice system is of great concern. As argued by ACROD, 'there is no evidence to suggest that the overrepresentation of people with disabilities in the prison population reflects a greater tendency towards criminality than among other parts of the community'. ACROD cited evidence gathered by the NSW Law Reform Commission that 'strongly indicates the influence of indirect discrimination, especially among those with intellectual disabilities' (sub. 45, p. 3).

FINDING 9.6

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are overrepresented in the criminal justice system (as victims of crime, alleged offenders and in corrective services).

The civil justice system

Civil law regulates conduct between private individuals. It includes both federal law (in areas such as family law and migration) and State and Territory law (in areas such as property law and commercial contracts). Civil law includes anti-discrimination law, where it is up to individuals to take civil action to enforce their rights. As in the criminal justice system, people with disabilities can face barriers in the civil justice system (in both courts and tribunals).

Little comprehensive data were available to the Productivity Commission in relation to people with disabilities in the civil justice system, other than in relation to the DDA. The Mental Health Legal Centre argued that people with psychiatric disabilities face discrimination in the Family Court and in child protection services (sub. 108). The Office of the Public Advocate, Victoria, also raised concerns about unequal treatment of parents with disabilities by child protection services (sub. 91).

The Productivity Commission considers that people with disabilities in the civil justice system are likely to face difficulties similar to those that they face in the criminal justice system, as witnesses, plaintiffs (applicants) and respondents (defendants).

Conclusion on access to justice

All citizens are entitled to fair treatment in the justice system. It is particularly important to protect the rights of those who are most vulnerable. The administration of many aspects of the justice system, particularly criminal justice, is the responsibility of State and Territory governments, and lie outside the scope of this inquiry's terms of reference. However, the Productivity Commission considers that there is a role for the Australian Government in ensuring basic human rights, evidenced by Australia's adoption of the UN Covenant on Civil and Political Rights.

The Australian Government has demonstrated its willingness to provide leadership on disability issues through the DDA—for example, through the development of disability standards that bind State and Territory governments in areas such as public transport and access to premises. It should also provide leadership in an area as important as access to justice.

The Attorney General should commission an inquiry into access to justice by people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal and civil justice systems. Such an inquiry would require both legal and disability-rights expertise. It could build on the discussion paper recently released by the Office of the Public Advocate, Victoria (2004) *Disability and the Courts*. The discussion paper seeks to stimulate debate on ways of making the court system more responsive to the needs of people with a disability or mental illness, including the introduction of specialist 'therapeutic courts' with expertise on disability issues.

As argued by the Villamanta Legal Service, an inquiry into equality before the law for people with an intellectual disability would improve justice for all (trans., p. 1870).

Many inquiry participants supported an inquiry into access to criminal and civil justice, including the National Disability Advisory Council (sub. DR358), People with Disabilities Australia (sub. DR359), Action for Community Living (sub. DR330) and the Office of the Public Advocate in Victoria (sub. DR310). The ACT Government (sub. DR366) suggested that such an inquiry should extend beyond procedural aspects to examine:

- support for witnesses and victims with disabilities
- the range of sentencing options for people with disabilities
- access to information on the legal system for people with intellectual disabilities
- physical, social and economic impediments to participation in the justice system
- capacity, resources and expertise of Legal Aid to represent people with disabilities.

Subject to appropriate resourcing, HREOC could be requested under s.67(j) of the DDA to conduct such an inquiry. Alternatively, the inquiry could be conducted by the Australian Law Reform Commission (ALRC) or some other qualified body. This inquiry could draw on work such as the *Report into People with an Intellectual Disability and the Criminal Justice System* by the NSW Law Reform Commission (1996b), the *Access to Justice* report by the Access to Justice Advisory Committee (1994) and the *Report of the National Inquiry into the Human Rights of People with Mental Illness* by HREOC (1993c). In addition, the Law and Justice Foundation of New South Wales (2004) is currently examining the ability of disadvantaged people, including people with mental illness, to participate in the legal system.

This inquiry would address many issues that are particularly relevant to the States and Territories. State and Territory cooperation could be facilitated by involving the States and Territories in appointing associate Commissioners to the inquiry. The Productivity Commission considers that the Attorney General should discuss the alternative forms the inquiry could take at a meeting of the Standing Committee of Attorneys-General.

RECOMMENDATION 9.1

The Attorney General, in consultation with State and Territory governments, should commission an inquiry into access to justice for people with disabilities, with a focus on practical strategies for protecting their rights in the criminal and civil justice systems.

Civic participation

People with disabilities can face many barriers to participation, including participation in the civic life of the community (see appendix D). Contributing to civic life helps develop social capital (see chapter 6) and is an important means of demonstrating that people with disabilities accept social responsibilities as well as rights. The Disability Council of New South Wales argued:

> … people with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure these rights are upheld. … While they are, ostensibly, equally entitled, they are effectively disentitled by the failure to recognise differential access and forms of participation as valid. (sub. 64, p. 13)

Inquiry participants identified two areas of civic participation that have particular relevance to equality before the law: voting and jury duty.

Voting

Voting is regarded as a civic duty and right of citizenship. Every Australian citizen (18 years or over) is required by law to vote. If an enrolled citizen fails to vote and cannot provide a valid reason for not voting, penalties can be imposed. HREOC (2003d, p. 27) noted that 'equal electoral access clearly has great significance for equality of citizenship'.

However, some people with disabilities argued that they have been actively discouraged from voting or required to vote from their car, or have had to submit postal votes (Blind Citizens Australia, sub. 72; Peter Young, sub. 199; Paraplegic and Quadriplegic Association of Queensland, sub. 138; Disability Council of New South Wales, sub. 64; Joe Harrison, sub. 55). Others complained about a lack of information (about the election, how to vote and ballot papers) in accessible forms (National Disability Advisory Council, sub. DR358; People with Disabilities Australia, sub. DR359; Blind Citizens Australia, sub. DR269).

One inquiry participant gave an example of apparent discrimination in access to voting, and described how Australian Government and New South Wales Government electoral officers adopted different approaches (box 9.4).

Box 9.4 **Accessible voting**

Betty Moore (sub. 42, p. 2) noted:

> At the recent State election, we were faced with inappropriate venue problems which had been documented at the regional office and Sydney headquarters for the previous two State elections. The Sydney officer still had on his file all the previous correspondence but failed to act.
>
> The new regional officer again rented a first floor conference room for the pre-poll voting venue. This building does not have a passenger lift nor any method of communication between the ground and first floor. It also has 14 steps up to the front door. It took a concerted effort of political lobbying to the Labor Party Member of the Legislative Council and the letting agent for the building to prevent use of this venue.
>
> The Sydney officer in charge would not change the Saturday polling venue—he stated it was classified 'assisted disabled access'. This, despite file documentation and new information of two other available fully accessible buildings in the central business district. He did not inspect the venue or provide the electoral staff to do the 'assisting'.
>
> Hats off to the Federal Electoral Commission, whose new regional officer saw fit to physically inspect the traditional voting venues in this area, and made the decisions to change to accessible voting venues.

Dr Cath Gunn of the Communication Project Group found that confidentiality of the electoral ballot is also a concern for people with disabilities (trans., p. 902). Many voters needed assistance to complete their ballot paper because they were visually impaired, lacked manual dexterity or had an intellectual or communication impairment. This created the potential for undue influence to be exerted on their voting decisions.

Dr Gunn (pers. Comm.. 29 August 2003) surveyed 639 people who received the Disability Support Pension or other allowance (some of whom received help from a care giver and some of whom did not) about their voting experiences. Although statistical analysis of the data is still underway, many responses indicated problems, particularly for people who needed assistance to fill in a ballot paper. One survey respondent summarised many issues:

> … round here we do what they (carers) want. I'm dependent on them for everything so you don't argue. I'd like to choose for myself—but the only way that could happen was for you to have to use an official person and not someone who knew you. They'll never do that. It's too expensive so I'll never get to vote will I? Disenfranchised that's me—and a lot of others. (Gunn 2003, pers. comm., 29 August 2003)

Other issues raised in Dr Gunn's research are provided in box 9.5.

Box 9.5 **Voting by people with disabilities**

Access difficulties, including getting to a polling place, discouraged some people from enrolling or voting, for example:

> Going to vote is awkward. We used to do it in a church hall but they changed it to the school and there are two steps into their hall. My Dad had to take the ramp over, not just for me but a couple of other people as well. They should think of that sort of thing but they don't—just let him do it instead.

Many people were 'advised' how to vote by someone else, for example:

> I voted the way my parents said, because my sister would have told them if I hadn't done it that way.

Only two respondents were aware that they could ask for independent assistance, and others thought it should be compulsory (not optional), for example:

> First I've heard of it and who's going to ask someone else for help when the help they're supposed to be getting is already standing there? I'd really like it if they made it so you had to have one of the staff to do it … it would be more private. … They make those laws so you can ask for help but they don't think it through—think how impossible it would really be—don't they realise that you can't ask sometimes even when you want to because—well you just can't.

Many did not even see the ballot paper after it was filled in on their behalf, for example:

> I didn't even get to see the papers to start with and he didn't show me when he finished. (Did you ask him?) Sure I asked him and all he said was 'Don't you trust me?' so of course I had to say yes and then he said, 'Well you don't need to see them do you?' but I reckon he didn't do what I wanted because we don't think the same.

Source: Gunn 2003, pers. comm., 29 August 2003.

HREOC stated that despite individual complaints about electoral access and a public inquiry on electoral processes in 1999-2000, results have been limited (sub. 219). HREOC stated:

> A number of complaints have been conciliated with agreement to improve electoral access in particular locations. In an effort to secure broader progress, a public inquiry into an individual complaint regarding a range of barriers to accessibility in local government elections was conducted in 1999. This led to agreement in 2000 by the Australian Electoral Council—of which all electoral commissions are members—to establish a committee … to develop a standard definition for access, and set benchmarks for its achievement over a period of years. Formal progress through this committee process has not been as effective as anticipated. (HREOC 2003d, p. 27)

Several inquiry participants raised the potential for electronic voting to improve access for many people with disabilities. A Joint Standing Committee on Electoral Matters Report (2003, p. 263) pointed out that computerised voting can 'extend the secret ballot to those with visual impairment who otherwise require assisted voting to cast their vote'.

The ACT Government noted that computerised voting was used in the 2001 ACT election and is to be expanded for the 2004 ACT election (sub. DR366, p. 4). Blind Citizens Australia applauded the ACT trial and noted that:

> The [ACT] Electoral Commission analysis of the trial concluded that the system could be continued with only a minimal impact on the cost of elections; in fact, the Commission suggested that cost offsets could result in a reduction in the cost of an election. (sub. DR269, p. 8)

Electronic voting is not currently an option in federal elections (or in many other jurisdictions). In 1999, HREOC declined a disability discrimination complaint on the grounds that the *Commonwealth Electoral Act 1918* did not give the Electoral Commission any discretion to permit the electronic voting that the complainant was seeking to protect his privacy. The extent to which compliance with laws with discriminatory effects can be challenged under the DDA is subject to some debate (section 9.5 and see chapter 12).

HREOC recommended consideration of legislative requirements for accessible voting:

> The United States has more specific legislative requirements in place requiring accessible polling places to be used unless the responsible officer certifies no such place is available in the district. It may be appropriate to consider such a provision for inclusion in Electoral Acts to give greater specificity to the general application of the DDA in this area. (sub. 219, p. 40)

Voting is an essential element of Australian citizenship. The Productivity Commission considers, given the lack of progress following HREOC's inquiry in 1999-2000 and the Joint Standing Committee report in 2001, that it is desirable to take direct action to ensure voting processes are accessible to all citizens eligible to vote. Accessibility involves physical access, provision of information in accessible formats and an appropriate means of allowing people who require assistance to vote to do so confidentially. People with disabilities should have access to the same facilities and opportunities to vote 'on the day' as people without disabilities, in order to have equal access to up to date information.

The Productivity Commission considers, given the significance of voting as part of citizenship, that it is inappropriate to rely on individual complaints to improve access. The HREOC inquiry and Joint Senate Committee report should have placed authorities on notice that access needed to be improved. The Australian Government should amend the *Commonwealth Electoral Act 1918* to require accessible federal voting procedures (physically and in provision of information and independent assistance), and encourage State and Territory governments to amend their electoral Acts, if required.

Given the range of disabilities for which access is required, the access requirements in the electoral Acts should be expressed in general terms. There could then be scope to develop disability standards to clarify the general legislative access requirements. These standards would establish a national access benchmark. While there might be some doubt about the current ability to introduce standards in this area, the Productivity Commission is recommending that the DDA be amended to allow the Attorney General to introduce standards in any area covered by the Act (see chapter 14). Standards would also encourage the States and Territories to improve access, as they could apply to both federal and State and Territory voting arrangements.

FINDING 9.7

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

RECOMMENDATION 9.2

The* Commonwealth Electoral Act 1918 *should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.

Jury duty

Like voting, jury duty is regarded as a civic duty and is compulsory for large sections of the population. However, a person is usually ineligible for jury duty if (among other reasons) they are unable to read or understand English, or if they cannot discharge the duties of a juror because of sickness, infirmity or disability.

The DDA has been used by people with disabilities to address issues of jurors' physical access to courts. HREOC provided the following example:

> Two people with physical disabilities complained they had been discriminated against in 1994 by lack of provision of access for people who use wheelchairs to serve as jurors in certain courts in Sydney and at Coffs Harbour. [HREOC] found there had been a refusal to provide the service of assisting an eligible person to perform jury duty when Ms Druett was directed against her wishes to apply for exemption from duty. Damages of $5000 were awarded accordingly. (HREOC 2003d, p. 38)

Jurisdictions are also taking steps to improve access. However, the emphasis to date appears to have been on physical access. The Office of the NSW Sheriff provides advice on people with disabilities and jury duty. It states that 'the Sheriff's Office will take all reasonable steps to help you to participate in jury duty', but focuses on

issues such as wheelchair access and accessible parking (Office of the Sheriff, New South Wales, 2003, p. 1).

Some inquiry participants argued that people with certain types of disability are being discouraged from participating in jury service. Blind Citizens Australia stated:

> We are also aware that frequently blind and vision impaired people are discouraged from participating in jury service. Blind Citizens Australia believes that juries should be sourced from the widest possible pool. (sub. 72, p. 10)

This raises the difficult issue of what is required for a person with a disability to 'discharge the duties of a juror'. As discussed in chapter 2, some disability issues involve difficult tradeoffs. In this instance, there is a potential trade off between the rights of people with disabilities to participate in jury service and society's desire to ensure the fairest possible system of justice. It could be argued that juries should be more representative of the general population, including people with disabilities. However, some people with disabilities might not be able to assess all the evidence or communicate with other jurors. Does a defendant have a right to expect that all members of the jury can assess evidence in its original form? If so, what degree of disability should make a potential juror ineligible?

In April 2002, the NSW Law Reform Commission began a review into jurors with disabilities. The ongoing review is examining whether there is a need to exclude people from juries on the basis of serious hearing or vision impairment or if these people are being unnecessarily barred from jury duty. It is also examining ways of supporting those who do want to carry out their civic duty in this way. The review is considering the NSW *Anti-discrimination Act 1977*, the DDA and the need to maintain confidence in the administration of justice in NSW. A discussion paper was released in April 2004, and a final report is due in late 2004 (NSW Law Reform Commission 2004).

The NSW Law Reform Commission review has implications for access to jury duty for people with disabilities throughout Australia.

9.5 Laws with discriminatory effects

A significant issue relating to the DDA and equality before the law is the potential to use the DDA to challenge actions taken under laws that might have a discriminatory effect. (The DDA makes it unlawful to undertake various 'acts'; it does not operate to make legislation invalid.) A related issue—the interaction of State and Territory laws and DDA disability standards—is discussed in chapter 14.

Several inquiry participants raised examples of laws with potentially discriminatory effects.

- The Mental Health Council of Australia argued that the Victorian Wrongs and Limitation of Actions Act (Insurance Reform) Bill 2003 (now an Act) discriminates against people with psychiatric disability, because the threshold for compensation for 'psychiatric impairment' is set at 10 per cent, while the threshold for 'general damages' (which covers physical impairment) is 5 per cent (sub. 150, p. 11).
- The Mental Health Council of Australia criticised the disproportionate effect of Centrelink 'breaching rules' on people with mental illness (sub. 150).
- Other inquiry participants criticised the exclusion of supported accommodation from *Residential Tenancies Act 1997* protection (section 9.2).

As noted in section 9.1, the original Disability Discrimination Bill included provisions that would have allowed people to use the DDA to challenge legislation that was discriminatory, similar to provisions in the *Racial Discrimination Act 1975* (box 9.6). These provisions were dropped as a result of concerns about their possible effect on special legal regimes in relation to people with disabilities, including guardianship and mental health legislation (HREOC, sub. 143). It is not clear what these concerns were, or why the exemption mechanism in the DDA for 'prescribed laws' could not have been used to exempt these laws from the operation of the DDA (see chapter 12).

Box 9.6 **Equality before the law under the Racial Discrimination Act**

Section 10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Source: *Racial Discrimination Act 1975,* s.10.

However, even in the absence of substantive provisions relating to equality before the law, it might be possible to use the DDA to challenge actions taken under other legislation. The DDA expressly exempts 'anything done by a person in direct compliance with a prescribed law' (s.47), implying that compliance with a law that is *not* prescribed is no defence to an action under the DDA.

The Sex Discrimination Act (which does not have specific provisions dealing with equality before the law)[2] has been used to challenge actions taken under Victorian State law (box 9.7).

[2] The Act mentions equality before the law in its preamble, but does not have a specific object covering equality before the law. It does not have specific provisions allowing actions taken under laws with discriminatory effects to be challenged.

Box 9.7 **McBain v Victoria**

In July 2000, the Federal Court decision in *McBain v Victoria* (2000) 99 FCR 116 rendered the *Infertility Treatment Act 1995* (Victoria) inoperative to the extent that it restricted assisted reproductive technology to married or heterosexual *de facto* couples.

The case arose following a request by a single woman for invitro fertilisation (IVF) services. The request was made to a medical practitioner specialising in reproductive technology. The practitioner considered that the woman was suitable for the treatment, but was precluded from providing the treatment under the Victorian Act. The practitioner applied to the Federal Court for a declaration that section 8 of the Victorian Act was inoperative due to inconsistency with section 22 of the Commonwealth Sex Discrimination Act, which outlaws discrimination on the basis of marital status. The State of Victoria and the Minister did not concede inconsistency, but they did not offer any arguments supporting the validity of the Victorian legislation. The Infertility Treatment Authority adopted a passive role. The only active supporters of the Victorian legislation were the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church, which were granted leave to intervene as *amicus curiae* (friends of the court).

The Attorney General granted the bishops a *fiat* (special leave) to apply to the High Court. This application was dismissed by the High Court.

Sources: Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; *Ex parte* Attor (2002) HCA 16 (18 April 2002)

However, several inquiry participants stated that HREOC would not accept complaints about actions taken under other laws. Blind Citizens Australia stated:

> [Section 47] appears to enable a complainant to lodge a complaint against an action or decision made in direct compliance with a law as long as it is not a prescribed law and the action or decision was not made within three years of the commencement of the section. The three-year exclusion period has long expired. It has nonetheless been impossible for Blind Citizens Australia to date to lodge a complaint where compliance with a not prescribed law has been in issue. HREOC has maintained that it is not possible to make a law the subject of a complaint and that it is not possible to use section 29 in this context because it is not the administration of the law which is at issue. (sub. 72, p. 6)

In comments on this issue, HREOC distinguished two situations (sub. 219).

- Where another law creates a power to act and gives no discretion but to act in the manner complained of, HREOC believes the DDA does not apply. That is, the DDA does not apply to discrimination in the *content* of laws.
- Where another law gives a person discretion to act, and the person uses that discretion to act in a discriminatory manner, HREOC believes the DDA does

> apply. That is, HREOC considers that the DDA does apply to discretionary actions under other laws.

HREOC's reasoning for this distinction is not clear. Section 47 of the DDA explicitly states:

> During the period beginning at the commencement of this section and ending three years after the day this section commences, this Part does not render unlawful anything done by a person in direct compliance with another law.

It therefore appears that, three years after this section commenced, part 2 of the DDA was capable of rendering direct compliance with another law unlawful (unless another, more specific exemption applied). The DDA makes no reference to the degree of discretion of the decision maker.

The Commission recognises, however, that there might be practical difficulties in bringing a complaint about discriminatory acts under other laws, because of the need to fit the subject of the complaint within one of the areas of activity covered by the DDA. The DDA specifically covers the administration of Commonwealth laws and programs, but it does not specifically cover the administration of State and Territory laws. It might be necessary to fit complaints about discriminatory acts under a State or Territory law under another area of activity, such as the provision of a service.

FINDING 9.8

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

Clarifying the ability to challenge other laws

The Productivity Commission considers, given the uncertainty surrounding this issue, that the scope of the DDA to challenge actions taken under other laws should be clarified. It is also necessary to clarify the interaction among relevant provisions of the DDA, particularly the 'special measures' (s.45) and 'prescribed laws' (s.47) provisions.

Which law should have precedence?

The Victorian Government favoured giving compliance with other laws priority over the DDA (as is the case under the Victorian *Equal Opportunity Act 1995*):

> The Victorian *Equal Opportunity Act 1995* has a general exemption from discrimination where the conduct is necessary to comply with, or is authorised by, an enactment, such as another piece of legislation, regulations or Orders … there is no requirement for the other law to be expressly 'prescribed'. (sub. DR367, p. 6)

On the other hand, the ACT Government (sub. DR366) and the South Australian Government (sub. DR356) supported giving DDA priority, subject to the ability to exempt specific laws through the prescription process. The South Australian Government stated:

> The South Australian Government supports this recommendation. However, it makes the exemption provision and the process of adding State Acts to the exemption list much more important than at present. Amendments to the DDA for state governments should be simple to administer. (sub. DR356, p. 4)

The Productivity Commission considers that actions taken under another law should be able to be challenged (unless another, more specific exemption applies). Governments should be held accountable to the principles they espouse and the duties they impose on the rest of the community. Where governments want to ensure actions taken under laws are free from challenge, they should be exempted under section 47, as the DDA allows.

On one reading of the DDA, it is already possible to challenge laws with discriminatory effects, although this is not clear. As noted, HREOC has been declining complaints where the alleged discrimination has resulted from the application of laws that give no discretion to the decision maker.

The Productivity Commission considers that the ability to use the DDA to complain about discriminatory acts under other laws should be clarified by the introduction of explicit provisions on equality before the law. These could be based on those in the Racial Discrimination Act (box 9.6). This would help overcome the difficulty of having to fit complaints about the administration of State and Territory laws within a specific subject area of the DDA, by allowing the discriminatory provision of the law itself to be the subject of a complaint. In some circumstances this might allow a complaint to be made about the discriminatory effect of a law before a specific discriminatory action is taken (in the same way that proposed direct discrimination is currently covered by the DDA, and that the Commission recommends proposed indirect discrimination be covered).

The Department of Employment and Workplace Relations was concerned that such provisions would create a new right to challenge legislation itself, rather than discriminatory actions:

> Amending the DDA to insert a specific 'equality before the law' provision modelled on section 10 of the [Racial Discrimination Act], as suggested by the Productivity

> Commission, would fundamentally alter the scope of the DDA. It would open up the potential for aggrieved persons to challenge Commonwealth legislation which is said to have a discriminatory impact or effect upon people with disabilities, independently of any actions taken under such laws. This would be an extremely far-reaching new power and not one to be recommended lightly. (sub. DR299, p. 20)

The Productivity Commission notes that the equality before the law provisions in the *Racial Discrimination Act 1975* do not invalidate challenged laws. Rather, where legislation grants a discriminatory 'right' to a particular group, the Race Discrimination Act provisions have the effect of extending that 'right' to members of the disadvantaged group. That is, the law still applies, but in a non-discriminatory manner. It is also necessary for an aggrieved person to their specific circumstances—the DDA does not allow complaints to be made on a purely in-principle basis.

RECOMMENDATION 9.3

The Disability Discrimination Act 1992 *should apply to actions done in compliance with laws that have not been prescribed under section 47 of the Act.*

Special measures and prescribed laws

The 'special measures' provision of the DDA exempts actions (acts) that are 'reasonably intended' to benefit people with disabilities (s.45). This requires a distinction to be drawn between laws with discriminatory effects (laws that disadvantage people with disabilities relative to people without disabilities) and laws that establish levels of funding or eligibility criteria for disability services. The DDA should allow aggrieved persons to complain about laws with discriminatory effects, but existing limitations on complaints about the establishment, funding or eligibility criteria for disability services should remain (see chapters 12 and 15).

Acts done in compliance with 'prescribed laws' are exempted from the application of the DDA (s.47). Prescribed laws are listed in the Disability Discrimination Regulations 1996. The prescribing mechanism operates transparently, clarifying governments' tradeoffs between potential discrimination and other objectives of government (see chapter 12). If the scope to use the DDA to challenge other laws with discriminatory effects were clarified, it might be necessary to provide a transitional period to review existing prescribed laws and allow governments to prescribe other laws they wish to exempt from challenge. It might also be necessary to ensure exemptions are regularly reviewed so that the reasons for exemption remain valid (see chapter 12).

9.6 Effect of the DDA on equality before the law

As noted throughout this chapter, there are practical limits to achieving equality before the law for people with disabilities, particularly people with cognitive disabilities.

State and Territory governments have primary responsibility in many important areas, and many of their existing arrangements appear to be appropriate. However, there appears to be scope to protect the rights of people with disabilities in institutional and supported accommodation, and improve access to justice by people with disabilities.

There appears to be only a limited role for DDA complaints in many areas that are important to achieving equality before the law. One area where the complaints mechanism could be useful is in challenging potentially discriminatory acts done in compliance with non-prescribed laws. Lack of clarity in this area has prevented such complaints from being heard. Equality before the law could be enhanced by making it clear that acts under non-prescribed laws are not exempt from challenge.

The DDA gives HREOC some important functions in this area. HREOC could make greater use of its powers to report to the Minister on government actions that could promote the rights of people with disabilities, and to examine Commonwealth legislation for consistency with the DDA. In addition, HREOC research in the area of equality before the law could provide a useful national focus and assist regulatory benchmarking by the States and Territories, in conjunction with the AGAC.

Finally, one of the most important symbols of equality before the law is the right to vote. The Australian Government should amend the Commonwealth Electoral Act to ensure voting processes are accessible to people with disabilities, and encourage State and Territory Governments to follow suit. Subject to the extension of the standard making power, the Attorney General, in consultation with the States and Territories and people with disabilities, could consider developing disability standards for voting, to clarify how the access requirements of electoral Acts are to be implemented.

10 Promoting community recognition and acceptance

People with disabilities can confront physical and attitudinal barriers. The third object of the *Disability Discrimination Act 1992* (DDA) in part seeks to address attitudinal barriers, aiming:

> … to promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community. (s.3(c))

Recognition implies an awareness or knowledge of the rights of people with disabilities, but acceptance goes further, implying that the community agrees such rights apply to people with disabilities. Thus, the two aspects of this object suggest two broad indicators of its achievement: changes to community awareness (recognition) and changes to attitudes (acceptance).

This chapter examines the extent to which the DDA has successfully promoted community recognition and, to the extent possible, acceptance. Based on this examination, it discusses potential improvements that can be made. It outlines how the DDA has been applied in this area (section 10.1), and the extent to which community awareness and attitudes have changed since the enactment of the DDA (section 10.2). Section 10.3 examines the effectiveness of the current approach to promoting community recognition and acceptance, while section 10.4 discusses options for improving the effectiveness of this approach, focusing on the education and information provision functions of the Human Rights and Equal Opportunity Commission (HREOC).

10.1 The approach so far

Many factors can influence awareness and attitudes (see Vaughan and Hogg 2002), including:

- direct experience with people from a particular group—the Mental Health Legal Centre commented ‘one of the key benefits of maximum social participation of people with disabilities is that it … dispels people’s misconceptions about reduced capacity or increased cost of such participation’ (sub. 108, pp. 1–2)

- legislation—Nicholson (1996) commented that 'laws outlawing discrimination should serve as more than a source of enforceable rights and protections; they should also provide a basis for shifting prejudicial community attitudes'
- repeated exposure to a message or people
- reinforcement of behaviour (such as rewarding certain behaviour), which may shape attitudes towards that behaviour and lead to long-term behavioural change
- accumulation and integration of information about 'attitude objects', with sources of learning including family, friends and peers, and the mass media.

Various aspects of the DDA have the potential to contribute to promoting community recognition and acceptance through several of these attitude-influencing channels. Under s.67 of the DDA, for example, HREOC must:

- promote an understanding and acceptance of the Act (s.67(1)(g))
- undertake research and educational programs to promote the objects of the Act (s.67(1)(h))
- prepare and publish guidelines for the avoidance of discrimination (s.67(1)(k)).

HREOC is also required to undertake educational and other programs under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). It conducted a number of educational activities (such as distributing an information paper to peak organisations) during the DDA's first year (HREOC 1993a, pp. 72–3). Hastings (1997) commented, however, that a 'substantial part' of HREOC's work and budget in that year was allocated to developing the National DDA Awareness Campaign, which had been foreshadowed in the second reading speech of the DDA (Australia 1992a, p. 2755). The campaign, launched in March 1994, aimed to increase community awareness of the DDA. Despite some positive impacts, it was generally perceived to be constrained by a lack of resources, although Hastings (1997) suggested that even a much larger scale campaign in the United States resulted in 'disappointingly low levels of awareness'.[1]

HREOC has not conducted this type of large scale information campaign since the 1994 campaign. Instead, it has focused on: regional visits; public speaking by commissioners; media releases and newsletters; staff participation in informal and formal educational events, conferences and workshops; and provision of

[1] During the first year or so of its operation, various methods were used to inform people of the Americans with Disabilities Act 1990 (US), including a grants program, information hotlines and publications, involving the input of various bodies. According to the National Council on Disability (NCD 1993), these efforts to disseminate information were 'extraordinary'. Despite this, awareness remained low—a survey cited by NCD (1993) found 14 per cent of Americans were 'very familiar' with the Act, and 42 per cent were 'unfamiliar' with it.

information on a website, in publications of various formats, and through the media and community networks. In 2003, it also conducted forums in cities across Australia to celebrate and promote the tenth anniversary of the DDA.

Other aspects of the DDA have also been used as educative tools.

- Public inquiries have aimed to help parties immediately involved in a particular complaint or issue, as well as to disseminate information more widely. Consultation has been an important aspect of inquiries.
- Guidelines and advisory notes have been prepared to clarify aspects of the DDA's operation (see chapter 14).
- Other research and policy work has been conducted in areas such as the sterilisation of girls with intellectual disabilities, accommodation and abuse, and mental health projects.
- Complaints resolved through court decisions (or previously through HREOC determinations) can, according to HREOC, achieve 'national media publicity … which is otherwise difficult to generate for disability discrimination issues' (sub. 143, p. 54). HREOC also publishes summaries of conciliated complaint outcomes in its annual reports and website, but noted 'more high profile publicity' of these outcomes 'is only undertaken or attempted with the agreement of the parties so as not to discourage parties from entering into conciliated agreements' (sub. 143, p. 54).
- The development of disability standards has involved wide consultation.
- Action plans registered with HREOC are made available on its website (see chapter 14). Jones and Basser Marks (1998, p. 63) commented that both action plans and disability standards 'are designed to play a role in … value formation', with educative effects stemming from the development process.

Other bodies have also been involved in awareness-raising activities, of both the DDA and disability issues. HREOC noted specifically:

> … the significant community education and awareness activities on rights and responsibilities undertaken by disability community groups, State and Territory anti-discrimination bodies, industry and government organisations and in particular through the network of Disability Discrimination Legal Services. (HREOC 2003d, p. 24)

The publication *Using Disability Discrimination Law*, produced jointly by Victoria's Disability Discrimination Legal Service, Victoria Legal Aid and the Villamanta Legal Service, is one example of activities undertaken by other bodies. Now in its second edition, it describes in 'plain English' (and by using case studies and other everyday examples) what constitutes disability discrimination under the law, differences between Victorian and federal legislation and processes, and how

to go about making a complaint. Work is also underway to develop editions for other States and Territories, including New South Wales and Western Australia (in conjunction with legal assistance providers in those States), and to produce brochures of the document in community languages (Disability Discrimination Legal Service, sub. 76, att. 1). The involvement of such groups can help improve the relevance of information to target groups.

In some cases, HREOC has provided input to the activities of other groups. A manual to assist Disability Discrimination Legal Services educate people with disabilities about their rights was developed under the supervision of HREOC, which also conducted training for staff of advocacy services (HREOC 1994).

Not all awareness raising about disability issues has been conducted within the framework of the DDA or the HREOC Act. Major campaigns to raise awareness of mental illness (through television, cinema, outdoor advertising and education of key groups), for example, have been undertaken under the National Mental Health Strategy (an agreement between the federal and State and Territory governments that aims to improve the lives of people with mental illness).

Changes proposed under the Australian Human Rights Commission (AHRC) Legislation Bill 2003 would increase the emphasis on education. Some participants (such as the Anti-Discrimination Commission Queensland, sub. 119) were nevertheless concerned about the possible negative impacts of some aspects of this Bill. This concern related particularly to the possibility that the AHRC would not have a disability-specific commissioner, which some felt would lower the profile of disability issues. (A related issue is the desirability of having separate disability discrimination legislation—see chapter 7.) Reviewing the Bill is beyond the scope of this inquiry (see chapter 1).

10.2 Changes in community awareness and attitudes

One step in assessing the effectiveness of the DDA in this area is to measure changes in community awareness of disability issues and attitudes towards people with disabilities over time. Measuring attitudes is not easy because they are essentially unobservable. Most measurement techniques are based on asking people for agreement or disagreement with particular 'attitude positions' (Zimbardo and Leippe 1991; Vaughan and Hogg 2002). Problems with these approaches include their reliance on the willingness of survey participants to reveal their true feelings. Comparison across studies is also difficult because they define and measure attitudes differently (Vaughan and Hogg 2002).

A lack of baseline data compounds the difficulties of assessing changes in attitudes towards people with disabilities in Australia, and the possible influence of the DDA. The following discussion thus draws on direct and indirect, qualitative and anecdotal, indicators. This approach is the only option given available information, but has problems. If, for example, the DDA has changed expectations of what is acceptable, then people's perceptions of changes in community attitudes might have been affected.

Inquiry participants presented a mixed picture of community awareness and attitudes, and how these have changed over time. Some positive changes in a range of areas were noted, but significant scope for further improvement (even where there have already been some positive outcomes) was also emphasised. Perceived improvements included:

- generally improved attitudes towards people with disabilities (Anti-Discrimination Board of New South Wales, sub. 101; Mansfield Community Forum, sub. 202)
- the reduced social stigma of people with disabilities (Kaerest Houston, sub. 19)
- progress in community acceptance of the rights of people with disabilities (Public Advocate in Victoria, sub. 91; Mental Health Coordinating Council, sub. 84)
- improved knowledge of what disability is (that is, that it means more than 'wheelchair user') (Independent Living Centre NSW, sub. 92).

Positive changes have been highlighted in relation to specific types of disability and areas of activity. Blind Citizens Australia (sub. 72) noted improved awareness of issues for blind people, particularly in relation to accessible information and the use of guide dogs. Housing Connection NSW noted positive attitudes towards people with intellectual disabilities who live independently in the community:

> … clients living fairly independently in the community are well received, welcomed, … assisted by neighbours and other people in the community. This extends to many small acts of kindness (eg. help with keys, telephone), friendly greetings, showing interest in clients' programmes, and helping out with repairs/tools. (sub. 161, p. 3)

Some improvements in attitudes were also noted in sport, recreation and the arts at a local level (SPARC Disability Foundation, sub. 15). The Mental Health Coordinating Council commented on an apparent wider acceptance of people with disabilities in education and other areas of the community, particularly in large organisations (sub. 84). Australian Parent Advocacy Inc. noted a 'paradigm shift' in open employment (sub. 164).

Some commentators and inquiry participants suggested that these perceived positive changes have been reflected in changed behaviours of people with disabilities. Davis et al. (2001) commented that there appears to be greater exposure to, acceptance of, and openness about, disability issues, which might have contributed to increased self-reporting of 'severe restriction'. Similarly, Becky Llewellyn referred to an increased willingness to seek help:

> The difference in attitude I feel from one of virtually begging is that now I feel supported by benefits of citizenship in a democracy that cares about involving all its members. I no longer feel ashamed of needing to ask for something 'special' and 'different'. (sub. 9, p. 3)

However, significant scope for further improvement in awareness and attitudes was noted by others, including the City of Melbourne (sub. 224) and National Disability Advisory Council (NDAC, sub. 225). Comparing Australia with other countries, ParaQuad Victoria commented that anecdotal evidence from Australians visiting the United States, Canada and the United Kingdom suggests 'the feeling of acceptance and respect, the awareness [in those countries] … is much superior to what they experience here' (sub. 77, p. 3).

In particular, some participants suggested awareness and attitudes remain a problem for people with 'invisible', 'hidden' or 'new/emerging' disabilities, such as multiple chemical sensitivity (Australian Chemical Trauma Alliance Inc., sub. 152; Stella Hondros, sub. 167; Ann Want, sub. 194; Dorothy Bowes, sub. DR286; Barbara Prideaux, sub. DR340); intellectual disabilities (NSW Council for Intellectual Disability, sub. 117); dyslexia (Maureen Mastallone, sub. DR302); and mental illness (Pete Casey, sub. 3; Mental Illness Fellowship of Australia, sub. DR283). Apparent negative attitudes and continuing stereotyping of people with mental illness within the medical profession have also been reported (Mental Health Council of Australia, sub. 150; Groom, Hickie and Davenport 2003). Many inquiry participants—including Pete Casey (sub. 3), Arafmi Hunter (sub. 36); SANE Australia (sub. 62); and the Mental Illness Fellowship of Australia (sub. DR283)—pointed to the media's role in perpetuating stereotypes through its continuing negative portrayal of people with mental illness.

The Media Entertainment and Arts Alliance (MEAA, sub. 60, trans., pp. 2287–9 and pp. 2291–4), Souraya Bramston (sub. 33), Sally Martin (sub. 239) and Idilko Auer (sub. DR298, trans., pp. 2156–7) noted continuing exclusion and lack of acceptance of people with disabilities in various areas of life, including the arts, shopping, and recreational and social activities. The MEAA, for example, commented that, even in rare cases where roles are written specifically for characters with a disability, there is only a 'slight chance' that an actor with the disability is used for the role (trans., p. 2288; see appendix D).

For the most part, problems with inclusion and acceptance do not appear to have been translated into hostility and aggression towards people with disabilities. Data from the 2001 Household, Income and Labour Dynamics in Australia (HILDA) survey, for example, suggest that a high proportion of people with disabilities do not commonly experience hostility and aggression in their local neighbourhood (table 10.1). Nonetheless, a slightly higher proportion of people with disabilities than of people without disabilities reported such experiences as 'fairly' or 'very' common. Long term time-series data are not available to assess trends over time.

Table 10.1 **How often people experience hostility and aggression in the local neighbourhood, 2001[a]**

	People with a disability			*People without a disability*		
	All	*Rural* [b]	*NESB* [c]	*All*	*Rural* [b]	*NESB* [c]
	%	%	%	%	%	%
Never	29	29	31	27	28	33
Very rarely	35	37	32	40	40	33
Not commonly	23	21	22	23	22	22
Fairly commonly	5	5	6[d]	4	5	5
Very commonly	3	3	4[d]	2	2	2
Don't know	5	5	5[d]	3	3	5

[a] Percentages are calculated as the proportion of the people in each category who responded correctly to the question. [b] Rural excludes major cities of Australia, but includes inner regional Australia, among others. [c] Non-English speaking background: excludes people born in Australia, New Zealand, the United Kingdom, the Channel Islands, Ireland and Eire, Canada, the United States and South Africa. [d] The relative standard errors on the data from which these percentages are calculated are just over 25 per cent. These estimates should be used with caution—see ABS (1999d, pp. 60–2) for a discussion of relative standard errors.

Source: Productivity Commission estimates based on unpublished data from the 2001 HILDA survey.

Employment was the area of activity that elicited the most concern from inquiry participants. The Australian Chamber of Commerce and Industry (ACCI, sub. DR288) suggested widespread employer understanding of anti-discrimination laws and active recruitment of people with disabilities by some employers. However, others—including the Council for Equal Opportunity in Employment (sub. 204); the Australian Association for the Deaf (sub. 229); Sally Martin (sub. 239); Blind Citizens Australia (sub. DR269); the Australian Federation of Deaf Societies (sub. DR363); Tasmanians with Disabilities Inc. (trans., pp. 2166, 2168); and the National Diversity Think Tank (trans., p. 2583)—suggested that there were problems in employer awareness of disability issues, adjustment options and perceptions of people with disabilities as workers. Tasmanians with Disabilities Inc. (trans., p. 2168) argued that this was the cause of most discrimination in employment.

FINDING 10.1

In general, community awareness of disability issues and attitudes towards people with disabilities appear to have improved in the past decade. Significant scope for further improvement remains, particularly in areas such as employment, and for certain disabilities, such as mental illness.

Awareness of the DDA, which may underpin community awareness of disability issues, is discussed in the next section.

10.3 Effectiveness of the current approach

The next step in assessing the effectiveness of the current approach is determining the extent to which the DDA has generally contributed to the perceived positive changes (or is 'responsible' for any lack of change) in awareness and attitudes identified in section 10.2. Particularly important is the effectiveness of information provision under the DDA, given its possible influence on attitudes in the longer term (section 10.1).

Many difficulties confront such an assessment. First, attitude change is a long term process. The ACT Discrimination Commissioner noted:

> … 10 years in the life of legislation like the DDA—which seeks to redress major social imbalance and alter centuries of belief about people with disabilities—is not a long time. (sub. 151, p. 7)

Further, the DDA was enacted at a time of significant social change, both in Australia and abroad. Consequently, attitudes about human rights, including disability rights, were already changing. Becky Llewellyn noted that the 1981 International Year of Disabled Persons 'was a huge catalyst to awaken community attitudes and begin the process of hearing the voices of people with disabilities' (sub. 9, p. 1). It is difficult, therefore, to identify the extent to which changes in awareness and attitudes are attributable to these earlier changes or to the DDA.

Other factors might also have contributed to any perceived change, or lack of change, in awareness and attitudes. The Anti-Discrimination Commission Queensland stated:

> … it is both inappropriate and impractical to quantify the DDA's effectiveness in … promoting recognition and acceptance within the community … No doubt the DDA has played its part … in effecting cultural change but it is not possible to ascribe such change totally to the DDA nor even to quantify the changes. Many other factors are at work, including State and Territory anti-discrimination legislation, de-

institutionalisation, educational changes, employment schemes and international developments. (sub. 119, p. 10)

Inquiry participants also identified the following influences since 1992 on community attitudes towards people with disabilities:

- the ageing population
- lobbying and other work by people with disabilities
- State and Territory anti-discrimination legislation and government initiatives, such as disability service plans in Western Australia, State disability action plans in Victoria, and initiatives to promote inclusion in sport in South Australia
- the 2000 Paralympics in Sydney.

The fact that other factors have had an influence does not mean the DDA has had no effect. Furthermore, some of these other factors may themselves have been influenced indirectly by the DDA. This section examines current awareness of the DDA as this can underpin a general awareness (recognition) of the legal rights of people with disabilities. It also examines the extent to which the DDA might have contributed to attitude change.

Awareness of the Disability Discrimination Act

Awareness of the DDA would mean that people (including people with disabilities, those with responsibilities under the DDA and the general community) are aware of the legal rights of people with disabilities. However, as already noted, mere awareness is not the same as 'acceptance'. Moreover, widespread awareness of the DDA and its provisions might not be necessary for the DDA to influence community attitudes. Awareness by some people may be enough to encourage change, which has indirect effects on others. Some inquiry participants, however, suggested the importance of awareness of the legislation for attitude change:

> … if rights-creating legislation is to positively alter community attitudes—and we believe it can—it must at least be something that people know exists. (Women's Health Victoria, sub. 68, p. 4)

The education campaign accompanying the DDA's enactment (section 10.1) produced mixed results in terms of awareness, even though it incorporated many elements of successful campaigns (section 10.4). It initially generated many inquiries to a hotline and an increase in complaints, but Hastings noted:

> … the campaign had only patchy success in generating awareness of the existence or effect of the Act [DDA], even among the disability community, and less still among some important sectors of people with responsibilities. (Hastings 1997, p. 13)

HREOC submitted:

> … [while this campaign was effective] in increasing awareness of the existence and application of the DDA, this increase was from a very low base and awareness remained low even among specific target audiences including employers and people with a disability. (sub. 143, p. 54)

Many participants noted a continuing lack of community awareness and understanding of the DDA—including Women's Health Victoria (sub. 68); Queensland Parents for People with a Disability (sub. 103); participants in the Mansfield Community Forum (sub. 202); DDA inquiry regional forum (regional forum notes); and the Guide Dogs Association of SA and NT Inc (sub. DR292). Others suggested a perceived lack of awareness among specific groups or sectors, including:

- people with disabilities (Equal Opportunity Commission Victoria, sub. 129; Deafness Forum of Australia, sub. 71; NDAC, sub. 225; Stella Hondros, sub. DR281; Guide Dogs Association of SA and NT Inc, sub. DR292). Some inquiry participants suggested that awareness is especially low among specific groups of people with disabilities, such as those with a psychiatric disability (Mental Health Council of Australia, sub. 150; SANE Australia, sub. DR264), people with disabilities from non-English speaking backgrounds (National Ethnic Disability Alliance, sub. 114), and Indigenous people with disabilities (ATSIC, sub. 59).
- people with responsibilities under the DDA, such as the legal profession (Disability Justice Advocacy Inc., sub. 5; DDA inquiry regional forum notes)
- people in regional areas (DDA inquiry regional forum notes)
- those involved in sports clubs (Leichhardt Council Disability Access Committee, sub. 75).

This lack of awareness does not mean necessarily that people with disabilities are unaware of having rights, however. Some inquiry participants were aware that people with disabilities had 'rights', although they were not specifically aware of the DDA (DDA inquiry regional forum notes).

Moreover, to the extent that key organisations—such as advocacy groups and the Disability Discrimination Legal Services—are aware of the DDA or have been empowered by its introduction, this awareness might be sufficient to allow reasonably effective protection of people's rights under the DDA. The Public Advocate in Victoria argued that the number of complaints made—particularly in employment and goods and services, which are 'key indicators of the level of community access, acceptance and participation'—suggests the DDA is 'well utilised' (sub. 91, pp. 1–2). However, it also noted:

> … it will take time to reach the level of community acceptance and understanding of the DDA that the *Sex Discrimination Act 1984* and the *Race Discrimination Act 1975* currently have. (sub. 91, p. 2)

General impact of the Disability Discrimination Act on community awareness and attitudes

The apparent lack of widespread awareness of the DDA, highlighted above, suggests that 'direct' awareness of the details of the Act might not have been a major influence on the positive changes in attitudes that have occurred in the past decade. Some of the perceived positive changes identified in section 10.2 have, nevertheless, been attributed to the DDA, both by inquiry participants and others (box 10.1). This suggests that the DDA has, to some extent, worked through channels other than just direct awareness of it in promoting change.

Box 10.1 Inquiry participants' views on the impact of the DDA on awareness and attitudes

Some inquiry participants and others have attributed the changes in community awareness and attitudes to people with disabilities to the DDA:

> One of its greatest benefits is that it has raised the profile of the rights of people with disabilities and expectations about those rights. (Joe Harrison, sub. 55, p. 12)

> … the DDA has done much … to dispel the vision of people with a disability as denizens of backwaters … the full impact of the DDA is to be seen in the many subtle and immeasurable ways in which it is helping to shape attitudes and replace the paradigm of benevolence with one of equality. (Bruce Maguire in HREOC 2003d, pp. 67–8)

> The DDA has literally increased the visibility of people with disabilities … It is arguable that it is this visibility, more than anything else, which has had the greatest impact on community attitudes to people with disabilities, and the introduction of the DDA, and the shift to a rights based approach to access for people with disabilities which it represented, was fundamental to this. (Blind Citizens Australia, sub. 72, p. 11)

> To a certain extent, the DDA contributed to increasing awareness regarding the rights of people with disabilities. (Women with Disabilities Strategic Consumer Advocacy Project and Women's Health Victoria, sub. DR296, p. 3)

The DDA's impact appears to have been more significant in certain areas of activity and for people with particular types of disability. David Buchanan considered that the DDA had contributed to the decreased stigma associated with HIV/AIDS, for example (sub. 163). Similarly, other inquiry participants noted the DDA's contribution to improved attitudes in employment (Recruitment and Consulting Services Association, sub. 29; Mental Health Coordinating Council, sub. 84), sports, art and recreation (SPARC Disability Foundation, sub. 15), and education (Australian Association of Special Education South Australian Chapter, sub. 38).

The DDA was also seen to have contributed to an increased awareness about access issues for people with disabilities (Housing Connection NSW, sub. 161; Blind Citizens Australia, sub. 72).

In contrast, some inquiry participants asserted that the DDA has had little effect on attitudes towards mental health issues (Western Australian Office of Mental Health, sub. 94) and people with an intellectual disability (NSW Council for Intellectual Disability, sub. 11; Housing Connection NSW, sub. 161), and that the pace of change generally had been slow (NDAC, sub. 225).

Impact of aspects of the Disability Discrimination Act

Specific aspects of the DDA have contributed, to varying degrees, to the DDA's overall impact on awareness and attitudes, and thus to promoting community recognition and acceptance.

Education, research and other policy work

HREOC's education and information provision role elicited considerable inquiry participant comment. Some inquiry participants, including the Anti-Discrimination Commission Queensland (sub. 119), Blind Citizens Australia (sub. 72) and ASEHA Queensland (trans., p. 2067), considered that HREOC has been an effective educator, given its resources. Others, such as ParaQuad Victoria (sub. 77) and Leichhardt Council Disability Access Committee (sub. 75), commented on the usefulness of its disability rights website, which attracts about 50 000 hits per month (HREOC 2003d, p. 24). The website provides general information about HREOC's disability rights work and includes resources targeted at students and teachers.

By contrast, other inquiry participants argued that too little effort is put into educating the community, as evidenced by:

- continuing negative attitudes towards people with disabilities (Marrickville Council, sub. 157)
- a lack of awareness about the DDA and its processes (Mackay Regional Council for Social Development, sub. 87)
- a lack of information on, and the low profile of, HREOC in some States and Territories (Job Watch Victoria, sub. 215; SPARC Disability Foundation, sub. 15; ACT Discrimination Commissioner, sub. 151).

HREOC has acknowledged both the strengths and the shortcomings of its approach. The current Acting Disability Discrimination Commissioner (Ozdowski 2002a, p. 3) suggested that the DDA 'has had a bigger impact because we [HREOC] have not tried to change community attitudes head on'—that is, HREOC had 'not spent most of its money on advertising campaigns attempting to change attitudes, or lecturing people about what to think or say'. Hastings (1997) suggested that focusing on 'system change rather than attitude change … is the best way to win … hearts and minds'.

Hastings (1997) also noted that 'informing and catalysing activity by other agencies in government and organisations' can help to increase HREOC's effectiveness. This effect appears particularly important given that education about disability issues needs to reach a large, dispersed and heterogeneous group. However, she pointed to the problems HREOC experienced trying to do so in the first five years of the DDA's operation, commenting that information 'simply did not filter from the [peak organisations] through the system'.

HREOC continues to communicate with other organisations and actively cooperates with State and Territory anti-discrimination bodies about education and public information activities (HREOC, sub. 143; Equal Opportunity Commission Victoria, sub. 129). The extent to which these links have overcome the problems experienced during the DDA's first five years is unclear, but a continuing perceived lack of awareness suggests improvement is possible.

HREOC's general research and policy work did not receive as much comment from inquiry participants. The Anti-Discrimination Commission Queensland stated that it 'relies on the research and policy work done by the specialist units at HREOC' (sub. 119, p. 5), and the Intellectual Disability Services Council commented on the benefits of HREOC's sterilisation report (sub. 162). The Guide Dogs Association of SA and NT Inc (sub. DR292) and Barbara Prideaux (sub. DR340) noted the importance of HREOC's research in general. Research and policy work is an important aspect of HREOC's education role, informing policy makers and others about important issues, and potentially influencing future research, attitudes and policy. A particular benefit has been its highlighting of issues that otherwise might not have arisen through the DDA. The number of projects conducted has not been large, possibly reflecting resource constraints (see chapter 15).

FINDING 10.2

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

Public inquiries

HREOC viewed public inquiries as 'one of the major means for promoting awareness and compliance with the DDA' (sub. 143, p. 55). This view was supported by inquiry participants such as Blind Citizens Australia (sub. 72), the Equal Opportunity Commission Victoria (sub. 129), the Intellectual Disability Services Council (sub. 162), and NDAC, which described them as 'vitally important' (sub. DR358, p. 4). Such benefits have been highlighted by, for example, the inquiries into captioning and e-commerce (see appendix D). Some inquiry participants perceived the educative value of inquiries to outweigh that of complaints. The Anti-Discrimination Commission Queensland noted 'the scope of inquiries to achieve systemic change and to have an educational value which confidential individual complaints can never have' (sub. 119, p. 7) (see chapter 13).

Blind Citizens Australia (sub. DR269) suggested inquiries should be used more frequently, but several inquiry participants—including Disability Action Inc. (sub. 43) and the Equal Opportunity Commission Victoria (sub. 129)—noted that resource constraints limit HREOC's ability to conduct inquiries. HREOC also commented on this issue, particularly on its ability to conduct inquiries in non-complaint contexts (sub. 143).

FINDING 10.3

Public inquiries appear to have had positive impacts on promoting community recognition and acceptance in specific areas. Their overall impact has, however, been limited by the small number that have been conducted.

Complaints

The impact of complaints on public awareness and attitudes has been mixed. Some high profile cases, such as *Maguire v SOCOG* (1999) (HREOC H99/115) and *Scott v Telstra* (1995) (HREOC H95/3), have been very effective in raising awareness of access issues for people with disabilities across a range of areas (see appendix D). However, few cases have generated as much publicity as these. Several inquiry participants—such as the Northern Territory Disability Advisory Board (sub. 121) and ParaQuad Victoria (sub. 77)—suggested there is insufficient publicity of complaint outcomes. Scope to increase publicity may be limited somewhat because most complaints are settled by conciliation and are subject to confidentiality agreements (although HREOC publishes some conciliated outcomes in a non-identifying way—see chapter 13). As a result, complaints generally provide less scope than do inquiries for promoting widespread recognition and acceptance.

Some inquiry participants suggested the complaints-based approach even had the potential to stimulate negative community attitudes towards people with disabilities, by presenting this group as aggressive and overly litigious. The Disability Coalition, for example, commented:

> … the legislation places people with a disability in the position of being the aggressive party. This does not create a positive image of people with a disability … In many ways it perpetuates the idea that people need 'special' treatment and are making themselves different by demanding something 'extra' … (sub. 67, p. 6)

Queensland Parents for People with a Disability (sub. 103) expressed similar views.

FINDING 10.4

Some complaints, particularly high profile cases proceeding beyond conciliation, appear to have helped promote community recognition and acceptance across a range of areas. However, the educative impact of complaints is limited by the confidentiality of many conciliated agreements.

Disability standards and action plans

The process of developing disability standards and action plans has the potential to have some positive effect on awareness and attitudes, at least in those sectors to which they apply. The Equal Opportunity Commission Victoria noted:

> … provisions relating to voluntary action plans and disability standards … have encouraged a greater level of attention, communication and consultation in relation to disability discrimination issues than would otherwise have occurred. (sub. 129, p. ii)

The Australian Building Codes Board (sub. 153), National Catholic Education Commission (sub. 86), Association of Independent Schools of South Australia (sub. 135) and NDAC (sub. DR358) expressed similar views about the impact of standards development in particular sectors and the community generally.

Consultation, to the extent that it involves a broad range of parties, is crucial in contributing to the educative effect of the standards development process. However, unless draft standards are widely available to the public during their development, the educative potential of the process is limited. Bruce L. Young-Smith commented:

> During the development of the current [education] standards, draft copies … were difficult to obtain … Such an important document/process should be available to the public to enable valuable discussion by the community. (sub. 80, p. 4)

Moreover, the real benefit of standards—in terms of creating systemic change and certainty (see chapter 14) and awareness raising—comes from their introduction. The time taken to develop standards, along with the fact that only one (the

Disability Standard for Accessible Public Transport) has been introduced, has therefore severely limited their overall impact.

FINDING 10.5

The process of developing disability standards appears to have had a positive impact on promoting recognition and awareness in some sectors, largely due to the consultation involved. Their overall educative impact has been limited because only one has been introduced.

In relation to action plans, the Equal Opportunity Commission Victoria argued that the number lodged 'illustrates that some service providers have turned their attention to the needs and rights of people with disabilities' (sub. 129, p. 10). Disability Rights Victoria argued that 'benefits are most evident in [the] public sector where [the] implementation process has done more to raise awareness about the DDA and its intent than any other process' (sub. 95, p. 4).

Nonetheless, some inquiry participants (including Blind Citizens Australia, sub. DR269) expressed concerns about the overall impact of action plans, especially given the low number of plans lodged by business organisations (see chapter 14). This low number would have moderated the overall educative effect of action plans. Further, because action plans are voluntary and do not apply industry-wide, the extent to which they can increase awareness on a large scale is limited relative to the effectiveness of disability standards.

FINDING 10.6

Action plans have raised awareness among those 'service providers' that have introduced them but their overall educative impact has been limited by the relatively small number that have been lodged.

Guidelines and advisory notes

Guidelines and advisory notes can have many awareness raising benefits. Carers Australia stated that they 'perform an educative role and clearly set out expectations to eliminate discrimination' (sub. 32, p. 4). Industry appears to have found guidelines and advisory notes useful sources of information, although there has been some issue about how they apply in practice (see chapter 14; appendix D). The Insurance and Financial Services Association, for example, welcomed the life insurance and superannuation guidelines as providing clear guidance on the types of information that industry could rely on in making underwriting decisions (see chapter 12 and appendix D). The National Association of People Living with AIDS (NAPWA, sub. DR314, p. 1) also submitted that these guidelines 'can play an

important role in educating both industry and consumers about the existence of obligations and rights under the DDA'. Innes (2000b) noted that these guidelines received about 60 'hits' per month on the HREOC website, although the number of hits does not indicate who was using the guidelines or how useful users found them. Although guidelines and advisory notes can have similar content, guidelines might have a greater potential impact because they are recognised in the DDA (see chapter 14).

FINDING 10.7

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

An overall assessment of effectiveness

It is impossible to quantify the effectiveness of the DDA in promoting community recognition and acceptance. Even a qualitative assessment is difficult, given the conflicting views of inquiry participants, as well as problems such as limited information, the need to isolate the DDA's impact from that of other influences, and the relatively short period of time for which the DDA has operated.

The DDA does appear, however, to have made some contribution to improved community awareness and attitudes towards people with disabilities. HREOC's education and general research functions, public inquiries and guidelines, appear to have made contributions. So, too, has the development of disability standards and action plans. The consultation involved in these processes has helped. The impact of complaints appears to have been more variable—although having effects across a broad range of areas, their impact has been constrained somewhat by the confidentiality of conciliated agreements, and the often specific nature of complaints.

Awareness of the DDA appears low in some sectors, suggesting there is scope to improve the way in which information is disseminated, such as through HREOC's links with other organisations. Notwithstanding scope for improvement, outcomes so far appear to have been reasonably effective, given resource constraints (see chapter 15) and the relatively short period over which the DDA has operated.

FINDING 10.8

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

10.4 Improvements to the current approach

The difficulties of assessing the DDA's effectiveness also make it difficult to identify areas for improvement. Nonetheless, a number of inquiry participants raised the need for improved education by HREOC as a way of improving community awareness and attitudes (although some, including Disability Action Inc. (sub. 43) and Blind Citizens Australia (sub. 72), also cautioned against HREOC's education role diverting attention from other work, such as complaints). Ways of improving education were suggested, ranging from general awareness campaigns to programs targeted at particular groups or types of disability (box 10.2). Whatever approach is taken, there is a need to recognise that:

- it is inherently difficult to achieve the object of promoting community recognition and acceptance, particularly in short timeframes (see for example, the Intellectual Disability Review Panel, sub. 207; ParaQuad Victoria, sub. 77)
- gaps are likely to remain, regardless of the appropriateness of the options chosen, and how effectively these are implemented (box 10.3)
- resources significantly affect what can be done and what results can be expected
- awareness raising must be considered in a broader context, specifically the extent to which this object should take precedence over, and resources from, other priorities, such as complaints handling.

General public awareness campaign

Many inquiry participants supported the use of general public awareness and education campaigns (box 10.2).

Public awareness campaigns using mass media can provide many benefits. They potentially reach a broad audience, can influence individual behaviour by creating a favourable climate of community opinion, and have had positive impacts on attitudes and behaviour in many areas (box 10.3).

However, advertising campaigns alone do not tend to change attitudes, although they can increase awareness and the level of information, and sensitise the audience to other forms of communication. They appear best suited to conveying particular types of information—such as specific, simple messages with specific behavioural implications (see, for example, South Australian Equal Opportunity Commission, trans., pp. 1001–2).

Box 10.2 **Inquiry participants' views on improving education**

Comments on public awareness campaigns included:

> More publicity promoting the dignified treatment of the disabled and the public's responsibility within the Disability Discrimination Act not only legally but morally is needed. Campaigns such as those … that educate on the issues of drug, alcohol abuse and driver responsibility are prime examples of … ongoing public education designed to alter unacceptable social behaviour. This same type of awareness campaign could be initiated to overcome the social issues faced by the disabled. (Souraya Bramston, sub. 33, p. 2)
>
> … a real push in mental health education in the public and in the media would help alleviate discrimination towards mental health … It is this type of education, in schools, public, and in the media, that … should be adopted … (Arafmi Hunter, sub. 36, p. 7)
>
> … perhaps it is timely to conduct another community information and education campaign. (Mental Health Council of Australia, sub. 150, p. 19)

Comments on strategies targeting particular groups included:

> … [is it possible to] incorporate an educational unit within the school system that would teach and promote tolerance, empathy, justice and consideration for all the many diverse communities within Australia including the disabled … ? (Souraya Bramston, sub. 33, p. 2)
>
> … we recommend the government provide more resources for community education … with a particular emphasis on … employers with less than 20 staff. (Job Watch, sub. 90, p. 2)
>
> Training and awareness raising … could … fruitfully occur in schools, neighbourhood centres and other venues where information is shared with members of the community. (Housing Connection NSW, sub. 161, p. 5)

Comments on accessible information included:

> … HREOC … [should] develop concrete and relevant multilingual information and resources about disability, rights and the DDA … provide more education and accessible information to people from a NESB with disability about the DDA and its availability to those who have been discriminated against. (National Ethnic Disability Alliance, sub. 114, pp. 6–7)
>
> … A plain English booklet on the DDA should be distributed through Centrelink and provided directly to clients … [it] needs to be clear, concise, user friendly and available in a variety of formats eg. talking books, Braille and through a variety of outlets eg. libraries, local governments, service providers etc. (Mansfield Community Forum, sub. 202, p. 1)

Comments on the type of information needed included:

> … [there is a need for] awareness/education of where to find skilled employees with disabilities … (Recruitment and Consulting Services Association, sub. 29, p. 2)
>
> … community education … could cover raising awareness of invisible disabilities, and the impact of disability on families and carers. In addition to ensuring people are aware of their obligations to all groups under the DDA, education could look at flexible approaches to inclusion … (Disability Coalition, sub. 67, p. 3)
>
> … [there is] a need for improved information … regarding the differences between the DDA and relevant State or Territory legislation. (Equal Opportunity Commission Victoria, sub. 129, p. 36)
>
> … in Victoria, HREOC does not have a high profile … The function and work of HREOC must be publicised extensively so that there is a nationwide understanding of its existence, purpose and accessibility. (Job Watch, sub. 215, p. 2)

Box 10.3 **Characteristics of successful education campaigns**

Education campaigns to change community attitudes have been used in various areas, including health and road safety. These show that various characteristics contribute to the effectiveness of education campaigns, although they do not guarantee success.

- Research and planning are essential before implementing a strategy. This helps set goals/desired outcomes, assess options for achieving those goals and assess what feasibly can be achieved. It also provides a basis for later review and adjustment.
- Both 'what' and 'who' to target need to be identified. 'What' might include precursors to behaviour, the behaviour itself, or the consequences of behaviour. 'Who' could involve the general public or specific groups. In influencing what the public thinks about, general campaigns can be beneficial by helping to create a 'supportive climate of opinion in the community' since 'public opinion … can act as a potent influence on the beliefs and behaviour of individuals' (Henderson 1991, p. 16).
- A multifaceted approach tends to be most effective. Education and information only tend to be effective as part of a broader range of measures, possibly including legislation and economic incentives. Although advertising campaigns alone may not change attitudes, they can increase awareness and the level of information, help form beliefs, and sensitise the audience to other forms of communication. Using the mass media can be useful, but other approaches—such as school and community-based programs—may also be effective, either as complements to or substitutes for broader scale campaigns.
- Collaborative approaches—across levels of government and with non-government groups—enhance effectiveness. Involving local and regional groups can help to identify any specific local issues and to ensure a message reaches the local level.
- Campaigns need to be ongoing or maintained for extended periods, although they need not be continuous—a series of campaigns (perhaps each with a different focus), with 'campaign free' periods between each, can be effective. Repetition helps reinforce initial gains and prevent the message being forgotten, and provides an opportunity to educate others over time. This needs to be managed carefully, however, to prevent 'message fatigue' setting in, which could offset earlier gains.
- Ongoing evaluation—during and after implementation—is required. This helps identify areas of need, what is likely to work, and what has been successful.
- Large scale campaigns tend to be expensive, especially if involving extensive media advertising. For example, $8 million in federal funding alone was allocated to the National Tobacco Campaign (launched June 1997) in its first six months. More than half of this was for advertising. Eight million dollars over four years was allocated to a National Community Awareness Program (launched 1995) under the National Mental Health Strategy. Two weeks of prime-time television advertising in Victoria during SunSmart Week cost $140 000, while airing free national Community Service Announcements saved a six-month Anti-Cancer Council campaign (focused on children) an estimated $500 000 in 1998.

Sources: Anti-Cancer Council of Victoria 1999, 2003; Borland and Balmford 2003; Donovan et al. 2003; Harrison and Senserrick 2000; Henderson 1991; Hill and Carroll 2003; Kent and Fildes 1997; Lawrence 1995; Vaughan and Hogg 2002; Wakefield et al. 2003.

Lessons from successful campaigns in other areas also suggest they need to involve extensive research and evaluation, be one part of a broader approach, and be well resourced and ongoing (box 10.3). One way to illustrate the potential magnitude of resource requirements is through comparison with HREOC's funding. Funding for its 1994 DDA campaign, for example, was $619 000, including funds HREOC reallocated from other purposes (HREOC 1994), The $8 million allocated to the first six months of the National Tobacco Campaign in 1997 (box 10.3) was equivalent to about half of HREOC's total appropriations (budget) across all its functions in 1997-98 (HREOC 1998d). The desirability of ongoing campaigns to promote long-lasting attitude change also means funding is required on an ongoing basis (although later funding requirements may be lower than in the initial stages of a campaign).

A new advertising campaign by HREOC could focus on increasing awareness of the DDA and/or changing attitudes. However, experience suggests that major public education campaigns in this area do not necessarily provide the desired results. HREOC's 1994 campaign and US attempts to promote awareness had relatively poor results (section 10.1; NCD 1993, 1995a). Similarly, there appears to be still significant prejudice in Australia against people with mental illness, despite large scale campaigns conducted under the National Mental Health Strategy. Slow progress in relation to mental illness might reflect unrealistic expectations and the fact that it takes time to observe changes, but it might also reflect the inherent difficulty of raising awareness in this area. The South Australian Equal Opportunity Commission suggested that many disability issues are too complex to be amenable to mass media public education campaigns, and that 'unless you target, you can waste an awful lot of money' (trans., p. 1001). It pointed specifically to the following important disability issues as being especially difficult to promote through general campaigns:

- how much adjustment is enough and what exactly is the behaviour you want people to stop, noting the difficulty even the courts have in grappling with these issues, as evidenced by the Purvis case (trans., pp. 1001–2)
- equality and difference, and what equal treatment means, commenting:

  > It doesn't mean the same treatment … I don't think it's that complicated, but a lot of people, when we talk about that issue in our training … we get absolute resistance. I'd hate for this to be a public message because by and large the bulk of the population does not agree with special assistance; they don't like it … Unless it's a very obvious reason why … (trans., p. 1003)

The use of large scale advertising campaigns for disability issues might best be reserved for conveying messages that are relatively clear and simple, and/or focus on a particular issue. If significant changes are made to the DDA as a result of the recommendations of this inquiry, then a one-off campaign by HREOC to publicise

these changes might be warranted, for example. There might also be benefits from undertaking campaigns to address specific issues, such as mental illness, but HREOC should not necessarily be responsible for all disability related campaigns. Mental illness, for example, might be better addressed directly by other organisations under the National Mental Health Strategy.

Targeting specific groups

Several inquiry participants suggested that more could be done to target awareness strategies to specific groups, including employers, the media and schools (box 10.2). This type of approach can have several benefits. It has had positive impacts in the past on attitudes and behaviour in areas such as health promotion, as well as in relation to people with disabilities (see, for example, Anti-Cancer Council of Victoria 1999; Vaughan and Hogg 2002; Robinson et al. 2001). It can be tailored to deliver information that is most relevant to these groups, using the most appropriate medium (such as the Internet, brochures and training materials). If carefully targeted, it can also be less resource intensive for HREOC than a major advertising campaign, although it would still require fairly significant funding. As with other approaches, it could be undertaken in conjunction with other groups, including State and Territory anti-discrimination bodies.

Employers

A range of inquiry participants—individuals, disability representatives and employer groups—highlighted the need to do more to target education efforts to employers. This reflects both continuing perceived deficiencies in, and the importance of, this area. Suggested information needs related to topics such as the benefits and role of people with disabilities in the workforce; adjustment options; government programs and types of assistance that are available, and the benefits that have been achieved by them so far; and relevant (especially new) legislative obligations.

Inquiry participants overwhelmingly supported a more collaborative approach to developing and delivering education and information to employers—involving various organisations but, critically, employers themselves (see, for example, ACCI, sub. DR288; Australian Industry Group (AIG), sub. DR326; ACE National Network, sub. DR361; National Diversity Think Tank, trans., p. 2574). As an example of such an approach, AIG pointed to its ‘extensive’ and ‘successful’ work with the Department of Employment and Workplace Relations, in developing publications and initiatives for employers in the industrial relations area (trans., p. 2608). It also noted that it had already ‘done some things with HREOC and the

state bodies'(trans., p. 2608) but suggested that more could be done:

> HREOC should devote more resources to working with [AIG] and other employer groups to educate their member companies about the issues in a positive way, rather than just focusing on legal obligations. Joint seminars and publications would be worthwhile. (sub. DR326, p. 5)

It suggested further that:

> … a lot more could be done by working through industry groups like ours … where we have a close relationship with our 10 000 or so member companies. This is … likely to be far more successful than putting an ad on television, for example, where it's a very broad brush and extremely costly way of going. (trans., p. 2615)

Employer representatives (AIG, sub. DR326, trans., pp. 2607–8 and pp. 2614–6; ACCI, sub. DR288; Victorian Automobile Chamber of Commerce, sub. DR369) and the Department of Employment and Workplace Relations (sub. DR299) suggested a greater emphasis on educating employers would be more effective than legislative approaches in promoting positive attitudes (and preventing negative attitudes) towards, and improving employment outcomes of, people with disabilities. AIG, for example, referred specifically to a conference where:

> … we had 150 or so senior managers … at typically the HR director level … and a very motivational speaker … spoke about the … benefits of employing people with disabilities and why this makes sound business sense … That has a much greater impact than a law that may or may not be well directed. (trans., p. 2608)

Similarly, in relation to small business, the Victorian Automobile Chamber of Commerce commented:

> Our members do not have the resources to deal with extra regulatory burden in the workplace.
>
> … Education is a more appropriate vehicle to ensure the participation and inclusion of people with a disability both in the community and, ultimately, in small business … Only through education and training programs will change in society and, ultimately, the workplace be effected. (sub. DR369, p. 3)

Others, though supportive of education of employers, questioned how much it would do on its own. Tasmanians with Disabilities Inc. suggested that attending a seminar about disability issues may not educate an employer 'nearly as much as … having an employee with a disability would educate you' (trans., pp. 2180–1). The Equal Opportunity Commission Victoria also commented that there will always be employers 'who aren't convinced by educative measures and who aren't convinced to comply proactively', and referred to the Canadian experience, where:

> They had purely and simply voluntary mechanisms; they had education. It wasn't enough. It was clearly shown not to be enough, and that's when they added the auditing and added their compliance regime. (trans., p. 2599)

Overall, given perceived continuing issues in employer awareness and attitudes, the Productivity Commission considers educating employers to be a priority, and an important component of the broader approach reflected in this inquiry's recommendations. Such targeting would be particularly important if employer obligations under the DDA were to change as a result of this inquiry, such as through the introduction of an explicit duty to make reasonable adjustments (see chapter 8).

That employer groups seem particularly willing to work with HREOC in developing and delivering such programs is encouraging, given the importance of cooperative approaches and the need for the target group to be receptive to the messages conveyed, as well as the potential to share resources and costs. Moreover, employer involvement can provide a double benefit—changing the perceptions of employers as they gain a better understanding through program development and delivery processes, and changing the awareness of employees as this information is disseminated through organisations.

FINDING 10.9

Significant benefits would derive from the Human Rights and Equal Opportunity Commission targeting education and information provision to employers.

FINDING 10.10

Actively involving employer groups in the development and delivery of education strategies would provide a double benefit—educating both employers and their employees.

RECOMMENDATION 10.1

The Human Rights and Equal Opportunity Commission should work with employers and employer groups to develop and deliver targeted education campaigns.

Professional development

Some inquiry participants thought HREOC should take a more active approach to targeting professional development of groups such as the media, teachers, architects, and legal community (see, for example, Marrickville Council, sub. 157; Mansfield Community Forum, sub. 202; Blind Citizens Australia, sub. DR269; Office of the Public Advocate Victoria, sub. DR290; Action for Community Living, sub. DR330). HREOC could take one or more of three broad approaches to influencing professional development: (1) directly providing education; (2) developing course material, in conjunction with educators and/or professional

associations; and (3) informally raising awareness of DDA requirements, by publicising them to educators (or making *ad hoc* presentations to classes).

HREOC does not generally favour having direct involvement in professional education, arguing that it lacks the resources and authority to conduct education for professionals (sub. 219). The Productivity Commission agrees. However, a more informal education role for HREOC—such as running occasional short courses or seminars—might be appropriate in some circumstances. This could be the case, for example, where lack of awareness has been identified as a particular problem but other organisations do not have sufficient knowledge of the subject matter to conduct their own courses. This strategy might also involve trying to develop the expertise of other organisations so they can eventually take on the education role.

HREOC could also use its expertise and understanding of human rights issues to encourage educators or professional associations to develop appropriate curricula. In a limited number of cases (those considered to be of particular importance or need), joint production of course material may be warranted, resources permitting.

Schools

Several inquiry participants suggested focusing on schools (box 10.2). There are many ways of doing this, not all of which would involve HREOC directly. HREOC has, for example, already prepared (in 1997) and updated (most recently in 2003), a dedicated schools' resource for race discrimination issues, which teachers can then deliver to their classes. Consideration could be given to developing a similar dedicated resource for disability issues.

This type of material, which otherwise might not be included in school curricula, has the potential to provide several benefits. It could increase students' understanding of, and improve attitudes towards, people with disabilities. Students could then take those improved attitudes into other areas of life, both in the short and long term. The resource could also encourage schools to adopt other community-specific strategies related to disability issues, and help to improve the experience of inclusion for school communities. Such a resource would be particularly valuable given the increasing inclusion of students with disabilities in mainstream schools and the possible implementation of the education disability standard (see appendix B).

Availability of information

Inquiry participants suggested a range of issues about which more information is needed, including differences between the DDA and State/Territory legislation, and

where to find skilled employees with disabilities (box 10.2). This raises the related issue of how such information is made available. One aspect of this, which can be especially important for targeting some groups, is how the information is presented. HREOC already provides information in a variety of formats and community languages to try to make information accessible to people with particular disabilities, and people with disabilities who are from non-English speaking backgrounds. Despite this, some participants commented on the need for more information and resources to be made available in accessible forms, including in community languages and 'plain English' (box 10.2).

The accessibility of information also depends on how it is distributed. HREOC's website has been an important source of information for many people, and it is one way of reaching those who are not part of formal disability networks. However, many people with disabilities (and other groups, particularly those in rural areas) do not have access to the Internet so that medium alone cannot be relied on for information distribution.

The Mansfield Community Forum highlighted the importance of multiple distribution channels, suggesting Centrelink, libraries and local governments as possible outlets through which to distribute information (box 10.2). Research by the Communication Project Group also suggests that various distribution channels are required; the most appropriate depending on the target group (trans., pp. 2057–8 and p. 2064). Daryl McCarthy suggested that disability liaison officers in tertiary institutions could be a more useful 'distribution channel', especially during orientation weeks, than pamphlets that are not read (trans., p. 2195). Fostering links with other organisations may also help to improve the effectiveness of information dissemination. Overall, the best approach to information distribution can be assessed only on a case-by-case basis, considering the benefits and costs, and factors such as the needs of particular groups and the extent to which generic information can meet these needs.

Research and information gathering

While most inquiry participants were concerned about the distribution of information, some suggested the need for further research and information gathering (effectively finding and/or producing new information) in some areas. The Disability Council of NSW (sub. 64) and Joe Harrison (sub. 55) suggested more statistical data are needed. They argued that such data could form the basis of a 'state of the nation' report that provides valuable information, stimulates public debate and enhances community awareness of disability. HREOC stated that it was:

> … not itself in a position to conduct a 'state of the nation' audit but agrees that

> improved indicators of a range of disability issues would be highly useful to inform policy and program activity and to inform public and media discussion of disability. (sub. 219, p. 4)

A comprehensive integrated data source about people with disabilities is not available (see chapter 3), but there are a number of existing sources of data on people with disabilities (many of which have been drawn on in this report). As well as the annual reports and occasional research of HREOC, information sources include the Survey of Disability, Ageing and Carers (SDAC), the HILDA survey, the *Report on Government Services* (which includes a chapter on services for people with disabilities), and publications by the Australian Institute of Health and Welfare and the Australian Housing and Urban Research Institute.

The Productivity Commission considers that HREOC's research function does not extend to an ongoing role in collecting and publishing general disability-related data. Rather, HREOC should continue to provide data within the context of its core duties, such as fulfilling its annual reporting requirements (by collecting and publishing complaints data) and undertaking specific research projects. Problems with existing data sources are best addressed by the relevant data collection agencies. The Productivity Commission recognises the efforts of agencies such as the ABS to improve the quality and quantity of data about people with disabilities.

In terms of general research, HREOC (2003d) indicated a desire to do further work in the psychiatric disability area, while Barbara Prideaux (sub. DR340) suggested chemical illness and unsafe products as an area for HREOC research. The Productivity Commission acknowledges that HREOC cannot deliver all the research needed to help change community attitudes, given its resource constraints, but considers that its contribution is valuable.

Links with other organisations

The importance of cooperation and the development of links with other organisations was noted earlier. Some inquiry participants, including HREOC (sub. 143), the Equal Opportunity Commission Victoria (sub. 129) and NDAC (sub. 225 and sub. DR358), highlighted the scope for, and desirability of, further cooperation with various organisations in education and information provision. NDAC argued that the 'ability for HREOC to expand its inquiry role, especially in conjunction with other bodies such as the State and Territory anti-discrimination bodies could be encouraged' (sub. DR358, p. 4). HREOC also expressed interest in pursuing 'expanded cooperation with business, disability community organisations, local government, or other agencies', in recognition of 'limits on its own resources, expertise and ability to reach people with appropriate information' (sub. 219, p. 29).

Enhancing links with other anti-discrimination bodies and other groups could produce benefits by:

- helping to identify, and address, particular issues and needs of specific groups, and the most appropriate ways of disseminating information in the respective States and Territories—for example, fostering further links with State and Territory governments may enhance access to disability groups formed by those governments (such as Victoria's regional access project groups)
- enhancing awareness of, and reducing confusion about, the federal and State systems
- consolidating knowledge, making the best use of the particular expertise of each group
- reducing duplication, which may free up resources that can be used in other areas or to increase the scope of educational activities (improving the efficiency of overall resource use)
- encouraging involvement by government departments and organisations that do not currently perceive such involvement as their responsibility (see, for example, the comments of the National Ethnic Disability Alliance (trans., p. 1447))
- enhancing the perceived strength of the message, by presenting a 'united front' on disability issues.

The effectiveness of the cooperative approach depends on its implementation. Leichhardt Council Disability Access Committee suggested HREOC may have 'a leadership role … to advise all levels of government and the community where discrimination is taking place' (sub. 75, p. 4), while the Anti-Discrimination Commission Queensland noted the need for HREOC's current research and policy work to be done at the national level (sub. 119).

Even to the extent that HREOC takes a 'leadership' role in some areas, the active involvement of other groups remains crucial. The importance of involving employer groups in the development and delivery of education programs targeted at employers was noted above. ParaQuad Victoria (sub. 77) suggested HREOC encourage other government departments and non-government organisations to produce education and training materials. Similarly, the Physical Disability Council of Australia argued:

> … there's enough national and State-based organisations to actually take on the role of educating people on their rights. There's advocacy organisations; there's the Disability Discrimination Legal Services … it's about time that the power was shared between some of those organisations so that it's not just HREOC's role. (trans., pp. 180–1)

Links with other anti-discrimination bodies would be enhanced by HREOC becoming a member of the Australian Council of Human Rights Agencies, which was established by the Commissioners/Presidents of State and Territory anti-discrimination bodies. Introducing HREOC to an existing structure has the advantage of not creating additional administrative layers. The Council's main focus—which has been on racial and religious vilification issues—could then be expanded to encompass disability, and possibly other, discrimination issues.

The Council could become a clearing house for ideas, and provide a means for discussing research priorities and programs for disability discrimination issues and their funding. It would also be the appropriate body to take ultimate responsibility for providing information about differences in, and the application of, relevant laws at the federal and State/Territory level. This does not mean that other groups should not be involved in such work. However, the Council would be in the best position to coordinate efforts to keep information regarding legislative changes up-to-date. Actual production could be contracted out to other parties. As well as being the vehicle for coordinating education and awareness raising, the Council could oversee efforts to provide a coordinated approach to complaints handling in each State and Territory, including through a 'shop front' presence in each jurisdiction (see chapter 13).

Overall, the Productivity Commission considers that further cooperation between HREOC and other organisations dealing with disability discrimination issues will help to identify areas of need in each region, reduce duplication and enhance awareness of, and reduce confusion about, the federal and State systems.

FINDING 10.11

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

RECOMMENDATION 10.2

The cooperative arrangements between the Human Rights and Equal Opportunity Commission and State and Territory anti-discrimination bodies should be formalised and extended. This would be facilitated by:

- ***including HREOC in the membership of the Australian Council of Human Rights Agencies***
- ***broadening the Council's focus to cover disability issues, especially the development of education programs, information provision, research priorities and programs, and a 'shop front' presence in each jurisdiction.***

10.5 Summing up—striking a balance

The DDA appears to have contributed to improving community awareness of disability issues and attitudes towards people with disabilities and, in so doing, appears to have made some progress towards achieving its object of promoting community recognition and acceptance. The exact scope of its contribution is unknown, given the limited, largely anecdotal, information available to measure the DDA's effectiveness, and its relatively short period of operation.

There does, however, appear to be scope to enhance the DDA's effectiveness in specific areas, suggesting that improvements to the current approach to promoting recognition and acceptance are possible. Implementing such improvements is not easy. It involves striking a balance—between different possible strategies, different objectives, the roles of different organisations, and competing resources—in a context in which HREOC's resources are limited, and information about the benefits of particular awareness raising approaches is incomplete.

A general, large scale mass media campaign does not appear justified at present, given the cost and uncertain benefits of such an approach. Focused campaigns to promote particular issues—such as to publicise any major changes to the DDA flowing from this inquiry—might nevertheless be appropriate. The desirability of this would need to be assessed on a case-by-case basis.

This chapter suggests that the most significant improvements to community recognition and acceptance of people with disabilities are likely to derive from HREOC:

- performing additional research into specific priority areas
- enhancing links and cooperation with State and Territory anti-discrimination organisations and other bodies
- targeting its information provision to gain the most leverage, with a particular focus on employers and other groups with responsibilities under the DDA, and schools.

11 Definitions

This chapter examines definitions for some of the key concepts of the *Disability Discrimination Act 1992* (DDA)—including disability, direct discrimination, indirect discrimination and harassment. These define who is covered by the DDA (section 11.1) and which actions are unlawful under the DDA (sections 11.2, 11.3 and 11.4). Recommendations are made to improve some definitions and clarify others. Areas of activity that are explicitly excluded from the DDA are discussed in chapter 12.

11.1 Definition of disability

The definition of disability in the DDA is deliberately broad. It does not require any assessment of the severity, type or permanency of a disability, or of when or how it was acquired. The disability may not even be current—it can be in the past, the future or imputed (see chapter 4).

Inquiry participants said the main benefit of this definition is that it 'avoids unproductive disputes over whether a person with a disability fitted a particular impairment category', as can happen under other anti-discrimination Acts (Val Pawagi, sub. 1, p. 2). LeeAnn Basser said this breadth is:

> … a real strength of the DDA. It stands in stark contrast to overseas experience, such as in America where people with disabilities—clearly with disabilities—are found to be not people with disabilities for the purposes of the [US Americans with Disabilities Act]. (trans. p. 2720)

HREOC noted that significant legal resources can be 'taken up with issues of the identification of who is, and is not, a person with a disability' in the United States and the United Kingdom (sub. 143, pp. 5-6). Under the UK's Disability Discrimination Act for example, 16 per cent of applicants in decided cases (from 1995 to 2002) lost because the tribunal 'ruled that they had not met the statutory definition of disability. This was the single most common reason for a claim to fail' (Leverton 2002). This is now being addressed (among issues) through an amendment to the Act (DRC 2004, p. 16).

By contrast, consideration of complaints made under Australia's DDA has tended to focus on whether a discriminatory act has occurred, rather than on the nature of the

complainant's disability. HREOC said that in this regard, the Australian DDA is much more 'inclusive' in practice than its equivalent in the UK (sub. 219, p. 4). Nevertheless, some participants raised concerns about possible gaps or confusion regarding the DDA's definition of disability. These are discussed in turn below, followed by the Productivity Commission's conclusions on this issue.

Social versus medical definitions of disability

The DDA, taken as a whole, 'reflects a social or environmental model of disability … rather than accepting a medical or deficit model' (HREOC, sub. 219, p. 4). The social model appropriately describes discrimination in terms of physical and attitudinal barriers to participation and is essential to the underlying rationale of the DDA (see chapter 2).

Within this 'social model' framework, the DDA's technical definition of disability is based on a medical approach that includes a mix of impairments, diseases and disorders (AIHW, sub. DR272, p. 2). Similar medically-based definitions of 'disability' (or 'impairment') are evident in State and Territory and in international anti-discrimination legislation (see chapter 4). The AIHW said this integrated approach is appropriate and that:

> … the DDA definitions of disability and discrimination, and the DDA objects, fit very well within the [International Classification of Functioning, Disability and Health] framework, which is based on an integration of the medical and social models of disability (or, as [the World Health Organization] puts it, represents a biopsychosocial model of disability). (AIHW, sub. DR272, p. 2)

However, some inquiry participants argued that the DDA's definition of disability should reflect the social model more closely, because the current definition 'allows many social myths and value judgements to be imported to the legal system … [and] used to legitimate abuses' (Joe Harrison, sub. 55, p. 5; Disability Council of NSW, sub. 64, p. 4, sub. DR291, p. 11). Participants suggested alternative definitions for disability, such as a 'disadvantage or restriction caused by a contemporary social organisation … [and] barriers in society' (Disability Council of NSW, sub. 78, pp. 7–8), or removing the word 'disability' from the DDA entirely, on the ground that truly inclusive environments and technologies would mean that people are 'no longer disabled' (Independent Living Centre of NSW, sub. 92, pp. 1-2).

Other inquiry participants did not favour adopting a more overtly 'social model' definition of disability for practical reasons. The National Ethnic Disability Alliance said of the two models, that 'from a pragmatic and legislative point of view the current definition of the DDA' is more useful and 'does not exclude anybody with a

disability' (sub. 114, p. 13). Alexa McLaughlin (trans., p. 657) said the social model has merit in some contexts, but was 'very concerned' about applying it to the definition of disability in the DDA.

In response to these comments, HREOC (sub. 219, p. 4) said that a definition of disability based more directly on the social model was considered in the initial drafting of the DDA, but was 'rejected because it risked leaving some instances of disability discrimination outside the coverage of the legislation'.

Taking the definition of disability more fully into the social model might also increase confusion between 'disability' and other sources of social disadvantage. Some inquiry participants, for example, recommended extending 'disability' to include social disadvantages due to past experiences as an Indigenous person (ATSIC, sub. 59, p. 4) or to homelessness (Women's Health Victoria, sub. 68, p. 2; Mental Health Legal Centre, sub. 108, p. 3). This approach appears to confuse 'disability' with 'disadvantage'. HREOC noted that if psychiatric disorders resulted from these or other social disadvantages, the DDA would cover any incidences of discrimination on the ground of that disorder (sub. 219, p. 6).

Medical conditions

Many inquiry participants considered that the DDA's definition of disability is broad enough to cover all medical conditions and that this is appropriate. The Anti-Discrimination Board of New South Wales said 'the broad definition of disability in the DDA should be retained' (sub. 101, p. 19), as did the Equal Opportunity Commission Victoria (sub. 129, p. 26).

However, other participants were concerned that the DDA was not sufficiently clear about its inclusion of individual medical conditions including depression, chronic fatigue syndrome, addictions, multiple chemical sensitivities (MCS) and dyslexia. Some of these concerns appeared to arise because the DDA does not list individual disabilities or impairments. For example, the Communication Project Group said 'we probably need a recognition of communication problems' (trans., p. 899) and the Mental Health Council of Australia and beyondblue said there is 'a strong need to expand the language' to cover depression, behavioural and emotional disorders more explicitly 'because people do not understand the disability' of mental illness (trans., p. 635). Villamanta Legal Service said that disability 'should include addiction' (trans., p. 1874).

Other participants were concerned the medical conditions of interest to them might not be covered by the DDA, sometimes because the very existence of the condition has been disputed by parts of the medical profession. For example, the Myalgic

Encephalopathy and Chronic Fatigue Syndrome Association of Australia (sub. 211, p. 3) was concerned that chronic fatigue syndrome may not be included in the DDA, because the condition is not always easily diagnosed. People with MCS and related illnesses raised the same concerns about their conditions (Dorothy Bowes, trans., pp. 1988-9; Agnes Misztal, sub. 160, p. 1).

In response to some of these submissions, HREOC noted that the DDA's definition of disability already includes some of these conditions and more:

> The existing DDA definition already covers depression, addiction and obesity, as is noted in explanatory material and complaint reports available on HREOC's website and (in the case of addiction) in Federal Court case law. (sub. 219, p. 6)

On the other hand, in the context of insurance, the Investment and Financial Services Association (IFSA) (sub. DR349, p. 4) was concerned about the potential for conflicting medical evidence for people who have medical symptoms but no diagnosis. It said that, in such cases, the underwriting decision 'would normally be deferred until a diagnosis has been made'. Due to the DDA's exemption for insurance decisions based on reasonable actuarial or statistical data or other relevant factors (s.46), this response would remain possible (see chapter 12).

The DDA expressly includes the presence of 'organisms capable of causing disease or illness', as well as disabilities that 'may exist in the future'. However, some doubt may remain among some people regarding conditions that are not easily diagnosed or recognised, such as chronic fatigue syndrome, MCS or other new conditions that have identifiable medical symptoms but not necessarily a medically recognised underlying organism, disease or illness. It would be worthwhile to clarify that such medical conditions are disabilities for the purposes of the DDA.

Genetic conditions

The current definition of disability in the DDA is broad enough to include genetic disorders and conditions. However, some participants were concerned that their inclusion is not sufficiently explicit (Anti-Discrimination Board of New South Wales, sub. 101; New South Wales Office of Employment and Diversity, sub. 172). IFSA (sub. DR349, p. 4) was again concerned about 'problems of evidence' and definition of genetic conditions for insurance and underwriting purposes. But as with other disabilities covered by the DDA, insurance providers may lawfully discriminate against people with genetic conditions if reasonable actuarial data or other relevant factors apply (see chapter 12).

In its review of legal protection for genetic information, the Australian Law Reform Commission (ALRC 2003) found the DDA includes 'genetic conditions that are

manifested by current symptoms' or that may cause a disability 'in the future', but it was concerned the definition of disability 'may not be wide enough' to include 'genetic status where a person is presently asymptomatic' (ALRC 2003, p. 306). It recommended amending both the objects (s.3) and the definition of disability (s.4) in the DDA (and equivalent clauses in the *Human Rights and Equal Opportunity Act 1986* (HREOC Act)) 'to clarify that the Act applies to … discrimination on the ground of genetic status'. The ALRC also recommended harmonisation of State and Territory anti-discrimination laws to reflect these changes (ALRC 2003, pp. 56–7).

In support of these recommendations, the ALRC referred to the UNESCO *Universal Declaration on the Human Genome and Human Rights 1997*, which aims for no 'discrimination based on genetic characteristics' (article 6)[1] and the Council of Europe's *Convention on Human Rights and Biomedicine*, which prohibits 'any form of discrimination against a person on grounds of his or her genetic heritage' (article 11).[2] In the UK, the Disability Rights Commission recommended extending the definition of disability in the Disability Discrimination Act 1995 (UK) to include 'genetic pre-disposition' to an impairment (DRC 2003, p. 41).[3]

HREOC (sub. 143, p. 5) said it supported the ALRC's 'proposals to confirm that the DDA covers genetic discrimination (although in HREOC's view this is already the case)', but preferred clarification through explanatory material rather than an amendment to the DDA. The Productivity Commission agrees with HREOC that clarification is needed. For the purposes of the DDA, the relevant genetic condition, predisposition or status should be clearly linked to a disability as otherwise defined in the DDA (such as a genetic predisposition to a particular disease), so as to avoid confusion with genetic status issues that may be more relevant to racial or other discrimination. Similar wording to that recommended for the UK Act by the Disability Rights Commission would help to make this clear.

Behaviour as a manifestation of a disability

In *Purvis v State of NSW (Department of Education and Training)* ((2003) HCA 62) the High Court of Australia ruled that 'disturbed behaviour' that is a consequence of a disability is part of the disability for the purposes of the DDA (box 11.1). That is,

[1] This Convention is not a legally binding instrument (ALRC 2003, p. 292).

[2] This Convention is legally binding on the 15 Council of Europe member countries which have signed it (ALRC 2003, p. 293). It applies in the context of sex, race and disability discrimination.

[3] By contrast, the Disability Rights Taskforce recommended the opposite in 2001, on the ground that the UK Act 'only covers people who actually have an impairment' and not those who may have one in the future (Disability Rights Task Force 2001, p. 21).

direct discrimination on the ground of a behaviour that is a consequence of a disability is discrimination on the ground of the disability.

Box 11.1 **Behaviour as a disability in the Purvis case**

Daniel Hoggan, the foster child of Mr and Mrs Purvis, was enrolled in a mainstream Year 7 class at Grafton High School in 1997. Daniel had multiple, complex disabilities due to a severe brain injury in infancy. During 1997, he was disciplined and suspended on several occasions for verbal and physical abuse of teachers, teachers' aides and other students. The school recommended Daniel be moved to a special education unit.

The New South Wales Department of Education rejected an appeal from Mr and Mrs Purvis against this move. The Purvises made a disability discrimination complaint to HREOC, which found in their favour, and the case then proceeded through the courts.

- HREOC found the Department of Education had discriminated against Daniel on the ground of his behaviour and therefore on the ground of his disability.
- The Federal Court disagreed with HREOC. It said 'the behaviour of the complainant is not *ipso facto* a manifestation of a disability within the meaning of the Act'.
- The Full Court of the Federal Court agreed with the first Federal Court decision. It said Daniel's 'conduct was a consequence of the disability rather than any part of the disability within the meaning of section 4 of the Act'. That is, Daniel's behaviour was separate to his disability, even though it was caused by the disability.
- The High Court said Daniel's conduct was part of his disability for the purposes of the DDA because it was 'disturbed behaviour' under part (g) of the definition. It said the Federal Court had erred in distinguishing between a condition and its behavioural manifestations. However, for other reasons, the majority of the High Court found that the Department of Education had not discriminated against Daniel.

Sources: *State of NSW (Department of Education) v HREOC* (2001) FCA 1199; *Purvis v State of NSW (Department of Education and Training)* (2002) FCAFC 106; *Purvis v State of NSW (Department of Education and Training)* (2002) FCAFC 503; *Purvis v State of NSW (Department of Education and Training)* (2003) HCA 62.

Until this High Court decision, there was some doubt about this question, with various legal decisions pointing in different directions (box 11.1 and HREOC 2003b, pp. 67–70). Contrary to the views of some participants, the High Court decision on this point in the Purvis case represented a clarification, not an extension, of the DDA's existing provisions. Following the High Court decision, it may be of value to remove any remaining confusion surrounding this issue by ensuring that it is clear that the DDA's definition of disability includes behaviour that is a manifestation of a disability (as per part (g) of the definition in the Act). This does not imply that the definition of disability requires alteration or extension as a result of the High Court's decision, but only that it requires clarification.

Concerns among some inquiry participants about the implications of recognising 'behaviour' in the definition of disability appear to be misplaced. A broad definition of disability does not mean that all actions by people with disabilities are automatically protected by the DDA—the High Court decision in the Purvis case makes this clear (section 11.2). The DDA includes a number of defences that allow disability discrimination in certain circumstances. Direct discrimination, for example, may be lawful if providing different accommodations and services would cause an unjustifiable hardship (see chapter 8). Indirect discrimination is lawful if the rules or conditions that have a disproportionate effect on the person with a disability are otherwise reasonable in the circumstances (section 11.2).

Conclusions on the definition of disability

The Productivity Commission considers that the DDA, in its entirety, promotes a social rather than a medical response to disability discrimination. Despite its medical connotations, the current broad definition of disability operates in a manner that is consistent with a broad 'social model' framework. Attention is then focused on the discrimination (that is, on the physical and attitudinal barriers), and not on the attributes of the person that constitute their 'disability'.

Whichever language or philosophical basis is used to describe the relevant attribute of people with disabilities (such as disability, impairment, condition or symptom), the DDA must include a definition of disability so it can operate in a practical manner. This definition of disability should not inadvertently exclude people with disabilities who face what would otherwise be genuine cases of disability discrimination, merely because their circumstances are not included, or because its wording is ambiguous.

Further, the definition of disability should not require repeated updates as medical knowledge advances or as new medical conditions emerge. To assist with this, the definition of disability should be amended to ensure there is no doubt that it includes the presence of genetic predispositions to disabilities, and conditions that have medically recognised symptoms but have not necessarily been diagnosed.

The status of behaviour that is a consequence or manifestation of a disability should also be clarified. This matter has been addressed by the High Court in the Purvis case (box 11.1). Nevertheless, the Productivity Commission agrees with HREOC and other inquiry participants that it would be beneficial to the general public to clarify this important point, in the interests of ensuring that 'disability' in the DDA is as clear and unambiguous as possible. This could be done in an explanatory note attached to the DDA. As noted above, this is a clarification, and not an extension, of the meaning of 'disability' in the DDA.

FINDING 11.1

The Disability Discrimination Act 1992 *is based on a 'social model' of disability discrimination, but it uses a medically-based definition of disability. This integrated approach is appropriate. However, the current definition of disability in the Act (s.4) is unclear in certain areas.*

RECOMMENDATION 11.1

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

- ***medically recognised symptoms where the underlying cause is unknown***
- ***genetic predisposition to a disability that is otherwise covered by the Act.***

A note should be added to the Act to explain that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Act.

11.2 Definition of discrimination

The DDA features two types of discrimination: direct and indirect discrimination. Inquiry participants raised several concerns about direct and indirect discrimination, which are discussed in turn below:

- the need for two separate definitions of discrimination
- the comparator test in the definition of direct discrimination
- the implications of providing 'different accommodation or services' in cases of direct discrimination
- the proportionality test in the definition of indirect discrimination
- the reasonableness test in the definition of indirect discrimination
- proposed (or future) acts of indirect discrimination.

Distinguishing direct from indirect discrimination

In the DDA, direct discrimination arises when a person with a disability is treated less favourably than others, in 'circumstances that are the same or are not materially different' (s.5(1)). In making this comparison, the fact that a person requires 'different accommodation or services' does not render their circumstances 'materially different'. By contrast, indirect discrimination arises when a person with a disability is particularly disadvantaged by being treated the same as people

without the disability, due to a uniform rule or requirement that the person with the disability cannot meet and that is not reasonable in the circumstances (see below and chapter 4).

One inquiry participant said this is an 'academic' or legal distinction only, and suggested merging the two (Anita Smith, trans., p. 297, sub. 127, p. 2). An example of a merged definition can be found in the Human Rights Code 1996 in British Columbia, Canada, which tests all cases of discrimination against the same set of criteria.[4] However, this single test still requires proof that an action is discriminatory 'either directly or indirectly', and does not appear to operate as a single test in practice (Equal Opportunity Commission Victoria, sub. 129, p. 28).

All Australian anti-discrimination Acts distinguish direct from indirect discrimination (although their actual wording varies), in acknowledgement of the different forms that discrimination can take. The Productivity Commission considers that the DDA's distinction between direct and indirect discrimination is appropriate. A distinction is necessary to ensure the DDA can address unlawful discrimination that arises from different circumstances.

The 'comparator' test in direct discrimination

Two elements of the DDA's 'comparator' test raised issues for this inquiry: identifying a suitable (real or hypothetical) person for comparison; and identifying the 'circumstances that are the same or not materially different' for the purposes of the comparison. Some inquiry participants suggested replacing the comparator with other tests of direct discrimination, while others suggested amending it. These issues and suggestions are discussed below.

Alternative approaches to the comparator

A small number of jurisdictions have sought to eliminate the comparator in their discrimination legislation. Instead of a comparator, they look at whether the person with a disability has been treated 'unfavourably' or in a manner that 'disadvantages' them, or has suffered a 'detriment' in an absolute sense (box 11.2).

Some participants said they preferred these alternatives. People with Disability Australia (trans., p. 1323) said the 'detriment test' recommended by the New South Wales Law Reform Commission for the *Anti-Discrimination Act 1977* (NSW) is more appropriate than the DDA's comparator test and would have wider application

[4] The Supreme Court of Canada established this test. The British Columbia Code does not define direct or indirect discrimination (Equal Opportunity Commission Victoria, sub. 129, p. 28).

(for example, where no comparison to a person without the disability is possible) (box 11.2).

Box 11.2 **Alternatives to the comparator in other legislation**

The Americans with Disabilities Act 1990 (US) defines discrimination in an absolute (unfavourable treatment) rather than relative sense (less favourable treatment). It defines discrimination in employment as (among other things):

> … limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee. (s.102(1))

The ACT's *Discrimination Act 1991* defines discrimination as when a person:

> (a) … treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7. (s.8(1))

In its review of the *Anti-Discrimination Act 1997* (NSW), the New South Wales Law Reform Commission (1999, paras. 3.51–3.53) said that Act's comparator, which specifies 'less favourable treatment', causes 'conceptual difficulties as well as problems associated with proof for complainants … artificiality and resulting complexity'. It recommended replacing the comparator with a 'detriment' test, with 'detriment' defined as 'adverse effects', 'somewhat akin to damage' or 'disadvantage' . This recommendation has not been implemented.

Sources: Americans with Disabilities Act 1990 (US); *Discrimination Act 1991 (ACT)*; *Anti-Discrimination Act 1977 (NSW)*; NSW Law Reform Commission 1999.

Currently in Australia, the ACT Act is the only anti-discrimination Act that does not define direct discrimination (in this Act, called 'unfavourable treatment') in a comparative sense. The ACT Discrimination Commissioner claimed this 'lack of a comparator' allows for 'unique circumstances and for each individual's experience of discrimination to be explored on its own merits' (sub. 151, p. 6). However, the Commissioner acknowledged that:

> … very often there's an implied comparator in that if a person is claiming to have been treated unfavourably, almost in the back of your mind you have some notion of what might have been fair treatment or favourable treatment. (trans., p. 713)

In *Prezzi and Discrimination Commissioner* ((1996) ACTAAT 132), the ACT Administrative Appeals Tribunal said that the lack of an explicit comparator meant that 'in some special cases', the ACT approach might lead to a different decision to that made under other anti-discrimination Acts, but, in most cases, the resulting decision would be the same. The Tribunal was concerned that the ACT approach 'involves some difficulty' in cases where all of the available courses of action might produce unfavourable outcomes, regardless of whether there was discriminatory treatment.

HREOC (sub. 143, p. 12) raised concerns about the implications of adopting the ACT approach for the scope of the special measures exemption in the DDA (s.45). It cited an ACT case in which a person complained about being denied the provision of a particular disability service. Because this service was used by people with a particular disability only, the ACT Tribunal had no comparator, such as how a person without the disability might be treated by the service. If the Tribunal had not exercised the special exemption clause in the ACT Act (which is similar to the special measures exemption (s.45) in the DDA, see chapter 12), it might have had to decide whether the person concerned was treated 'unfavourably' and, in effect, decide whether the person should receive the disability service in question, possibly in contravention of that service's eligibility criteria. If this problem were to arise in relation to the DDA, the special measures exemption for disability services might be applied in a similar manner (see chapter 12).

The Productivity Commission is not convinced that these alternative approaches are significantly different in practice from the comparator approach in the DDA. Any notion of 'unfavourable', 'less favourable' or 'detrimental' treatment almost inevitably requires a notional or theoretical comparison of the treatment of the person with a disability, and the treatment that person would have received if they did not have the disability. South Australia's *Equal Opportunity Act 1984*, for example, defines discrimination on the ground of impairment as 'unfavourable' treatment (s.66), but then goes on to define 'unfavourable' as treating someone:

> … less favourably than in identical or similar circumstances the discriminator treats, or would treat, a person who does not have that attribute or is not affected by that circumstance. (s.6(3))

For all intents and purposes, these different approaches are applied in a similar manner and achieve similar outcomes to that of the DDA. A direct point of comparison provides an essential, practical benchmark, against which the action of the discriminator can be measured. The use of a comparator in the DDA is therefore appropriate. However, this is not to say that the current version of the comparator in the DDA cannot be improved upon (see below).

FINDING 11.2

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

Identifying the comparator

Potential problems in identifying an appropriate comparator and appropriate circumstances for comparison sets disability discrimination apart from sex or race

discrimination, for which many more comparators (and comparative circumstances) are usually available. In its review of Federal Court discrimination cases (from September 2000 to September 2002), HREOC concluded:

> The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the inception of the DDA, and one that continues to be the subject of academic and judicial debate. (HREOC 2003b, p. 70)

Many inquiry participants said an appropriate comparator can be difficult to find (box. 11.3). These comments mainly related to alleged discrimination in access to disability services. Arguably, if a comparator cannot be found at all (for example, because people who do not have the disability do not use the service), then the situation is likely to involve problems such as 'inadequate planning … or a lack of adequate funding of support services', (National Disability Advisory Council, sub. 225, p. 2), rather than disability discrimination. Further, the DDA does not apply to complaints about access to disability services due to the 'special measures' exemption (s.45). For various reasons, the Productivity Commission considers this exemption appropriate (see chapter 12).

Box 11.3 **Inquiry participants' views on the comparator**

Disability Action Inc. (sub. 43, p. 2) and the National Council for Intellectual Disabilities (sub. 112, p. 12) said the comparator is problematic for people with intellectual or non-physical disabilities, and when dealing with cases of 'quality of life' or 'special needs' instead of physical access.

The National Disability Advisory Council (sub. 225, p. 2) said there are 'many areas that comparison cannot be easily made and in remote areas may not exist'. It said the comparator in these cases should be 'the quality of life of the average Australian, or the life expectations of the average Australian'.

People with Disability Australia (trans., p. 1322) criticised the comparator for producing 'perverse results' and for not addressing 'the substantial issues of the Act' or dealing with 'active measures' for people with disabilities.

Blind Citizens Australia (sub. 72, p. 2) recommended a review of the comparator in the DDA to clarify when and how it applies to disability services.

Queensland Parents for People with a Disability (sub. DR325, p. 3) said it found 'this area of the law most confusing'. It questioned the comparator's relevance to people living in institutional accommodation or nursing homes and suggested 'the comparator could be the living setting of non-disabled young people'.

In HREOC decisions, the comparator was a real or hypothetical person who was in the same (or not materially different) circumstances, but who did not have 'the

characteristics of the person with the disability'.[5] The treatment of a person with HIV/AIDS, for example, was compared to the treatment of a person who was not infectious, because 'infectiousness' was one of 'the characteristics of an HIV/AIDS sufferer' (HREOC 2003b, p. 71). To do otherwise, it was argued, would have had 'the result that the treatment could never be discriminatory within the meaning of the Act' (Wilson in *Dopking v Commonwealth of Australia [HREOC 1994]*, in HREOC 2003b, p. 71).

Some of the problems with the comparator have arisen from practical difficulties in identifying circumstances that are 'the same or not materially different'. Various HREOC and Court decisions have taken different approaches to interpreting circumstances 'that are not materially different' and the characteristics that should therefore be imputed to the real or hypothetical comparator (such as 'infectiousness' or 'disruptive behaviour').[6]

Most notably, in the Purvis case (box 11.1), the members of the High Court were split on this issue. The majority of the High Court said the circumstances for comparison included disruptive behaviour—that is, the comparator was a student without the disability who behaved in a similarly 'violent' manner, for reasons other than disability. The minority of the High Court dissented on this point, arguing that if disruptive behaviour was, in effect, part of Daniel's disability (which all members of the High Court agreed it was), it could not also be imputed to the comparator.

In essence, the majority of the High Court distinguished between two types of behaviour that seemed outwardly identical and that had the same disturbing or harmful effect on others, but that had different causes: (1) 'disturbed' behaviour that was a manifestation or symptom of a disability; and (2) 'wilful' behaviour that was not related to a disability. The High Court's majority finding of no direct discrimination rested largely on its view that the comparator was a (hypothetical) student exhibiting 'wilful' behaviour similar in outward appearance to Daniel's 'disturbed' behaviour. This case demonstrates the practical importance of identifying the correct comparator and circumstances for comparison in determining direct discrimination.

The majority view of the High Court regarding the comparator in the Purvis case appears to imply that different treatment of a person with a disability on the ground of the behaviour caused by their disability cannot constitute direct discrimination

[5] HREOC was empowered to make decisions prior to 2000; now it only conciliates (see chapter 4).

[6] Cases that followed HREOC's interpretation include *IW v City of Perth & Ors* (1997) 191 CLR 1 and *McKenzie v Dept of Urban Services & Canberra Hospital* (2001) FMCA 20. Cases that did not follow HREOC's interpretation include *NSW v HREOC & Purvis* (2001) FCA 1199 and *Minns v State of NSW* (2002) FMCA 44.

under the DDA. If this approach were extended to other manifestations of disability (for example, to non-behavioural symptoms or limitations caused by a disability), the scope of the direct discrimination provisions could be significantly narrowed.

Several participants raised concerns about the High Court's majority interpretation of the comparator in the Purvis case, and about its implications for future cases of direct discrimination. Lee Ann Basser and other participants were concerned that significant differences in the students' ability to control their behaviour had been overlooked in the circumstances of the comparison. Basser explained that:

> … a person without a disability who exhibits the kind of anti-social behaviour that goes on in Purvis is doing a deliberate act. They are acting up and acting out in response to authority or against authority. The person with a disability like the complainant in Purvis is acting in a way that they actually have no control over. … the problem in Purvis is if you don't analyse why the young man is behaving [disruptively]—if you simply compare behaviours, you'd have to say it was fair enough to expel him from school. You can't come to any other conclusion. (trans. p. 2735)

Conversely, although it was not the majority decision, the implications of the High Court minority's view in the Purvis case was of concern to many other participants (such as non-government schools and employer associations). They argued, among other things, that they had health and safety obligations to their employees, students and others that must also be met (see chapter 12). These concerns do not rest solely on the issue of the comparator, but extend to the bigger question of the extent of obligations to make adjustments to accommodate people with disabilities.

The Productivity Commission considers that these concerns would be addressed in part by its recommendation to introduce a general obligation to make reasonable adjustments for people with disabilities, excluding adjustments that would cause unjustifiable hardship. This would apply to both pre and post enrolment situations in education, and to all other areas of activity covered by the DDA (see chapter 8).

In situations such as the Purvis case, the Commission's recommended duty to make reasonable adjustments should help to ensure that regardless of whether or not a test of comparison indicates unlawful direct discrimination, adjustments to improve participation must have been attempted (excluding adjustments that would cause unjustifiable hardship). This recommendation would mean, for example, that the school in the Purvis case would have been required to make reasonable adjustments to accommodate the student's disability. But if, despite their reasonable attempts to make adjustments, the student's inclusion caused an unjustifiable hardship to the school or to other students, the school would have been able to lawfully exclude him. If the approach taken by the majority of the High Court has the effect of narrowing the application of the direct discrimination provisions of the DDA (as described above), an explicit duty to make reasonable adjustments (excluding

adjustments that would cause unjustifiable hardship) will become all the more necessary (see chapter 8).

Improving the comparator

The Productivity Commission agrees with HREOC and other participants that in most cases of direct discrimination, identifying a suitable comparator and circumstances for comparison is not overly difficult. The Commission also notes that some of the past uncertainty surrounding the comparator may be due to deficiencies in the definition of 'disability' rather than the comparator *per se*—for example, the question of whether 'disability' includes behavioural symptoms (now answered in the affirmative by the High Court in the Purvis case (section 11.1)).

However, the High Court decision in the Purvis case raised other issues for the comparator—most notably, the question of which circumstances should be taken into account in making a (real or hypothetical) comparison between the treatment of a person with a disability and that of someone without the disability. Lee Ann Basser (sub. DR266, p. 1) said the conflicting views on the comparator 'highlights the need for further clarification'. People with Disability Australia (sub. DR359, p. 15) suggested amending the DDA to clarify that 'the comparator shall have none of the characteristics or consequences of the other person's disability, and shall require no services or accommodations'.

Alternatively, greater guidance could be given on what constitutes circumstances that are 'not materially different'. HREOC noted that the DDA:

> … does not provide any clear test of what circumstances are, or are not, materially different so as to justify different treatment. This phrase cannot be regarded as providing a defence for justifiable differences in treatment where the disability itself is regarded as making a material difference. (sub. 219, p. 7)

To address this, HREOC suggested deleting the word 'materially' in section 5(1) to simplify the task of identifying a suitable comparator (sub. 219, p. 8).

Guidance could be provided in the DDA or in attached guidelines or standards (as suggested by the New South Wales Office of Employment and Diversity, sub. 172, p. 4). These could take the form of criteria or examples drawn from case law since, as noted by the Department for Employment and Workplace Relations (sub. DR299), detailed and comprehensive guidelines would be 'difficult to formulate'. Reference could also be made to the objects of the DDA.

FINDING 11.3

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

RECOMMENDATION 11.2

The definition of direct discrimination in the* Disability Discrimination Act 1992 *(s.5(1)) should be supplemented with examples (either included in the Act or in guidelines) to clarify the 'circumstances that are the same or not materially different' for the purposes of making a comparison.

'Different accommodation or services' in direct discrimination

The DDA's definition of direct discrimination has a second, equally significant, criterion: to ignore any 'different accommodation or services' that may be required by the person with a disability when making the comparison (s.5(2)). This 'recognises that people with disabilities may require accommodation to enable them to participate on an equal footing with their non-disabled peers' (Lee Ann Basser, sub. DR266, p. 2). If this provision were absent, the fact that a person requires an adjustment might be enough to make their circumstances 'materially different'. As found by HREOC Commissioner Wilson in the Dopking case:

> It would fatally frustrate the purposes of the Act if matters which it expressly identifies as constituting unacceptable bases for different treatment … could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act. (Sir Ronald Wilson (HREOC unreported 1994) in HREOC 2003b, p. 71)

In a case relating to an employee with a vision impairment who required screen magnifying software, the Federal Court found that despite the employee's need for different workplace equipment, her circumstances were not materially different from other employees:

> The comparison in this case must be as between Mrs Humphries, with her needs to enable her to function as an ASO1, and other ASO1s who are not disabled, but who have reasonable needs for equipment which would enable them to carry out their duties. (*Commonwealth of Australia v Nerilie Ann Humphries & Ors* ((1998) FCA))

This approach has been followed in subsequent DDA cases before HREOC and the courts. The DDA clearly states—and the courts have upheld—that a person who requires different accommodation or services is 'not materially different' in their circumstances, for the purposes of determining direct discrimination.

Section 5(2) of the DDA has also been interpreted by HREOC and others to mean that if a person with a disability requires a different accommodation or service, then failure to provide it might constitute unlawful direct discrimination. This interpretation is contentious. The Productivity Commission agrees that such adjustments should be made for people with disabilities (with certain caveats), but considers that the obligation to make reasonable adjustments should be stated clearly in a separate provision of the DDA (see chapter 8). If this recommendation is implemented, section 5(2) will continue to operate in its current form.

11.3 Definition of indirect discrimination

Indirect discrimination occurs when a person must comply with a requirement (such as a general rule or policy) with which a substantially higher proportion of persons without the disability can comply; which is not reasonable in the circumstances; and with which the person with the disability cannot comply (see chapter 4). In summary, this definition requires a complainant to establish four separate elements.

1. The discriminator requires the aggrieved person to comply with a requirement or condition.
2. A substantially higher proportion of people without the disability can comply with this requirement or condition (the proportionality test).
3. The requirement or condition is not reasonable in the circumstances (the reasonableness test).
4. The aggrieved person cannot comply with the requirement or condition.

Inquiry participants said these requirements are too complex and confusing for potential complainants. The Equal Opportunity Commission Victoria said:

> … many people do not understand what indirect discrimination is. Staff across the [Equal Opportunity] Commission state that actual and potential respondents and complainants find the concept confusing and the definition unwieldy and difficult. (sub. 129, p. 27)

HREOC said a simpler set of criteria for determining indirect discrimination would:

> … assist people with rights and responsibilities under the legislation in understanding more readily what indirect discrimination involves. (sub. 143, p. 17)

Three specific issues were raised by participants about indirect discrimination:

- the proportionality test
- the reasonableness test
- proposed acts of indirect discrimination.

These issues are discussed in turn below.

The proportionality test

Many inquiry participants were critical of the proportionality test for indirect discrimination. The Anti-Discrimination Board of New South Wales (sub. 101, p. 20) said it places an extra evidentiary burden on people with disabilities and adds little or nothing to the test. The Equal Opportunity Commission Victoria said:

> … the technical requirements of the definition may place too onerous a burden on complainants. … a complainant must first prove that they have been required to comply with a requirement or condition with which they cannot comply but which a substantially higher proportion of people without the disability would be able to comply. (sub. 129, pp. 27-8)

In the Minns case, Raphael FM noted that the proportionality test can require 'a complex, time consuming and undoubtedly expensive exercise in comparisons' ((2002) FMCA 605 in HREOC 2003b, p. 85).

On the other hand, HREOC said the proportionality element of indirect discrimination has not presented problems in practice:

> These issues of appropriate methods for comparison have not presented the same difficulties in applying the DDA as in applying sex discrimination law. There is no sophisticated mathematics required to determine, for example, that a requirement to enter a building or vehicle by stairs will disadvantage people who use a wheelchair compared to people who do not. (sub. 143, p. 19)

Nevertheless, HREOC recommended simplifying this element of the definition.

Anti-discrimination Acts in the Northern Territory, Tasmania and the ACT, and some other federal anti-discrimination Acts, do not include a proportionality test. Instead, they use a concept of 'disadvantage' that is similar to the 'unfavourable' and 'less favourable' tests found in definitions of direct discrimination (section 11.2). The ACT Act, for example, states that a person indirectly discriminates against another person if:

> … the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7. (s.8(1)(b))

The federal *Sex Discrimination Act 1984* was amended in 1995 to simplify the test of indirect discrimination. In this Act, indirect discrimination occurs when a condition or requirement 'has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person' (s.5(2)). The Anti-Discrimination Board of New South Wales (sub. 101, p. 21) recommended this section of the Sex

Discrimination Act as 'an appropriate model' on which to base a simpler indirect test for the DDA. Federal age discrimination legislation (s.15(1) of the *Age Discrimination Act 2004*) refers to 'disadvantage' instead of a proportionality test to define indirect discrimination in a similar manner.

In the draft report, the Productivity Commission suggested removing the proportionality test (s.6(a)). This suggestion was supported by the ACT Government (sub. DR366), People with Disability Australia (trans., p. 2464), Lee Ann Basser (trans., p. 2725), NSW Office of Employment Equity and Diversity (sub. DR354), DEWR (sub. DR299) and Blind Citizens Australia (sub. DR269).

Alternatively, the Australian Industry Group (sub. DR326) suggested replacing the proportionality test with the notion of 'disadvantage'. This seems unnecessary because 'disadvantage' is implied by both the subsequent clauses—that the rule is 'not reasonable having regard to the circumstances' (s.6(b)), and the person 'is not able to comply' (s.6(c)).

The Productivity Commission considers that the current proportionality test in the DDA places a further burden of proof on the complainant for little apparent benefit. The criteria set out in clauses s.6(b) and (c) are sufficient to demonstrate indirect discrimination. The DDA's definition of indirect discrimination should be simplified by removing the proportionality test in s.6(a).

FINDING 11.4

The proportionality test in the definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6(a)) is unnecessarily complex and places an unwarranted burden of proof on complainants.*

The reasonableness test

In addition to the proportionality test, the definition of indirect discrimination in the DDA requires that the rule or condition also be 'not reasonable having regard to the circumstances of the case' (s.6(b)). This feature is common to many other anti-discrimination Acts, including the *Discrimination Act 1991 (ACT)*, Sex Discrimination Act and Age Discrimination Act. As noted in chapter 8, it is also one of the provisions of the DDA that has been interpreted to imply an obligation to make reasonable adjustments or accommodations.

Unlike these other Acts, the DDA does not include a definition or criteria to help determine reasonableness in indirect discrimination. Instead, a set of criteria has developed through case law, based in part on the established legal concept of

'reasonable' (Blind Citizens Australia, trans., p. 1690). This was loosely described by Raphael FM in relation to the DDA:

> The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience … which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances must be taken into account. (Minns (2002) FMCA 60 in HREOC 2003b, p. 86)

HREOC has suggested non-exclusive criteria for assessing the 'reasonableness' of a requirement or condition in employment cases as including: the purpose of the rule; the importance of the rule; whether other means are available to achieve it; the nature and extent of the disadvantages it causes; and the effects of its removal on others (HREOC 2003f).

By contrast, the Sex Discrimination Act lists matters to be taken into account in determining 'reasonableness':

> (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
>
> (b) the feasibility of overcoming or mitigating the disadvantage; and
>
> (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice. (s.7B(2))

The ACT's Discrimination Act lists similar criteria for judging whether an otherwise discriminatory action is reasonable in the circumstances (s.8(1)).

The Productivity Commission considers the presence of the reasonableness test in the definition of indirect discrimination appropriate. It should be possible, for example, to include a reasonable requirement to have unimpaired eyesight in the job description for aeroplane pilots, or to prohibit students from harming other students, without causing unlawful indirect discrimination under the DDA.

However, section 6(b) could benefit from clarification of the criteria that should be considered in determining whether a rule or condition is reasonable, as appears in some other anti-discrimination Acts (see above). This suggestion was supported by some participants (Blind Citizens Australia, sub. DR269; Department of Employment and Workplace Relations, sub. DR299; Disability Council of NSW, sub. DR291), but the Australian Industry Group said 'an overly prescriptive approach to clarifying the term could cause more problems than it solves' (sub. DR326, p. 17). The South Australian Government argued that fixed criteria could be problematic because:

> The concept of reasonableness permeates the law and is nowhere defined, because this is impossible. The criterion is meant to be flexible. Making lists of ancillary criteria

> would only result in something important being omitted. Each case must continue to be looked at on its own merits. (sub. DR356, p. 7)

The Productivity Commission acknowledges these concerns, but considers greater guidance on 'reasonableness' would be desirable. This is particularly important in the light of the Commission's recommendation to introduce a new provision into the DDA, requiring 'reasonable adjustments' to be made (see chapter 8), so as to distinguish the meaning and application of 'reasonable' in these two different contexts in the DDA. Non-exclusive, flexible guidance criteria for 'reasonableness' in indirect discrimination could be inserted into the DDA or described in guidelines or explanatory notes, using other anti-discrimination Acts, HREOC's existing explanatory material and DDA case law as models.

FINDING 11.5

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

Burden of proving 'reasonableness' in indirect discrimination

The DDA is silent on the issue of who must prove 'reasonableness' in indirect discrimination. In his second reading speech to Parliament, the then Minister said that 'the overall legal burden of proof, in proving discrimination unlawful, will remain with the complainant', except for proving the inherent requirements of a job or unjustifiable hardship to a person or business (Australia 1992a, p. 2751).

As noted by inquiry participants (and Raphael FM in HREOC 2003b, p. 86), this burden can be considerable. The Equal Opportunity Commission Victoria said the:

> … burden of proving that the requirement or condition is not reasonable … can be problematic for complainants, because the information necessary to make an assessment of what is reasonable, or to prove reasonableness, often lies with the respondent and is inaccessible to the complainant. (sub. 127, pp. 27–8)

Other anti-discrimination Acts, including the Sex Discrimination Act (s.7C), place the burden of proving the 'reasonableness' of their actions on the alleged discriminator. The Age Discrimination Act also places the burden of proving that a requirement is reasonable in the circumstances on the alleged discriminator. The explanatory memorandum for the Bill to this Act explained this is because:

> … the person who is imposing or proposing to impose such a requirement is in the best position to explain or justify the reasons for it in the particular circumstances. For example, where an employer's business context requires certain productivity standards for competitiveness or to meet external requirements, the employer understands the

> reasons for requiring those standards and is therefore best placed to show that they are reasonable. An employee or prospective employee, on the other hand, is less likely to have access to all the information about the overall needs of and demands on the business in question. (para. 20)

The Australian Chamber of Commerce and Industry (sub. DR288), Australian Industry Group (sub. DR326) and IFSA (sub. DR349) did not support altering the onus of proof of 'reasonableness' in the DDA to match the requirements of other anti-discrimination Acts.

However, the Productivity Commission considers that the same issue of access to appropriate information that was identified in relation to the sex and age discrimination Acts is relevant to the DDA also. The current provisions place an additional burden on the complainant in proving that they have been indirectly discriminated against. In the interests of reducing the (already significant) burden of proof on the aggrieved person, the burden of proving that an indirectly discriminatory rule or condition is reasonable in the circumstances should be placed on the defendant (who is best placed to do so), as is required in other Australian anti-discrimination Acts.

FINDING 11.6

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

Proposed acts of indirect discrimination

HREOC (sub. 143, p. 21) identified that 'as the result of an apparent oversight in drafting, proposed acts of indirect discrimination are not expressly covered in the DDA' in the same way as they are in the Sex Discrimination Act and other anti-discrimination Acts, or in the DDA's definition of direct discrimination, which includes 'proposed treatment' of a person with a disability that is different from treatment of others (s.5(a)).

This means that a person with a disability must wait until a requirement or condition that indirectly discriminates against them is introduced before they can make a complaint, even if they can recognise beforehand that it will have a discriminatory effect. If a school or club, for example, proposed to introduce a dress regulation that would indirectly discriminate against a person with a disability, then the person could not make a complaint until after the regulation is introduced.

Some inquiry participants agreed that this anomaly should be addressed, although the Australian Chamber of Commerce and Industry disagreed, on the ground that it would add to 'the regulatory burden on employers' (sub. DR288, p. 9). In the Productivity Commission's view, the current approach seems both inefficient and unnecessary, as it requires a proposed rule or regulation to be introduced and disadvantage someone (because they cannot comply with it due to their disability) before a complaint can be made. The anomaly that proposed actions are included in direct discrimination but not in indirect discrimination in the DDA should be addressed.

FINDING 11.7

The definition of indirect discrimination in the Disability Discrimination Act 1992 *(s.6) does not include proposed acts of indirect discrimination. This is neither appropriate nor efficient. It is inconsistent with the definition of direct discrimination and with other anti-discrimination Acts.*

RECOMMENDATION 11.3

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

- ***remove the proportionality test***
- ***include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances'***
- ***require the respondent to prove that a requirement or condition is reasonable***
- ***cover incidences of proposed indirect discrimination.***

11.4 Harassment and vilification

The DDA makes harassment of people with disabilities unlawful in some, but not all, of the areas in which it makes disability discrimination unlawful. Harassment of people with disabilities, their carers and their associates is unlawful in employment (by employers, commission agents and contractors only), education (by education staff but not other students) and the provision of goods and services (ss.35–40).

Harassment is not unlawful in the other areas of activity to which the DDA applies, including accommodation, clubs, sport and the administration of Commonwealth laws and programs. However, behaviour that amounts to harassment might constitute part of a disability discrimination complaint—for example, harassment of a customer, client or club member could be part of the 'less favourable' treatment in

a case of direct discrimination, or a school's policies (or lack of) to address harassment by other students could be part of a case of indirect discrimination.

Vilification is offensive, humiliating or intimidating behaviour in public, directed at a class of people rather than at a particular individual. Unlike some other anti-discrimination Acts, the DDA does not mention vilification. Vilification is to be distinguished from 'victimisation', which does appear in the DDA. Victimisation refers to unlawful interference in the complaints process or harassment of a person who has made a complaint under the DDA (see chapters 4 and 13).

Inquiry participants' comments on harassment

HREOC said it receives few harassment complaints under the DDA (sub. 143). The Attorney-General's Department noted 'there appear to have been no [legal] cases considering the term as it is used in the DDA', and did not identify any particular issues or problems associated with it (sub. 115, p. 10).

Many participants gave personal examples of significant harassment and problems with the processes intended to address harassment, particularly in employment and education (Denis Denning, sub. 109; Victor Camp, sub. 20; Ivor Fernandez, sub. DR332; Stephen Kilkeary, sub. DR309; Daryl McCarthy, sub. DR278). Janet Hope, for example, was concerned about 'student to student harassment' in universities and said that the DDA's failure to cover this was 'an anomaly' (sub. 165, p. 63). James Bond also spoke about harassment from other students:

> The harassment that you put up with from other schoolchildren when you're in the school system ... if you're unable to read and write, the kids pick on you like anything. So you're not learning anything … because children taunt those kids at morning tea and lunch and after school, and it's still going on severely. (James Bond, trans., p. 2901)

Some inquiry participants wanted the scope of the DDA's harassment provisions expanded to address these problems, particularly in education and employment. The Disability Rights Network of Community Legal Centres, for example, recommended extending the DDA's unlawful harassment provisions to:

> … students harassing teacher/staff with disability on the basis of the disability
>
> … no person in the workplace is to harass any other person in the workplace with a disability on the basis of the disability
>
> … no person in relation to the provision of goods and facilities should harass another person with a disability on the basis of the disability. (sub. 74, pp. 3–4)

Inquiry participants' comments on vilification

Many inquiry participants expressed concern about vilification of people with disabilities in the media, particularly for 'those with cognitive impairments, addiction issues and psychiatric conditions' (UnitingCare Australia and UnitingCare NSW.ACT, sub. DR334, p. 15). Inquiry participants—including Pete Casey (sub. 3), Arafmi Hunter (sub. 36), SANE Australia (sub. 62), the Mental Illness Fellowship of Australia (sub. DR283), and the Media, Entertainment and Arts Alliance (trans., p. 2287)—pointed to the media's role in perpetuating stereotypes through continuing negative portrayals of people with mental illness. SANE Australia said that action to address:

> … stigma and discrimination towards Australians with a psychiatric disability is held back by the limited nature of the DDA's terms, especially in relation to vilification and harassment. Offensive, stigmatising representation of this group in the media and advertising needs to be easier to prosecute as discriminatory. (sub. 62, p. 2)

Autism Aspergers Advocacy Australia (sub. DR267) spoke of a complaint made to a television station about alleged vilification of people with autism in a television program. It was unhappy with the response it received and noted that the station's code of practice did not cover disability vilification and neither did the DDA.

Options for addressing harassment and vilification in the DDA

Participants made many suggestions to address these gaps in the DDA including:

- making harassment against people with disabilities unlawful in all areas of activity in which the DDA makes disability discrimination unlawful
- making harassment unlawful in all facets of life in general, in a similar manner to the Queensland Anti-Discrimination Act (Anti-Discrimination Commission Queensland, sub. 119). This would make harassment unlawful in areas beyond the existing (albeit very extensive) areas of activity covered by the DDA
- adding 'more definition on what constitutes harassment and on an employer's duties in preventing harassment' (HREOC, sub. 143, p. 29)
- replacing or further defining harassment to include the 'concept of a hostile environment' (Blind Citizens Australia, sub. 72, p. 8)
- amending the definition of indirect discrimination 'to include discriminatory, vilifying language against a whole class of persons with a disability', such as people with mental illness (SANE Australia, sub. DR264, p. 2). This may require adding media and advertising to the areas of activity covered by the DDA

- making all vilification of people with disabilities unlawful, modelled on provisions in other anti-discrimination Acts (box 11.4).

Box 11.4 **Examples of vilification provisions in other legislation**

The *Racial Discrimination Act 1975 (Cth)* was amended by the *Racial Hatred Act 1995 (Cth)* to include:

18C (1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

The *Anti-Discrimination Act 1977 (NSW)* was amended in 1994 to include:

49ZXB (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).

49ZXC (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected) by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The *Anti-Discrimination Act 1998 (Tasmania)* states:

19. A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of—

(a) the race of the person or any member of the group; or

(b) any disability of the person or any member of the group; or

(c) the sexual orientation or lawful sexual activity … .

(d) the religious belief or affiliation or religious activity … .

20. (1) A person must not publish or display … any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.

All three Acts feature exceptions for some or all of: fair reporting; artistic performances; academic or scientific debate; research; religious instruction; good faith; public interest.

Sources: *Racial Discrimination Act 1975* (Cth); *Racial Hatred Act 1995* (Cth); *Anti-Discrimination Act 1998* (NSW); *Anti-Discrimination Act 1998* (Tasmania).

Currently, most State and Territory anti-discrimination Acts make behaviour that amounts to vilification unlawful on some or all of the grounds of race, religion, sexuality or gender identity. In NSW, vilification of people with (or presumed to have) HIV/AIDS is unlawful and in Tasmania, vilification of all people with disabilities is unlawful (AGS 2004b; Smyth 2003).

Constitutional limitations

The Productivity Commission agrees with inquiry participants that it would be desirable to extend the harassment provisions and add vilification provisions to the DDA. However, the Australian Government Solicitor (AGS) noted that 'a legislative provision that is not supported by a legislative power of the Commonwealth under the Constitution is invalid' (AGS 2004b, p. 10). The AGS advised that there are constitutional limitations to the Commonwealth's power to legislate in this area, due to the nature of the international treaties to which the DDA is linked. The AGS noted that the proposed UN convention on the rights and dignity of persons with disabilities (see chapter 4) would give the Australian Government greater constitutional authority in this area, but that this convention is 'likely to be some years away' from ratification (AGS 2004b, p. 18).

In the meantime, the AGS advised that the Government may have a 'power to legislate generally' against 'conduct that attacks the honour or reputation of a person or group of persons on the basis of disability', based on the International Covenant on Civil and Political Rights (Article 17) (2004b, pp. 1-10). Aside from the external affairs power, the AGS said the Australian Government's constitutional authority to make disability vilification unlawful would be limited to vilification:

- that occurs in the ACT or Northern Territory
- of or by Australian Government employees
- by foreign corporations or national trading or financial corporations
- in the course of international or inter-state trade or commerce.

This means, for example, that it would be possible in the DDA to make vilification of people with disabilities unlawful by international and national corporations but not State-based businesses or individuals, and unlawful for national broadcasters and newspapers but not for smaller State-based or regional media. Such limitations and distinctions would be likely to render any vilification provisions in the DDA unwieldy and ineffective. The same constitutional issues would be likely to arise for any attempt to extend the harassment provisions beyond those already included in the DDA.

Role of State and Territory anti-discrimination legislation

As noted above, all State and Territory anti-discrimination Acts include harassment and vilification provisions against people or groups on at least some grounds (typically, race, religion and gender). Tasmania makes vilification of people with disabilities unlawful. In some States and Territories, 'serious vilification' (typically on the grounds of race and religion only) is also a criminal offence (AGS 2004b).

Given the constitutional limitations on the Australian Government's power to legislate comprehensively with regard to vilification of people with disabilities, it may be preferable for the State and Territory jurisdictions to extend their anti-discrimination Acts to make vilification of people with disabilities unlawful, following, for example, the existing provision in the Tasmanian Act (box 11.4).

Self-regulation and other measures

The Association of Independent Schools of South Australia (sub. 135; sub. DR357) and other inquiry participants from the education sector pointed out that this issue in education is far from being ignored and that harassment and vilification of students with disabilities by other students is addressed in school and institution policies. HREOC noted that the draft disability standards for education 'provide significantly more detailed compliance measures' than provided by the DDA, including 'the duty of schools to have effective policies and measures in place to prevent harassment' (sub. 143, pp. 29, 63). HREOC was interested in feedback on extending this model to other areas of activity in the DDA, but none was received following the draft report.

In employment and other areas of activity, many businesses and organisations have policies to address harassment, bullying and related problems. UnitingCare Australia and UnitingCare NSW.ACT, for example, said all its agencies must:

> … develop anti-harassment policies and practices … agencies are quick to act where they perceive any harassment and … encouraged to develop policies that strongly sanction harassment and vilification. (sub. DR334, p. 15)

As an alternative to amending the DDA, Gary Batch (sub. 189) and the Disability Council of NSW (sub. 64) suggested that vilification, stigma, harassment and discriminatory practices should be the subject of 'a public awareness campaign' (see chapter 10).

Conclusions on addressing harassment and vilification

The DDA does not make harassment of people with disabilities unlawful in all of the areas of activity in which discrimination is unlawful. However, in many cases, harassment could constitute direct or indirect discrimination under the DDA—for example, harassment by other students might be part of a disability discrimination complaint against a school. In most other cases, behaviour that constitutes harassment will be unlawful under State or Territory anti-discrimination legislation.

The DDA does not make the vilification of people with disabilities unlawful at all. There are constitutional reasons for this omission in the DDA. Until the proposed UN convention on the rights of people with disabilities is ratified by Australia, there appears to be more scope to make disability vilification unlawful in the State and Territory anti-discrimination Acts than there is in the DDA.

FINDING 11.8

There are constitutional limitations on the Australian Government's power to make vilification of people with disabilities unlawful. There is scope for the States and Territories to extend their anti-discrimination Acts in this area.

12 Exemptions

The *Disability Discrimination Act 1992* (DDA) makes disability discrimination and harassment unlawful in a wide range of key public and commercial activities, including employment, education, the provision of goods and services, access to premises, accommodation, sports, clubs and the administration of Commonwealth laws and programs (see chapter 4). The DDA makes specific exemptions for a small number of areas of activity that would otherwise be included in the above list. This chapter examines the reasons for, and effects of, the more significant of these exemptions including:

- the partial exemption for insurance and superannuation
- the *Migration Act 1958* and its regulations
- various specific activities, such as combat duties, special measures intended to benefit people with disabilities and capacity-based wages
- prescribed laws
- health and safety related exemptions.

Other areas of activity are exempt from the DDA because it is silent on them (see chapter 4). These mainly relate to personal activities and are not discussed here. The DDA also allows the Human Rights and Equal Opportunity Commission (HREOC) to grant temporary exemptions to organisations for up to five years.

12.1 Partial exemption for insurance and superannuation

Insurance and superannuation are 'goods or services' for the purposes of section 24 of the DDA. In most circumstances, it is therefore unlawful to discriminate against people with disabilities in the provision of insurance and superannuation. However, the DDA also contains a specific exemption that states that it is not unlawful to discriminate on the ground of a person's disability by refusing to offer, or by imposing special terms or conditions to, an annuity, life insurance policy, insurance policy against accident, other policy of insurance, or membership of a superannuation or provident fund or scheme (ss.46(1)(a)–(e) and (2)(a)–(e)) if:

- the discrimination 'is based on actuarial or statistical data on which it is reasonable' to rely 'and is reasonable having regard to the matter of the data and other relevant factors' (ss.46(1)(f) and (2)(f)) or
- 'in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors' (ss.46(1)(g) and (2)(g)).

Inquiry participants raised several concerns about this partial exemption including: access to insurance and superannuation; acceptable actuarial and statistical data; the nature of 'any other relevant factors'; reliance on stereotypes; and access to the insurers' underwriting data and information. These concerns are discussed below, following an examination of the reasons for having such an exemption in the DDA, and the way in which it currently operates. Some options for improving the exemption and some conclusions are then presented.

Rationale for a partial exemption for insurance and superannuation

There are several reasons that may justify a partial exemption for insurance and superannuation. First, the insurance industry is based on assessing risks of future adverse events—to one's house, employment, holiday, health, life or whatever other object or activity is being insured—and processing future claims resulting from such events. In at least some cases, the presence of a disability will increase an individual's risk, and hence increase the probability that they will make a claim against their insurance policy.

The Investment and Financial Services Association (IFSA) explained that if insurers could not take disability status into account in underwriting formulae and decisions (that is, if there were not a partial exemption), insurance premiums for all insurance customers would need to increase. This would be necessary to cover people who have a higher risk of making a claim but who cannot be easily identified and/or be lawfully discriminated against in either policy conditions or price (IFSA sub. 242; sub. DR349).

Likewise, the Insurance Council of Australia (ICA) argued that because 'risk-based premiums are fundamental to the insurance model', insurers' ability to 'take account of relevant characteristics as variables for assessing risk' would be reduced and premiums for all insurance customers would increase as a result (sub. 234).

Second, ICA explained that the current exemption can be justified in part by the presence of 'asymmetric information' (that is, unequal availability of information between buyer and seller) in the insurance market. Information assymetry can be

particularly significant if, for example, applicants do not reveal all aspects of their health status to the insurer. It can lead to:

- adverse selection, where one of the parties (the principal) is unable to observe (or take account of, as it may be) important characteristics of the other (the agent) or of the good involved in the transaction and
- moral hazard, where the principal is unable to monitor the actions of the agent following the decision to proceed with the transaction and where the agent has no incentive to act in the principal's interest. A pertinent example would be where a fully insured person might not then take appropriate risk reduction measures. (ICA, sub. 234, p. 3)[1]

These two factors together mean that even in the absence of an exemption, insurers would, in many cases, be able to lawfully discriminate against people with disabilities on the ground that making adjustments for them would cause the insurer an unjustifiable hardship (see chapter 8). Under the DDA, the defence of unjustifiable hardship would need to be proved individually in each case.

Under these circumstances, a third reason for exempting some insurance and superannuation decisions is that transaction costs would be higher without the exemption—for example, if each case of different treatment for an insurance applicant with a disability had to be proven to be lawful on the ground of unjustifiable hardship.

Insurance and superannuation guidelines and explanatory material

Because the insurance and superannuation exemption applies in limited circumstances only, HREOC and others have produced documents to help explain it. These include:

- HREOC guidelines for providers of insurance and superannuation, which explain the DDA in relation to life, disability and accident insurance, and death and disability cover under superannuation arrangements (HREOC 1998b). These guidelines are used in the insurance industry on a voluntary basis. They are currently being revised by HREOC in consultation with the industry and others (HREOC 2004b)[2]
- HREOC's 'frequently asked questions' on insurance, which emphasise that insurance is not wholly exempt from the DDA (HREOC 2003n)

[1] In insurance industry terminology, 'the principal' is the insurer, 'the agent' is the applicant or customer and 'the good involved in the transaction' is the insurance policy.

[2] HREOC will release a draft of the new guidelines for consultation later in 2004 (HREOC 2004b).

- the Memorandum of Understanding between the Mental Health Sector Stakeholders and IFSA (2003), which sets out principles of good practice for the provision of insurance to people with mental health conditions.

The current version of the HREOC guidelines list the following examples of lawful discrimination under the DDA, where reasonable and relevant cause can be shown:

- deferring approval, given an inability to quantify the applicant's risk at the time (although not deferring it for an unspecified or unreasonable amount of time)
- reducing or limiting the amount of insurance cover
- restricting the terms of liability or using exclusion clauses for pre-existing conditions or conditions to which the person is susceptible
- imposing an additional premium
- denying cover, where the risk of making a claim can be shown to be unacceptable to the insurer or would cause an unjustifiable hardship.

Currently, it is not possible for disability standards (a form of subordinate regulation under the DDA) to be implemented for insurance and superannuation. Disability standards—and their possible desirability in insurance and superannuation—are discussed in chapter 14.

Legal decisions on disability discrimination in insurance

Another important vehicle for explaining the operation of the insurance and superannuation exemption is case law. Both aspects of the insurance exemption—actuarial and statistical data, and 'other relevant factors'—have been tested in the courts, most significantly in *Xiros v Fortis Life Assurance Ltd* ((2001) FMCA 15) with regard to reliance on actuarial and statistical data, and *Bassanelli v QBE* ((2004) FCA 396) with regard to reliance on 'other relevant factors' (box 12.1).

The Xiros case emphasised that statistical data must be current if they are to be considered 'reasonable' (for the purposes of s.46(1)(f)), particularly in the context of changing medical knowledge and actuarial evidence. The Bassanelli case was significant in clarifying the meaning and scope of discrimination that is 'reasonable having regard to any other relevant factors' (s.46(1)(g)) in underwriting decisions. In that case, Mansfield J emphasised that actuarial and statistical data should be relied upon where possible, that all relevant factors should be examined and that stereotypes should not be used (see below).

Box 12.1 **Legal decisions about disability discrimination in insurance**

Xiros v Fortis Life Assurance Ltd. Xiros, who was HIV positive, alleged discrimination on the ground of disability because he was denied payment several times between 1997 and 1999 under his mortgage protection insurance, which included death, and permanent and temporary disability cover. Conciliation by HREOC was unsuccessful. Xiros took his case to the Federal Magistrates Court.

Fortis defended its denial of payments on 'actuarial and statistical' evidence (s.46(1)(f)). The Magistrate found Fortis had discriminated under section 5 of the DDA. He said substantial statistical data were available to suggest a reasonable basis for the HIV/AIDS exclusion in policies offered from 1991 until 1996, and for rejecting the existing claim in 1999. But the incidence of HIV/AIDS had since declined, so it was questionable whether an exclusion based on actuarial data could reasonably remain.

Bassanelli v QBE Insurance. In 2002, QBE denied travel insurance to Bassanelli after she disclosed that she had metastatic breast cancer. Bassanelli subsequently obtained travel insurance (excluding cover for her pre-existing medical condition) from another company. Bassanelli had expected:

> … the Insurer not [to] cover her for … cancer, a pre-existing illness … To exclude Denice from all policy items was considered by us to be disability discrimination. (sub. 175, p. 1)

Conciliation by HREOC was unsuccessful. Bassanelli took her case to the Federal Magistrates Court.

QBE argued its decision was based on the 'other relevant factors' component of the insurance exemption in the DDA (s.46(1)(g)), and said it would be 'uneconomic' to issue a non-standard policy excluding Bassanelli's medical condition. The Magistrate found QBE had discriminated by refusing any insurance policy because: QBE had issued similar policies in the past; it was unreasonable for QBE to refuse to provide any policy at all; and no unjustifiable hardship would have been involved in providing one.

QBE appealed the Magistrate's decision to the Federal Court, again arguing that its underwriting decision was 'reasonable having regard to any other relevant factors' (s.46(1)(g)). Mansfield J dismissed the appeal for several reasons. He said the insurer cannot rely on section 46(1)(g) without first seeking out relevant actuarial and statistical data (as required in section 46(1)(f)). Further, the insurer cannot pick and choose which material it considers in the context of 'any other relevant factors'. Instead, it must consider 'any matter which is rationally capable of bearing upon whether the discrimination is reasonable', and must not rely on stereotypes in doing so.

Sources: *Xiros v Fortis Life Assurance Ltd* (2001) FMCA 15; *Bassanelli v QBE Insurance* (2003) FMCA 412 ; *QBE Travel Insurance v Bassanelli* (2004) FCA 396 ; Michael and Denice Bassanelli, sub. 175.

Access to insurance and superannuation for people with disabilities

Access to insurance and superannuation is a significant issue for people with disabilities. Denial of insurance can reduce opportunities to participate in areas such

as employment, travel and home ownership, as highlighted by many inquiry participants, including the Disability Services Commission Western Australia (sub. 44), the Association for the Blind of WA (sub. 83), Michael and Denice Bassanelli (sub. 175), and Frank Fisher (sub. 200). Access to superannuation is important to ensure quality of life in retirement (see appendix D).

People with Disability Australia (sub. DR359) said access to insurance and superannuation was a priority area for its members. The National Disability Advisory Council (sub. DR358, p. 5) said 'access to insurance and superannuation has been a significant issue for people with disabilities for many years'.

The National Association of People Living With HIV/AIDS (NAPWA) emphasised that insurance is not 'a luxury product' and that in some situations, insurance is not optional. NAPWA noted, for example, that 'you can't get a mortgage without mortgage insurance' and 'if you choose not to [buy] health insurance, you actually pay higher tax' (trans., p. 2337).

Availability of insurance for people with disabilities was also raised as an issue for employers, with some participants indicating problems getting appropriate (and necessary) insurance for employees and volunteers who have disabilities. The Department of Family and Community Services (sub. DR362, p. 36) noted that 'increasing uncertainty about insurance liabilities was discouraging employers to continue with work experience' and work placement programs for people with disabilities. The Association of Competitive Employment raised similar concerns:

> There are some significant problems, particularly in New South Wales at the moment, with insurance coverage, particularly for work experience for people with disabilities, … it's near impossible to get insurance that will cover work experience through our sector for people with a disability, and … we don't know how things would go if someone tested their insurance, but certainly loss of future earnings is something that's not covered by insurance generally. (trans., p. 2629)

Evidence of disability discrimination in insurance and superannuation

DDA complaints about insurance that HREOC has conciliated have included cases about infertility treatment, post natal depression, death and disability insurance, HIV status, vision impairment, cancer, mental disorders, Tourette's syndrome and AIDS (HREOC 2003l, see appendix D).

There have been few DDA complaints about superannuation (see chapter 5 and appendix D). Now that superannuation is compulsory in Australia, people with disabilities cannot be denied membership entirely. Discrimination is still possible, however, in the terms and conditions on which superannuation is offered, or in relation to insurance offered as a component of superannuation. One complainant

with a vision impairment, for example, was refused additional benefits cover on top of automatic entitlements. The complaint was settled through agreement that the company would provide additional benefits except for vision impairment or vision disorders (HREOC 2003d, p. 59).

In its report on protecting genetic information in Australia, the Australian Law Reform Commission (ALRC 2003) summarised the evidence presented to it on genetic discrimination, which can amount to disability discrimination, in insurance:

- A 2001 survey identified 48 cases of alleged discrimination on the ground of genetic information or disorders in life, income protection and trauma insurance (Barlow-Stewart and Keays 2001 pp. 254–6 quoted in ALRC 2003, p. 672).
- IFSA said life insurers had 'received no complaints with respect to underwriting decisions involving genetic testing results (IFSA quoted in ALRC 2003, p. 673).
- Several cases of discrimination were alleged following genetic test results that indicated 'genetic mutations' that can cause disorders such as Charcot-Marie Tooth disease and Huntington's disease (ALRC 2003, pp. 672–4).

The ALRC concluded that there is 'considerable uncertainty about the nature and extent of discrimination in this area'. It noted that further research on this topic had commenced and was due for completion in late 2004 (ALRC 2003, p. 674).

NAPWA reported some improvement in access to insurance by HIV positive people, but it stated that a national survey had found continuing incidences of discrimination.

> … 22 per cent had experienced less favourable treatment in relation to insurance [at some time] … and 15 per cent in the last two years for insurance. So it is a current issue. We have to recognise it has decreased but it's still significant. (trans., p. 2329)

A Breast Cancer Network of Australia (BCNA) survey of 750 women found about one quarter had had difficulties obtaining travel insurance due to their condition. Some had been refused insurance totally, others had their breast cancer excluded as a pre-existing condition, and others were charged higher premiums as well or instead of pre-existing condition exclusions. Survey respondents were concerned about 'inconsistent and inadequate risk assessment methods' across insurers and within companies (Timbs 2004; BCNA trans., pp. 1956–9).

Issues for the insurance and superannuation exemption

Aside from the primary questions of access and discrimination (see above), inquiry participants raised four important issues about the insurance and superannuation exemption: identification of reasonable and relevant actuarial data; the scope of

'other relevant factors'; reliance on stereotypes; and access to the information on which insurers base their underwriting decisions. These issues are examined in turn.

'Actuarial and statistical data' in the insurance and superannuation exemption

HREOC guidelines for insurance and superannuation list a variety of Australian and international actuarial and statistical data sources that can be acceptable for the purposes of the DDA exemption, including (but not limited to) underwriting manuals, government statistical studies, medical journals, international population studies and insurance studies. The guidelines state that international data should be modified for Australian circumstances if necessary, and all data must be up to date or adjusted for changes in relevant medical or other technologies (for example, a medical condition that would have stopped someone from working in the past but may no longer do so). The guidelines also state that it is not reasonable to refuse insurance cover due to: the insurer's lack of data; limited availability of data; the company's 'historical practice'; or inaccurate assumptions about the person. These guidelines are being reviewed by HREOC in consultation with industry (see above).

IFSA suggested the following actuarial data sources are reasonable bases for insurance decisions: underwriting manuals; established company actuarial practices for risks deemed too great to underwrite (based on the underwriting manuals); and published guidelines in cases where different life insurance companies offer the same person insurance on different terms (sub. 142, pp. 25–7).

IFSA (sub 142, p. 27) conceded that the insurance industry has been slow to change its actuarial practices and that it continues to rely on underwriting manuals, for which it sometimes has difficulties providing the supporting medical and clinical evidence. IFSA (sub. DR349, p. 3) was concerned about the costs involved in researching and compiling new data for risk ratings and underwriting manuals. It said that 'underwriting is subject to cost–benefit analysis' and that in some circumstances, or in relation to some conditions, there may be 'no commercial justification for obtaining that information' (sub. 242, p. 3). Nevertheless, IFSA gave several examples of actuarial research (including health risk assessments) undertaken to help assess insurance applications (sub. DR349, pp. 6–7).

Other inquiry participants said data availability and quality have improved:

> … there was really poor quality actuarial evidence being used to justify some of their decisions, and that's changing now. I mean, they have got access to better information about disease progression, life spans, life expectancy, all of those sorts of things. (NAPWA, trans., p. 1537)

Significantly, although the costs of statistical and actuarial data are a commercial consideration for insurers, the DDA requires the insurer to obtain data 'on which it is reasonable' to rely and that 'is reasonable having regard to the matter of the data and other relevant factors' for their underwriting decisions, if they are to rely on the exemption (s.46(1)(f)). This will not necessarily be the same benchmark for obtaining data as 'commercially justifiable'. In the absence of the exemption, insurers might be required to obtain data up to the point of 'unjustifiable hardship'—which arguably, could be a higher cost benchmark again (see chapter 8).

'Other relevant factors' in the insurance and superannuation exemption

In cases where no reasonable actuarial or statistical data are available (and 'cannot reasonably be obtained'), insurers may lawfully discriminate against a person with a disability if the 'discrimination is reasonable having regard to any other relevant factors' (ss.46(1)(f)(g) and (2)(f)(g)). For many inquiry participants, this was the most contentious element of the DDA's insurance and superannuation exemption.

HREOC guidelines for insurance and superannuation state that 'relevant factors include both those that may increase risk and those that may reduce it'. These can include (but are not limited to) medical opinion, other professional opinions, actuarial advice, information about the individual and commercial judgment. Given that these factors can include personal information, HREOC added:

> … this necessarily means that reasonable requests or requirements for information or examinations to determine insurance (including workers compensation) or superannuation entitlements are permitted. (sub. 143, p. 34)

In the Bassanelli case, Mansfield J said 'other relevant factors' should include 'any matter which is rationally capable of bearing upon whether the discrimination is reasonable' (box 12.1). IFSA (trans., p. 1369) explained that in practice, this often means looking at the lifestyle and financial circumstances of the individual—that is, personal factors that might affect an individual's risk rating. The ICA said this is a normal part of the risk assessment process undertaken for all insurance customers:

> An insurer who acts in accordance with section 46 is merely performing a normal and necessary part of the insurance process that includes the assessment of individual risks. (sub. 234, p. 3)

IFSA noted there is a cost in obtaining information about an individual's risk factors. It said this cost (relative to the commercial value of the insurance product) should be considered a relevant factor in itself, 'particularly in those products where those decision points are set at very limited [premium] levels' (sub. 242, p. 4). However, the Federal Court decision in the Bassanelli case (para. 54) made clear that first, a reasonable effort should have been made to obtain relevant data before

turning to ‘other relevant factors’, and second, where there are no reasonable data, all ‘other relevant factors’ should be considered and not just the factors selected for consideration by the insurer. As noted by People With Disability Australia (sub. DR359, p. 19), this ‘decision will in all likelihood provide some much-needed clarity regarding section 46’ of the DDA.

Stereotypes and assumptions in ‘other relevant factors’

Some participants were concerned that insurance and superannuation providers might sometimes base their underwriting decisions on stereotyped, outdated or incorrect assumptions about people due to their particular disability. They were concerned that insurers sometimes rely on ‘prejudicial assumptions related to disability’ (Blind Citizens Australia, sub. 72, p. 5) or make ‘blanket decisions … without determining the functioning capacity of the individual applicant’ (Disability Rights Network of Community Legal Centres, sub. 74, p. 2). The Mental Health Legal Centre (sub. 108, p. 5) alleged that unjustified, stereotyped ‘relevant factors’ are used to deny insurance to people with psychiatric disabilities.

In response, IFSA (sub. DR 349, p. 7) agreed that it is inappropriate for insurance providers ‘to rely on stereotypical assumptions’, and argued that if they attempted to do so, they would not succeed in proving their discrimination was reasonable. Indeed, this was the outcome in the Bassanelli case (box 12.1), in which Mansfield J said ‘other relevant factors’ should not include stereotyped assumptions about a person’s disability. Significantly, one of the reasons given for dismissing the insurer’s appeal was that the insurer:

> … applied a decision-making process which was too formulaic or which tended to stereotype the respondent by reference to her disability. Such grouping of individuals, whether by race or disability, without proper regard to an individual’s circumstances or to the characteristics that they possess, may cause distress or hurt. This case provides an illustration. Legislation such as the [DDA] is aimed to reduce or prevent such harm. Section 46 of the [DDA] recognises that there are circumstances in which discrimination by reason of disability may be justified (or, at least, not be unlawful). It requires that the particular circumstances of an individual who is discriminated against be addressed, but not in a formulaic way. Even if the exemption pathway provided by section 46(1)(f) is utilised, the reference to ‘any other relevant factors’ confirms that legislative intention. (*QBE Travel Insurance v Bassanelli* (2004) FCA 396)

Access to data and information used in underwriting decisions

Under the DDA, failure to provide actuarial or statistical data to HREOC when requested (in relation to a discrimination complaint) is an offence that carries a

penalty of up to $1000 (s.107). However, there is no requirement to provide actuarial data or other evidence to complainants or to insurance applicants.

Many inquiry participants wanted greater transparency in underwriting decisions more generally—and not just the decisions subject to an official DDA complaint—so as to improve accountability, accuracy and dialogue. People with Disability Australia (sub. DR359) wanted clarification of 'the nature of the information' that insurers must disclose to applicants and, in the event of a DDA complaint, to complainants. The BCNA (sub. DR373, p. 1) said the paucity of information about underwriting decisions meant the 'consumer is hard pressed to make an assessment of whether the insurer has acted lawfully' in exercising the DDA exemption.

In relation to insurance cover for sports clubs that include people with disabilities, Action for Community Living Inc. said:

> … [the sports clubs] are actually seen as a bigger risk in insurance when there's not evidence—there hasn't seemed to be much onus on insurance companies to provide arguments or evidence-based rationale … because that's been not terribly clear under the [DDA], it is a difficult area, but I think it's one that needs certainly more guidelines, and we would support that area in particular. (trans., p. 2671)

Further, NAPWA said lack of information impedes dialogue with the industry:

> … we don't have access to the information, to the data, on which they base their underwriting decisions. Without that, it's very difficult to have an objective discussion. We can come up with our own data from epidemiologists and the like, but the industry's response tends to be, 'Well, we just don't accept that', or, 'We're not going to accept data about longevity until the treatments have been available for another fifty years'. That's just unrealistic. (trans., p. 2331–2)

Options for improving the insurance and superannuation exemption

Inquiry participants suggested options ranging from abolishing the exemption and relying solely on the unjustifiable hardship and 'reasonableness' safeguards in the DDA; amending or clarifying the exemption; or retaining it in its current form.

Inquiry participants who suggested removing the partial exemption completely included the Mental Health Coordinating Council of NSW (trans., p. 1466); the Northern Territory Disability Advisory Board (sub. 121); the Physical Disability Council of New South Wales (sub. 78) and the Physical Disability Council of Australia (sub. 113). They argued that without the exemption, the 'unjustifiable hardship' defence (see chapter 8) and the 'reasonableness test' in indirect discrimination (see chapter 11) would still be available to insurers in cases where actuarial or other evidence supported differential treatment.

Referring specifically to workers compensation and superannuation, the Northern Territory Disability Advisory Board (sub. 121, p. 1), suggested offering tax breaks or incentives to offset any costs to insurers from the removal of the exemption.

Other participants called for the exemption to be limited or reduced in some way. The Physical Disability Council of New South Wales (sub. 78, p. 9) and the Physical Disability Council of Australia (sub. 113, p. 8) qualified their calls for the removal of the exemption by saying that 'in arguing for these exemptions to be ended we do not advocate 'blanket' application of unrealisable outcomes' but 'a shift of paradigm'. Robin and Sheila King (sub. 56, p. 1) suggested that: there be no DDA exemption in property insurance; that life insurance be assessed according to the individual's situation only; and that pre-existing conditions clauses be applied in medical insurance.

HREOC, the ICA and IFSA supported retaining the exemption. IFSA (sub. 142, p. 25) went so far as to argue that 'the continuation of the exemption in some form is fundamental to the continuation of the life insurance industry as we know it'. HREOC (sub. 219, p. 13) said most forms of insurance require 'reasonable distinctions' to be made and that the exemption 'needs to be maintained, rather than insurers being left to rely solely on an unjustifiable hardship defence'.

Many inquiry participants wanted to clarify the meaning of 'other relevant factors' in insurance decisions (ACT Government, sub. DR366; Action for Community Living Inc., sub. DR330; NDAC, sub. DR358; People With Disability Australia, sub. DR359). Blind Citizens Australia (sub. 72, p. 5) recommended deleting 'other relevant factors' (in ss.46(1)(g) and (2)(g)) so as 'to oblige insurance companies to obtain actuarial and statistical data to support exclusion or higher premiums'. HREOC (sub. 219, p. 13) said the DDA leaves much open to interpretation of what constitutes 'other relevant factors' and recommended 'further specification of what is reasonable, including potentially through standards or industry codes and procedures'. This issue has been addressed, in part, by the Federal Court's decision in the Bassanelli case (box 12.1).

The BCNA (sub. DR373, p. 1) said insurers relying on the exemption should be obliged to state their reasons for modifying or refusing an application 'in a clear and meaningful manner' and to provide copies of the actuarial reports, manuals and other documents relied upon in the underwriting decision (as recommended by the ALRC, see below). The BCNA also suggested amending section 107 of the DDA to require respondents to provide evidence of all 'other relevant factors' (as well as actuarial or statistical data) to HREOC when requested in relation to a DDA complaint. The National Disability Advisory Council suggested 'HREOC undertake a further full inquiry into access to insurance and superannuation', with a view to amending the exemption (sub. DR358, p. 5).

In terms of mechanisms, the options for addressing continuing concerns with the insurance and superannuation exemption include:

- voluntary guidelines (as currently being revised by HREOC)
- voluntary industry codes of practice and standards (some of which already exist)
- rely on legal precedent (such as the Xiros and Bassanelli cases) to establish the scope of 'reasonable' data and 'any other relevant factors'
- develop and impose disability standards on the industry
- amend the DDA by adding criteria, examples or other explanatory clauses to 'other relevant factors'.

The first two of these options are already in place, and have already required revision. NAPWA said the guidelines have not been very effective in practice:

> … they look fairly good; they have stood up pretty well since 1998 when they were introduced. However, they weren't being used … . So they were just advice that was sitting there really, not being taken. (trans., p. 2331)

Given the continuing concerns of people with disabilities regarding insurance, voluntary guidelines and codes do not appear to have been effective in ensuring the smooth operation of this exemption. Reliance on legal precedent for further clarification, while valuable, will be slow due to the small number of formal complaints and cases heard in this area. Other measures therefore seem necessary.

Recommendations on genetic discrimination in insurance by the ALRC 2003

In its report on protecting genetic information in Australia, the ALRC made a number of recommendations about genetic discrimination and the use of genetic information in insurance that are relevant to broad disability discrimination issues (ALRC 2003). The ALRC said that, as a general rule, there should be no departure from the principle of 'equality of information between the applicant and the insurer', but that where genetic information is used in insurance underwriting, the insurance process should be subject to the ALRC's recommendations (box 12.2).

The ALRC's approach was supported by the Anti-Discrimination Board New South Wales (sub. 101, p. 23), which proposed that lawful discrimination in insurance must be 'based upon actuarial or statistical data which has been approved for use in underwriting by the relevant independent body', so as to address concerns about genetic testing.

Although put forward by the ALRC in relation to genetic discrimination only, the Productivity Commission considers some of these recommendations to have

potential to assist all people with disabilities. In particular, the ALRC recommendations to develop better industry policies, and to require insurers to explain clearly and meaningfully their underwriting decisions, could have benefits for all people with disabilities, including those with genetic disorders.

Box 12.2 **Genetic discrimination and genetic information in insurance**

In its report on genetic information, the Australian Law Reform Commission (ALRC) made several recommendations to address 'genetic discrimination' in insurance.

- A Human Genetics Commission of Australia should be established to (among other duties): 'keep a watching brief on developments in the insurance industry in relation to the use of human genetic information': review insurance practices regarding genetic information; and establish procedures and make recommendations on the use of particular genetic tests in insurance underwriting.
- IFSA and the ICA 'should develop mandatory policies' to ensure their members use genetic tests only as approved by the proposed Genetics Commission, and should develop policies about the use of family medical histories in insurance underwriting.
- The *Insurance Contracts Act 1984* should be amended to require insurers 'to give reasons that are clear and meaningful and that explain the actuarial statistical, or other basis for decision' in cases where an unfavourable underwriting decision has been based on genetic information or family medical history. Applicants should be advised by insurers of their statutory entitlement to such reasons, and IFSA and the ICA should develop policies for their members regarding this duty.
- The DDA should be amended to 'clarify the nature of the information required to be disclosed by an insurer to HREOC in the course of resolving a complaint' and to allow access to such information by the complainant.
- IFSA and the ICA should expand the jurisdiction of the Financial Industry Complaints Service Ltd and the Insurance Enquiries and Complaints Ltd to allow them to hear complaints and review underwriting decisions based on genetic information and family medical history.

Source: ALRC 2003, pp. 64–6.

Conclusions on the insurance and superannuation exemption

The Productivity Commission considers that, on balance, an exemption is warranted for disability discrimination that is genuinely based on reasonable, relevant, up-to-date statistical and actuarial data. As HREOC and other inquiry participants acknowledged, insurance (and to a lesser extent, superannuation) is discriminatory by nature. If the risks carried by an individual with a disability renders the individual uninsurable or costly to insure, insurers need to be able to vary the price or conditions of their products or, in extreme cases, to refuse insurance altogether.

Relying instead on unjustifiable hardship (and/or 'reasonableness' in indirect discrimination cases) in the DDA in order to justify variations to insurance policies on a case-by-case basis would carry significant transaction costs for all concerned, including legal costs, data costs and potentially lengthy delays in issuing policies.

In order to maintain flexibility in cases were no reasonable data are available, the Productivity Commission also supports the retention of the 'any other relevant factors' clause (ss.46(1)(g) and (2)(g)), but considers it could be improved upon. Uncertainty about this clause has been addressed, to some extent, by the Federal Court's decision in the Bassanelli case. Further guidance will be available soon from HREOC's revised guidelines (forthcoming). As noted above, HREOC suggested further clarification by the industry is required. Industry codes or standards could be developed, but they would have voluntary status only. If the DDA were amended, disability standards could be introduced to cover insurance and superannuation (see chapter 14).

More powerfully, the DDA itself could be amended to clarify the meaning of 'any other relevant factors'. Criteria should be added, for example, about the types of information that insurance and superannuation providers should (or should not) consider in identifying 'other relevant factors'. HREOC's revised guidelines, conciliated complaints and case law could provide guidance for formulating such criteria. Following the Bassanelli case, they could make clear, for example, that the basis for underwriting decisions must not include stereotypes about people with disabilities or unfounded assumptions about individuals' health status.

In the interests of improving transparency, accountability and accuracy in underwriting procedures, the data sources and 'any other relevant factors' relied upon in unfavourable underwriting decisions should be explained to the insurance applicant, in cases where the insurer plans to rely on the section 46 exemption in the DDA. Insurers should not be required to reveal confidential or commercially sensitive actuarial data, but they should be required to explain their reliance on the data (or in the absence of data, on 'other relevant factors') in a meaningful manner, if they are to rely on this exemption from the DDA. As recommended by the ALRC, insurers should be obliged to make this right to information known to insurance applicants at the time of their application.

FINDING 12.1

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

RECOMMENDATION 12.1

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

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

RECOMMENDATION 12.2

The* Disability Discrimination Act 1992 *should be amended to limit the application of the insurance and superannuation exemption (s.46). It should only apply if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied).

Applicants should be advised of their entitlement to request these reasons.

12.2 Exemption of the *Migration Act 1958*

Section 52 of the DDA exempts the *Migration Act 1958,* all regulations made under that Act and anything done by a person in relation to the administration of that Act from the discrimination provisions of the DDA. In the absence of this exemption, the Migration Act (and its regulations) would be subject to the DDA in the context of the 'administration of Commonwealth laws and programs' (s.29).

The Migration Act and the Migration Regulations 1994 are the primary legislative instruments of the Australian Government for determining:

- the arrival and presence in Australia of non-citizens
- selection criteria, application processes and compliance for all visa categories
- migration sponsorships
- detention of, deportation of, and recovery of costs from non-citizens
- offences in relation to entering and remaining in Australia
- registration and duties of migration agents (who provide immigration assistance)
- establishment, functions and powers of the Migration Agents Registration Authority, the Migration Review Tribunal and the Refugee Review Tribunal.

These functions are administered by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA). DIMIA also administers other Acts that relate to migration, such as the *Immigration (Education) Act 1971*, the *Australian Citizenship Act 1948* and various Acts for setting fees and charges. These are not exempt from the DDA and are not discussed here. Social security, disability and health services for migrants, as for other Australians, are provided under relevant social security, disability and health Acts and are also not exempt from the DDA.

Rationale for the Migration Act exemption

One of the key functions of the Migration Act is to establish who may enter and remain in Australia, temporarily or permanently, under various visa categories. If the Migration Act were not exempt, some of the criteria for assessing visa applicants might be found to be directly or indirectly discriminatory under the DDA. However, the Australian Government considers these criteria necessary for other public policy reasons.

Criteria for migration visa categories are extensive and vary considerably across visa categories. Depending on the visa category, entry criteria can include, for example, family status, occupation, education qualifications, assets, age, and language skills, and may be determined using a points-based test or other methods of assessment. These criteria are set out for each visa category on the application forms, in the Migration Regulations 1994 and in explanatory material from DIMIA (all of which are available on the internet, in electronic and other formats). Some criteria change periodically (for example, priority occupations for skilled migration or assets requirements for business visas), but they apply equally to all applicants in each visa category. They are aimed at meeting a range of Australian Government policy objectives, including social, economic, financial and security objectives.

In addition to meeting the criteria for their particular visa category, all applicants for permanent visas to Australia, their spouses and dependents must meet separate and additional health requirements under the Migration Regulations 1994 (box. 12.3). Similar health checks also apply for temporary entry visas over a certain duration.

If the Migration Act were not exempt from the DDA, these health requirements might conceivably be found to discriminate against some people with disabilities indirectly (by setting rules that they do not or cannot meet), or discriminating directly (by requiring additional tests or medical evidence that are not required of people without disabilities). However, the Australian Government deems these health requirements to be necessary for other public policy reasons. These are to:

- minimise public health and safety risks to the Australian community

- contain public health expenditures on health and community services
- maintain access to health and community services for Australian residents (DIMIA 2003b; sub. DR365, p. 2).

Box 12.3 **Migration Regulations 1994: health requirements**

Public interest criteria for permanent migration to Australia require that the applicant:

a) is free from tuberculosis; and

b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and

c) (i) does not have a disease or condition that is such that the person would be likely to: (A) require health care or community services, or (B) meet the medical criteria for the provision of a community service, during the period of the applicant's proposed stay in Australia; and

(ii) provision of the health care or community services relating to the disease or condition would be likely to: (A) result in a significant cost to the Australian community in the areas of health care and community services; or (B) prejudice the access of an Australian citizen or permanent resident to health care or community services, regardless of whether the health care or community services will actually be used in connection with the applicant.

d) if a Medical Officer of the Commonwealth has requested a signed undertaking to present to a health authority in Australia for a follow-up medical assessment, the applicant must provide such an undertaking.

Source: Migration Regulations 1994, Schedule 4, ss.4005–7.

Issues arising from the Migration Act exemption

Several inquiry participants argued the Migration Act exemption in the DDA is too broad. In particular, they argued that the health requirements for permanent migration have unfairly or unreasonably denied entry to some people with disabilities and their families. Their concerns appeared to relate mainly to the manner in which the health requirements may have been applied, rather than to the existence of the requirements themselves (box 12.4).

In response, DIMIA (sub. DR365, p. 2) said 'decisions to refuse applications on the grounds of health are not made lightly' and there are several checks and balances.

First, DIMIA emphasised that 'each case is considered on its merits' and that health requirements 'do not automatically exclude persons with disabilities from visiting or migrating to Australia' (sub. DR365, p. 2). Where they are required, health

assessments are conducted for each applicant (and any dependants) by a medical officer approved for this purpose by the Australian Government. This can involve tuberculosis x-rays, HIV tests and other checks as deemed necessary by the medical officer. Under the Migration Regulations (reg. 225A), 'the Minister must seek the opinion' of a medical officer and DIMIA officers 'must accept the opinion' of the medical officer on whether the applicant meets the health requirement (DIMIA 2003b). This means that in practice, the decision must be based upon the individual's health assessment results and not on assumptions based on stereotypes.

Box 12.4 Inquiry participants' views of the *Migration Act 1958* exemption

If these [entry] decisions are to remain exempt from the DDA, HREOC would like to see improved criteria and procedures within immigration law in relation to admission of people with disabilities. (HREOC, sub. 143, p. 18)

… the Migration Act in particular … has had the effect that people with a disability are often ineligible to emigrate to Australia because of their disability. … it is not uncommon for immigrant families to leave behind a relative with a disability. (National Ethnic Disability Alliance, trans., pp. 1433–4)

…people with disabilities are discriminated against unreasonably because of the operation of the health rules. The rules should require that the estimated cost of entry or migration be offset against the skills and resources of the applicant … [there are a] number of skilled migrants with disabilities who are denied permanent residency purely on the basis of disability. (Blind Citizens Australia, sub. DR269, pp. 21–2

… if the Australian community supports the DDA, … why doesn't that then translate to other sorts of overseas obligations? … The positive contribution that people with disability can make both to the workforce and to the Australian community generally should be required to be taken into account, not just the supposed economic burden in terms of cost to the health care system. (NAPWA, trans., p. 2340–1)

… the [DDA] recognises the rights of citizens with a disability and their ability to participate … the absence of human rights of non-citizens with the same mix of skills and abilities is contradictory and out of step with international obligations. (New South Wales Office of Employment Equity and Diversity, sub. DR354, p. 9)

… people with disabilities are often discriminated against in applying for residency and visas are rejected on the basis of a person's disability as a matter of course. … while there may be a health related basis to reject an applicant … being a person with a disability does not automatically provide a justifiable reason. (Disability Council of New South Wales, sub. DR291, p. 6)

[The DDA] should also prevent a person who has a disability or has a dependent family member or spouse with a disability, being refused immigration where that person would otherwise be eligible. This exemption serves only to permit discrimination, even where all other criteria have been met, and frequently serves to condone stereotypes regarding the capacity of the individual. (Guide Dogs Association of South Australia and the Northern Territory Inc., sub. DR292, p. 4)

DIMIA provides detailed information about the basis for its decisions. For example, with regard to the health requirements for general skilled migration visas:

> A decision is made on, first, any detection of tuberculosis, … and then, of medical conditions which are likely to result in significant health treatment and community service costs in Australia, or which may use treatment or services in short supply. Some allowance is made for normal health and welfare costs (calculated as a multiple of average annual costs for an Australian). When the Medical Officer … is of the opinion that an applicant's costs are beyond these and are therefore significant, this generally leads to refusal. The cost assessment takes no regard of whether a person has or intends to take private health insurance or make other financial or nursing arrangements to lessen the claim on public funds. (DIMIA 2004, p. 43)

Second, DIMIA advised that for applicants who have not met the medical requirements for humanitarian, refugee, family and some other visa categories 'it is possible for the Minister to waive the last requirement (to do with the cost of potential treatment)' for compassionate or other compelling reasons.[3] For sponsored employment visas (for permanent or long-term temporary entry), a health waiver may be granted if the sponsoring employer undertakes 'to meet all costs related to the disease or condition' of the applicant or dependents (Migration Regulations 1994, s.4006A(2)). A waiver could enable, for example, a person with unique skills to be sponsored by an employer, subject to the employer meeting any health costs related to their (or their dependants') pre-existing condition—not unlike pre-existing conditions clauses in health insurance policies. In such cases, it would be up to the employer to balance the value of the prospective employee to their business against the employee's prospective health costs.

Health requirement waivers are made at the discretion of the Minister (on advice from DIMIA and medical officers) and are mainly made for compassionate or family reasons. DIMIA (sub. DR365, p. 2) advised that health waivers are used regularly and that 'people with disabilities can and do migrate to Australia'. NAPWA, for example, confirmed that discretion has been exercised to grant visas to people with HIV/AIDS, but said such cases were rare:

> There are cases … of compassionate circumstances … where people [with HIV/AIDS] can argue the economic case, in terms of them being able to cover their health costs and matters such as that, where visas have been granted, but they are the exception rather than the rule. (trans., p. 2338)

Third, review processes are available for applicants whose visa application is refused on health or other grounds through the Migration Review Tribunal, the Refugee Review Tribunal and, in some cases (such as some onshore applicants),

[3] Waivers are not possible for offshore visa applicants who have untreated tuberculosis or other untreated diseases that may be a threat to public health in Australia. Applicants may be asked to re-apply following treatment.

Australia's courts. Applicants are advised of 'any review rights and provided with information on how to apply for review' at the time of refusal (DIMIA 2003b). Further medical and other evidence can be submitted to a designated medical officer 'to have a fresh look' at the case. Based on the opinion of the medical officer, the review body can then: affirm the original refusal, set aside the refusal, or refer the case to DIMIA officers for further consideration of a waiver (DIMIA 2003b).

Exemption of administrative matters under the Migration Act and Regulations

The DDA exempts not only the Migration Act and regulations from its discrimination provisions, but also 'anything done by a person in relation to the administration' of them (s.52(b)). This means all actions done in relation to the Migration Act and regulations are exempt from the DDA. Despite this, DIMIA advised that it has received legal advice to the effect that:

> … section 52 of the DDA does not exempt DIMIA from complying with the DDA in respect of premises it occupies. That is, DIMIA is required to provide appropriate disabled facilities at detention centres. (sub. DR365, p. 3)

This approach to disability access is consistent with the DDA's application to the administration of Commonwealth laws and programs (s.29) and with the Commonwealth Disability Strategy that applies to all Australian Government agencies (see appendix E). This approach is to be commended. It also indicates that the current exemption of *all* administrative actions done under the Migration Act may be wider than necessary.

The *Age Discrimination Act 2004* contains a similar exemption for anything done in the administration of the *Migration Act 1958*, the *Immigration (Guardianship of Children) Act 1946* and their regulations. In its submission to the Senate inquiry into the Age Discrimination Bill, HREOC disagreed that all actions done under the Migration Act should be exempt. HREOC said that actions done in direct compliance of the law should be exempt, but discretionary acts done to administer immigration law (such as providing information or services to immigrants and applicants) should not, because to do so would be 'inconsistent with the general thrust of the provisions in the Bill in relation to Commonwealth laws and programs' (HREOC 2003j, pp. 21–2). A similar argument would appear to apply to the DDA—that is, that the exemption of *all* actions done under the Migration Act and its regulations is inconsistent with the general application of the DDA to the administration of all other Commonwealth laws and programs.

Conclusions on the Migration Act exemption

The criteria for Australia's various visa entry categories are designed to address a wide range of health, labour market, social welfare, financial and other government policy considerations. They are, by nature and design, discriminatory. Some of these criteria may indirectly discriminate against some people with disabilities, in that they will be less likely to meet the criteria than people with no disability. However, the Australian Government considers these entry criteria necessary for the health and welfare of the Australian community. Their exemption from the DDA (s.52(a)) is therefore appropriate. Care should be taken in applying and explaining visa entry criteria to people with disabilities, so as to minimise unnecessary perceptions of disability discrimination.

On the other hand, the Productivity Commission considers general administrative functions, policies and practices under the Migration Act and its regulations should comply with the DDA in the same manner as other Commonwealth laws and programs (all of which are subject to the DDA and the Commonwealth Disability Strategy, see appendix E). Indeed, as noted above, DIMIA appears to have adopted this approach in some activities already. DIMIA agreed there may be a case for reviewing the Migration Act exemption and that:

> … general administrative actions taken under the Migration Act and regulations should be separated in principle from those areas of the Act that are directly relevant to the criteria and decision-making for Australian entry and migration. (sub. DR365, p. 3)

However, DIMIA also emphasised that 'particular care' would need to be taken in separating 'general administrative actions' from 'the criteria and decision-making for Australian entry and migration visa categories' because the two parts are 'closely entwined' and may significantly overlap (sub. DR365, p. 3). DIMIA should be consulted about any review or amendment of section 52 of the DDA.

FINDING 12.2

An exemption for the Migration Act 1958 *and its regulations in the* Disability Discrimination Act 1992 *(s.52) is appropriate, but its current scope may be wider than necessary.*

RECOMMENDATION 12.3

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

- ***exempts only those provisions which deal with issuing entry and migration visas to Australia***
- ***does not exempt administrative processes under the Act and its regulations.***

12.3 Exemptions for specific activities

Many activities other than insurance and superannuation and the Migration Act are also expressly exempt from the DDA. Many of these exemptions are also only partial. They include: combat and peacekeeping duties in Australia's armed forces and Australian Federal Police; special measures (that is, disability services intended to benefit people with disabilities); capacity-based wages for people with disabilities; and domestic duties in employment. Some functions of charities are also exempt (s.49), however, this exemption did not attract comments from inquiry participants and is not discussed here.

Combat and peacekeeping duties

The DDA exempts combat duties and peacekeeping by the defence forces (s.53) and peacekeeping services by the Australian Federal Police (s.54). However, the nature of these duties had to be prescribed in regulation, which was done in the Disability Discrimination Regulations 1996. Before the introduction of the regulations, this exemption did not operate, and discrimination against people with disabilities in these activities (primarily in the form of exclusion) had to be defended using inherent requirements, unjustifiable hardship or the 'reasonableness test' in indirect discrimination in the same manner as for other activities covered by the DDA. In the case of *X v the Commonwealth* ((1999) HCA 63), a person who tested positive to HIV was found to fail the inherent requirements for combat duty. In deciding on this case, the High Court observed that section 53:

> … would appear to have been incorporated into the Act precisely … to relieve the [Australian Defence Forces] from the necessity to conform with the Act in respect of such duties and services as specified, the 'combat duties' and 'combat-related duties' mentioned in section 53. (*X v the Commonwealth* (1999) HCA 63)

HREOC disputed the need for this exemption in the DDA (sub. 219, p. 15) on the ground that 'the concept of inherent requirements ought to be regarded as sufficient'. In its submission to the Senate inquiry into the Age Discrimination Bill—which contained an exemption for all Australian Defence Force positions rather than only combat-related positions as in the DDA (s.39(1) and schedule 1 of the Bill)—HREOC said such a wide exemption was inappropriate. It recommended replacing it with non-discriminatory recruitment tests (HREOC 2003j, p. 17).

Without this exemption in the DDA, the defence forces would have to rely on the inherent requirements (see chapter 8) and indirect discrimination test of reasonableness (see chapter 11) in the same manner as civilian employers. This approach could be costly and create uncertainty until suitable legal precedents have been established. If a whole class of employment positions are known to be

unsuitable for people with disabilities, then a general exemption such as this one provides certainty and eliminates the need for expensive litigation on a case-by-case basis, which would be likely to achieve the same result as achieved by the exemption (in this case denial of employment in combat and peacekeeping duties).

FINDING 12.3

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

Special measures for the benefit of people with disabilities

'Special measures' that provide services, programs, facilities or funds that are 'reasonably intended' to benefit people with disabilities are exempt from the DDA (s.45). This exemption aims to protect 'special needs' services and facilities for people with particular types of disabilities from being challenged by people who do not have the particular disability.

Other anti-discrimination Acts in Australia contain similar exemptions for special disability services. As noted by the New South Wales Law Reform Commission in relation to that State's *Anti-discrimination Act 1977*, 'not every treatment that involves a distinction is discrimination', and not all discrimination is unlawful. In particular, 'benign discrimination', where a person's characteristics justify different treatment that is to their benefit (such as medical, social welfare or other treatment), should not be unlawful (NSW Law Reform Commission 1999, para. 3.41).

HREOC argued that in one sense, this provision is not necessary because a person cannot make a valid claim of being discriminated against if they do not have the particular disability identified as necessary to secure an opportunity or benefit. However, HREOC also said the special measures exemption helps to protect information requests that are necessary or reasonable to establish eligibility for a benefit or opportunity directed at people with a disability (sub. 143, p. 11).

HREOC expressed concern about the wide interpretation given to a similar provision in the ACT's *Discrimination Act 1991*. The ACT Administrative Appeals Tribunal found that a similar provision protected any act done in the course of administering a beneficial program and not just beneficial acts. The National Council for Intellectual Disability was similarly concerned, stating:

> … there have been decisions which have held that once a service is characterised as a service for the purpose of meeting the 'special needs' of people with disability or an affirmative action program, then nothing done by the service provider in the course of

> that program or service can constitute an act of discrimination on the ground of disability even if the same action would be an act of discrimination in a similar context of a person without a disability. (sub. 112, p. 12)

HREOC (sub. 143) suggested that the appropriate test under the DDA is whether the action complained of was reasonably intended to be beneficial, not whether it occurred in the administration of a program or facility intended overall for beneficial purposes. Alternatively, the National Council for Intellectual Disability suggested looking to US legislation for an example of how to apply discrimination legislation to disability services:

> One alternative is to follow the US approach of legislating to require service providers to deliver their services in the 'least restrictive environment' and with 'maximum integration' within the community. (sub. 112, p. 12)

In response, HREOC (sub. 219, p. 7) said this idea could be useful, but noted the principles suggested—least restriction and maximum integration—are relevant to all goods and services and not just to special disability services. The National Council for Intellectual Disability's suggestion might be more relevant to service charters for disability services (such as those developed under the Commonwealth, State and Territory Disability Agreement, see chapter 15 and appendix E) than to anti-discrimination legislation.

Conclusions on the special measures exemption

The Productivity Commission considers that the reason for introducing the special measures exemption—to ensure it is lawful to do things for the benefit of people with disabilities—is still relevant but has been misinterpreted or misunderstood. As stated in chapter 2, the DDA is aimed at eliminating discrimination on the ground of disability, so as to promote equality of opportunity for people with disabilities. The DDA does not (and cannot) aim to achieve equality of outcomes or of resources.

The eligibility, availability and quality of disability services are often the subject of complaint by people with disabilities, but rarely on the ground of discrimination. Some people might consider their access to disability services inadequate, inappropriate, undesirable or even unfair, but these problems are rarely due to disability discrimination. Complaints about them should be addressed directly through appropriate complaint mechanisms, such as those operated by State and Territory government health departments, disability services commissions and ombudsmen, and not through the DDA.

The Productivity Commission considers that it is therefore appropriate that the DDA does not apply to the establishment, funding or eligibility criteria for disability

services designed to benefit particular groups in the community. However, the exemption should be clarified to ensure that people with disabilities are not discriminated against in the general administration of special disability services. Premises for special services, for example, should be accessible to all, and information about special services should be available in accessible formats to people with all types of disability who want to find out about those services.

FINDING 12.4

An exemption for 'special measures' that are reasonably intended to benefit people with disabilities in the Disability Discrimination Act 1992 *(s.45) is appropriate, but its current scope is unclear.*

RECOMMENDATION 12.4

The exemption in the* Disability Discrimination Act 1992 *for 'special measures' that are reasonably intended to benefit people with disabilities (s.45) should be amended to clarify that it:

- ***exempts the establishment, eligibility criteria and funding of these measures***
- ***does not exempt general actions done in their administration.***

Capacity-based wages for people with disabilities

Under section 47(1)(c) of the DDA, it is not unlawful to discriminate against a person with a disability by paying them a capacity (or productivity)-based wage, as long as this wage is consistent with an Award, a certified agreement or an Australian workplace agreement, and the person would otherwise be eligible for the Disability Support Pension.

Many workers with a disability who are employed either in the 'open' labour market, or in the 'supported employment' labour market (also known as 'business services' or 'sheltered workshops') receive wages lower than full wages, based on their assessed relative capacity (or productivity). One scheme for assessing relative capacity is the federal Supported Wage System.

The Australian Government has developed a wage assessment tool as part of its Quality Assurance System reforms of disability services.[4] This tool is intended to assist business service providers to meet National Disability Services Standards 9,

[4] The wage assessment tool was introduced on 21 April 2004 as part of new financial supports and wage increases for people with disabilities employed in business services (Howard 2004).

which applies to the employment of people with disabilities. The tool allows business service providers to calculate the wages of their employees on the basis of capacity, competency and registered Awards or agreements. Its adoption by business services providers will be a condition of continued Australian Government funding after December 2004 (subject to some flexibility, so as not to disadvantage any person with a disability who is employed in business services).

A number of inquiry participants criticised the wages paid by business services providers (Job Watch, sub. 90; National Council in Intellectual Disability, sub. 112; New South Wales Council for Intellectual Disability, sub. 117; Disability Action Inc., trans., p. 929; Intellectual Disability Review Panel, sub. 207). They had four main criticisms.

- Wages are often not based on any Award or agreement registered by the Australian Industrial Relations Commission (AIRC).
- Capacity assessments are often not conducted by accredited, independent assessors.
- Employees are often not able to make informed decisions about their pay and conditions (for the purpose of making workplace agreements).
- The AIRC is not obliged to only make Awards or certify agreements containing a Supported Wage System clause.

Some of these issues have been raised in complaints to HREOC (under the DDA) and to the AIRC (under the *Workplace Relations Act 1996*).

Inquiry participants indicated there is uncertainty about how the DDA applies to these business services. Some considered that the specific provisions of section 47(1(c)) should govern capacity-based wages paid in the business services sector (Job Watch, sub. 90, sub. 215; HREOC, sub. 143). However, the Intellectual Disability Review Panel (sub. 207) argued that business services could be characterised as 'special measures' and hence be exempt from the DDA under the 'special measures' exemption (s.45).

The Productivity Commission considers that any uncertainty about the application of the DDA (and especially of the special measures exemption) to business services should be clarified. It is a general principle of statutory interpretation that specific provisions take precedence over general provisions. Therefore, the special measures exemption (s.45) should not apply to capacity-based wages that are governed by section 47 of the DDA.

Job Watch suggested that section 47 of the DDA be amended to prescribe the Supported Wage System wage assessment tool as the only method to be used by

employers wishing to offer capacity-based wages. Job Watch also suggested that the DDA be amended to require the AIRC and State tribunals to only register Awards or agreements that include a Supported Wage System clause (sub. 90, sub. 215).

The Productivity Commission considers that it is not desirable either to prescribe a particular wage assessment tool within the DDA, or to include in the DDA a reference to the operation of the AIRC and State tribunals. The AIRC is entrusted with applying the Workplace Relations Act, which contains a requirement to adhere to the principles of the DDA in industrial relations. The Productivity Commission shares HREOC's wish to move the issue of wages for people with disabilities into the mainstream (HREOC, sub. 219).

FINDING 12.5

The current provisions of the Disability Discrimination Act 1992 *dealing with capacity-based wages are appropriate (s.47(1)(c)). However, there is some uncertainty about the interaction between provisions dealing with capacity-based wages and the exemption for 'special measures' (s.45).*

RECOMMENDATION 12.5

The* Disability Discrimination Act 1992 *should be amended to clarify that the general exemption for 'special measures' (s.45) does not apply to wages paid to people with disabilities. Wages should be subject to the specific provisions for capacity-based wages in the Act (s.47(1)(c)).

Domestic duties in employment

Within some areas of activity listed in the DDA, there are small, specific exemptions. Domestic duties are exempt from the employment provisions of the DDA. A similar exemption appears in virtually all Australian anti-discrimination legislation, including the federal race and sex discrimination Acts and the State and Territory Acts.

Two inquiry participants questioned the need for the domestic duties exemption in the employment section of the DDA:

> Such an anomaly needs to be addressed as discrimination against an employee should be unlawful regardless of the 'type' or location of employment. Other employees within the home (eg contract workers, support workers and attendants) are covered under the Act, thus it is not merely the location but the 'type of duties' that are exempted. (Joe Harrison sub. 55, p. 8; Disability Council of New South Wales, sub. 64, p. 20)

HREOC indicated that it does not know the underlying rationale for the domestic duties exemption in the Act (HREOC, trans., p. 1143) and that it favoured a review of the extent of this exemption (sub. 219, p. 13).

A similar exemption for domestic duties appears in the *Age Discrimination Act 2004*. The explanatory memorandum for the Bill to this Act explains the exemption 'reflects the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised' (para. 45). This argument is likely to be relevant to disability discrimination also.

12.4 Exemptions for prescribed laws

The Disability Discrimination Regulations 1996 list the 'prescribed laws' referred to in section 47(2) of the DDA, which states that it is not unlawful under the DDA for persons to do something in compliance with a prescribed law. All of the current eight prescribed laws are from New South Wales and South Australia (table 12.1).

Table 12.1 **Prescribed laws, Disability Discrimination Regulations 1996**

Jurisdiction	*Act or Regulation*	*Sections or clauses*
New South Wales	*Mental Health Act 1990*	All
New South Wales	Mental Health Regulations 1995	All
New South Wales	Motor Traffic Regulations 1935	10(1)(c) and 11
South Australia	*Firearms Act 1977*	20 and 20A
South Australia	*Motor Vehicles Act 1959*	88 and 148
South Australia	*Education Act 1972*	75(3) and 75A
South Australia	Industrial and Employee Relations (General) Regulations 1995	11
South Australia	*Workers Rehabilitation and Compensation Act 1996*	30A and schedule 3

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

HREOC supported the mechanism for prescribing laws, which it considered was

> … an appropriate means for determining when the DDA should give way to other laws, noting that this mechanism provides for scrutiny through provision for parliamentary disallowance as well as through consultation between governments. (sub. 143, p. 14)

The South Australian Government (sub. DR356) also supported the mechanism. It argued that the reasons for prescribing its laws are still relevant and indicated it would formally request the retention of all its prescribed laws.

By contrast, the National Council on Intellectual Disability was critical of the mechanism (sub. 112, p. 11). Similarly, the Physical Disability Council of NSW

recommended removing all exemptions, including actions taken under prescribed laws (sub. 78).

The Productivity Commission considers that the option for prescribing laws provides a useful mechanism for identifying when governments consider other laws should take priority over the DDA. However, the Commission notes the mechanism for prescribing legislation has been used inconsistently. As noted, New South Wales and South Australia are the only States to have prescribed legislation; other jurisdictions have similar legislation, but have chosen not to have it prescribed. These governments might believe that their laws fall within other exemptions contained in the DDA, or that the defences within the Act would apply.

The Disability Rights Network of Community Legal Centres (sub. 74) suggested that the list of prescribed laws be reviewed regularly or have a time limit:

> Whatever gets prescribed should be reviewed because things change. It shouldn't just be permanent exemption. (trans., p. 401).

HREOC noted the advantages of this approach:

> It may be appropriate to consider whether the power to prescribe laws should be for five years at a time similar to the temporary exemption power to ensure that the reasons for prescription remain current and that other laws provide for access and equity as far as is feasible (which may change over time including with technical developments). (sub. 219, p. 14)

The Productivity Commission recognises the advantages of introducing a time limit, of say five years, on laws prescribed under section 47. They should then be subject to review by the Attorney General. The Commission considers that it would be desirable to review the current prescribed laws as soon as possible. In doing so, the rationale for the inconsistent treatment of similar legislation in other States and Territories could be addressed. The South Australian Government (sub. DR356) argued that the relevant South Australian government agencies should be consulted before any changes are made to the current list of laws. The Commission considers it appropriate to give the New South Wales and South Australian Governments the opportunity to justify the ongoing prescription of their legislation.

FINDING 12.6

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

RECOMMENDATION 12.6

The laws prescribed under section 47 of the* Disability Discrimination Act 1992 *should be reviewed every five years to ensure that the reasons for their prescription remain current. The laws that are currently prescribed should be reviewed as soon as possible and delisted if necessary.

12.5 Exemptions for health and safety reasons

The DDA exempts actions that are necessary to protect the public from infectious diseases. Measures that are 'reasonably necessary to protect public health' where a person's disability is an infectious disease are exempt from the DDA (s.48). HREOC considered that this exemption has operated appropriately. Most other anti-discrimination Acts in Australia and other countries that include disability as a ground for discrimination include a similar exemption for infectious disease. However, unlike some other anti-discrimination Acts, the DDA does not exempt actions that are considered necessary for health and safety reasons more generally.

There are many health and safety regulations that apply in different contexts in Australia (such as employment, education and public safety). Some inquiry participants were concerned about potential conflict between the DDA and health and safety laws, and the lack of 'protection' from DDA complaints in these cases (box 12.5).

Gleeson CJ in *Purvis v New South Wales (Department of Education and Training)* ((2003) HCA 62) implied that where there is serious conflict between the DDA and occupational health and safety laws, the latter may override the former in practice:

> In construing the Act, there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia's obligations to protect the rights of other pupils. Furthermore, a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny. (*Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62, p. 3)

However, this intention is not evident in the DDA. Further, the DDA is silent about conflicts with other health and safety regulations, such as those covering air safety.

Box 12.5 **Health and safety and the DDA**

Some inquiry participants were concerned that where the DDA conflicts with health and safety requirements, the obligations under the DDA could prevail and jeopardise health and safety:

> If the DDA were in direct conflict with State [occupational health and safety] 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. (Victorian Government, sub. DR367, p. 6)
>
> It is essential that employers retain their ability to deal with unacceptable behaviour in the workplace, without being faced with discrimination complaints from persons arguing that their unacceptable behaviour was a symptom of, say, their depressed state or their addiction to a prohibited substance. Under occupational health and safety laws, employers have a duty of care towards employees, contractors, customers and all other persons in the workplace. Very large penalties apply if duties of care are breached. (Australian Industry Group, sub. DR326, pp. 8–9)
>
> Schools are genuinely struggling in trying to accommodate the needs of students with disabilities with their duty of care obligations to other students and staff. … Schools should have the flexibility and capacity to make decisions to protect the welfare of the student with a disability and the welfare of other students and staff. (Association of Independent Schools of South Australia, sub. DR357, p. 2)
>
> … it may be possible to seek to use the [DDA], or to argue that it can be used, to prevent the prohibition of smoking in enclosed workplaces and public places. Certainly, anecdotal evidence indicates that some employers and occupiers of public venues are concerned about the possibility of action being taken against them under the [DDA] by a person who smokes in the event that they do introduce a prohibition, and that this concern may play a role in dissuading them from doing so. (Cancer Council Victoria, sub. DR294, p. 2)
>
> … our fundamental concern is with [how] a conflict between the obligations imposed by the Commonwealth, through the Attorney-General's standards, and the aviation safety requirements imposed by the Commonwealth Civil Aviation Safety Authority would be resolved. (Australian Airports Association, trans., pp. 2138)

By contrast, other inquiry participants were concerned that legislation covering health and safety issues, particularly occupational health and safety legislation, was being used to undermine the rights of people with disabilities:

> …this [Occupational Health and Safety] legislation is taking precedence over the needs of the children, yet the departments have a policy on inclusive education … I'm really scared that a lot of kids are going to be adversely affected but it's not just a problem that's going to come up within the education system. It could be in employment, it could be in all sorts of areas when they've got to address issues of challenge, in my view. (People with Disability Australia, trans., p. 2473)
>
> … it doesn't take into account the fact that people's lives are being significantly restricted by the application in a very rigid way of those sorts of [health and safety] considerations. (Action for Community Living Inc., trans., p. 2670)

This conflict between the DDA and health and safety or air safety obligations raises issues about consistency between Australian Government laws generally; and about whether occupational health and safety obligations should take priority over DDA requirements specifically.

As a matter of principle, any new legislation introduced by the Australian Government (including subordinate regulation such as disability standards) should be consistent with existing legislation (Banks 2003). A number of processes are available for ensuring consistency: first, the Attorney-General's Department has a role in identifying any potential conflicts between new and existing Australian Government legislation; second, all new legislation affecting business must be accompanied by a regulation impact statement, which considers the costs and benefits of a regulatory proposal, including interactions with existing legislation; and third, with respect to the DDA, HREOC has powers to comment on inconsistencies (see chapter 9).

There are a number of options for addressing the potential conflict between the DDA and health and safety requirements specifically:

- make no changes to the current arrangements
- grant temporary exemptions for organisations facing conflicts between the DDA and health and safety obligations
- prescribe health and safety legislation (including regulations)
- address health and safety issues in disability standards
- introduce a general exemption for health and safety matters.

Each of these options is discussed below.

No change to the current arrangements

The first option for resolving any potential inconsistency between the DDA and health and safety regulations is to do nothing. According to NAPWA, the DDA does not override health and safety legislation (including subordinate regulations):

> The DDA … already contains significant defences available to employers, service providers and accommodation providers that take into account safety concerns. The DDA does not require employers or service providers to not discriminate against someone if this would result in a safety risk. For example, an employer can lawfully discriminate against a person provided that the person is unable to properly perform the functions of the job, including ensuring the health and safety of others (the section 15(4) 'inherent requirements' defence has been interpreted by the courts in this way). (sub. DR315, p. 2)

The main advantage of this approach is its simplicity because it relies on existing defences within the DDA. Further, there is little direct evidence of conflicts between the DDA and other health and safety requirements.

However, this option provides little certainty for organisations if and when conflicts arise. Organisations would have to rely on the complaints process to determine the extent to which complying with the DDA would result in unjustifiable hardship (see chapter 8). Some participants (such as the Australian Airports Association, sub. 213) expressed concern about whether health and safety issues are given sufficient practical consideration in unjustifiable hardship cases.

Because it relies on individual complaints, this option does not address the underlying, systemic conflict between health and safety and DDA requirements.

Grant temporary exemptions

Second, organisations could seek a temporary exemption from the general provisions of the DDA. HREOC suggested that this may be an appropriate course of action in the short term while long term solutions (such as prescribing laws or formulating disability standards) are being developed:

> … the exemption mechanism is available and … one of the purposes for which we see that power as legitimate is to provide people with certainty while legislative or regulatory issues are resolved. (trans., p. 2862)

Like the first option, the main advantage of this approach is its simplicity: it requires no changes to the DDA. It may provide organisations with some certainty in the short term, but it does not provide a long term solution. Temporary exemptions are issued for a maximum of five years, with no guarantee of renewal, and are granted at HREOC's discretion. Further, temporary exemptions would not generally address systemic conflicts. The Australian Airports Association considered this an inappropriate response:

> Suggesting that airports must seek exemption under the Disability Discrimination Act on the basis of 'unjustifiable hardship' completely fails to resolve those conflicts in any satisfactory way. (sub. 213, p. 11)

Prescribe health and safety obligations

Third, health and safety legislation (including regulations) could be prescribed under section 47(2) of the DDA. As discussed above, acts done in compliance with a prescribed law are not unlawful under the DDA. The Australian Airports

Association suggested prescribing Civil Aviation Safety Authority (CASA) regulations that potentially conflict with the transport disability standards:

> Section 47(2) of the *Disability Discrimination Act 1992* allows regulations to be made to resolve conflict of this nature. We believe this avenue should be used rather than leaving airports in a state of doubt and uncertainty as to their legal obligations. (sub. DR285, p. 1)

This option is most effective in providing the certainty that many organisations are seeking. The Productivity Commission's recommendation to review the list of prescribed laws every five years would ensure the reasons for their prescription remain relevant, and provide reassurance to people with disabilities that the prescribed health and safety laws cannot be used to undermine the objectives of the DDA in the long term. However, these regular reviews would carry some administrative costs.

This option could not be used in all cases of inconsistency between the DDA and health and safety requirements because not all health and safety requirements are enforced through legislation. For example, air safety requirements can be imposed as licence conditions (Australian Airports Association, trans., p. 2140).

Include in disability standards

Fourth, any conflicts between health and safety requirements and the DDA could be addressed in disability standards, where they exist. The disability standards for accessible public transport include a review mechanism, which means that they must be reviewed within five years of their introduction and then every five years after that (a similar process has been included in the draft disability standards for access to premises). HREOC suggested this as a means of addressing the concerns raised by the Airports Association of Australia about the potential for conflicts between the transport disability standards and CASA air safety requirements:

> The standards set up a review process which allows for these issues to be raised and there's an ongoing accessible public transport and national advisory committee process which has modal subgroups for bus, rail, taxis. The aviation one hasn't met as often as the others, but the capacity for it is there. (HREOC, trans., p. 2863)

Similarly, the Disability Discrimination Commissioner, Dr Sev Ozdowski, suggested that there 'may be a role for standards in addressing some specific issues including perhaps about the relationship between occupational health and safety laws and discrimination laws' (Ozdowski, 2003a, p. 5).

Addressing any conflict directly through disability standards would provide certainty to the organisations to whom they apply. However, it would not address

conflicts in areas not covered by disability standards. The Productivity Commission noted in chapter 14 that it is unlikely that disability standards will be developed for all areas covered by the Act, particularly employment, which is an area where the potential for conflict is high. Further, the Commission found that the process for developing standards is very slow, and hence this option will not address conflicts in the short term.

Using disability standards to give priority to health and safety requirements over the general provisions of the DDA may also be construed as using standards to extend the scope of the Act because no such exemption exists in the Act. The Productivity Commission recommends against using disability standards to alter the fundamental scope of the DDA elsewhere in this report (see chapter 14).

A general exemption for health and safety

Finally, the DDA could be amended to provide a general exemption for actions done to protect health and safety. The Cancer Council Victoria submitted that:

> … the operation of the *Disability Discrimination Act 1992* (Cth) would be enhanced by the inclusion of a section that exempts 'discrimination which is reasonable in order to protect the health or safety of any person or of the public generally' from the operation of the Act, or a similarly worded section. (sub. DR294. p. 1)

A general exemption for health and safety reasons appears in other anti-discrimination laws (box 12.6).

HREOC noted 'it may be desirable … to consider means of improving coordination between anti-discrimination and health and safety laws' (trans., p. 2858). However, it submitted that any change to the DDA to allow a general exemption for a health and safety matter:

> … should not lead employers or others to believe that people with disabilities generally present health and safety risks. … Or, for that matter, that discriminatory measures are a generally necessary and permissible response to such risks. (trans., p. 2859)

The Productivity Commission considers that if such an exemption were available in the DDA, it must be clearly and narrowly defined, so that merely claiming there is a health and safety problem would not be enough of itself to trigger the exemption. The (otherwise discriminatory) proposed action would need to meet criteria such as:

- it is truly necessary to protect the health and safety of others and/or the person who would otherwise be unlawfully discriminated against
- it is reasonable in the circumstances
- there is no reasonable alternative that would avoid the discriminatory action

- reasonable adjustments to address the discrimination should have been attempted, unless they would cause an unjustifiable hardship (see chapter 8).

Box 12.6 **Health and safety provisions in anti-discrimination legislation**

The *Equal Opportunity Act 1984* (Victoria) states:

s.80(1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary:

(a) to protect the health or safety of any person (including the person discriminated against) or of the public generally;

(b) to protect the property of any person (including the person discriminated against) or any public property.

The *Human Rights Act 1993* (New Zealand) does not 'prevent different treatment based on disability' in employment where:

s.29(b)… the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

The *Disability Discrimination Act 1995* (UK) states discriminatory treatment in the provision of goods, services and facilities is justified only if:

s.20(3) (a) in the opinion of the provider of services, one or more of the conditions mentioned in subsection (4) are satisfied; and

(b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.

… (4) (a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person).

Conclusion on health and safety issues

A number of inquiry participants were concerned about inconsistencies between the DDA and health and safety requirements. As a matter of principle, any new legislation introduced should be consistent with existing legislation. Government processes should, as a rule, minimise any potential inconsistencies. Further, the DDA has a range of mechanisms already in place to address this issue. These include the unjustifiable hardship defence, which the Productivity Commission has recommended be extended to all areas covered by the DDA (see chapter 8), temporary exemptions and the power to prescribe laws and regulations.

It would be possible to go further and amend the DDA to provide a general exemption for health and safety reasons similar to that applying in some other jurisdictions. However, as a rule, new regulations should only be implemented where there are demonstrable problems and regulation is the best way of addressing them. The Productivity Commission considers that the current mechanisms appear

adequate to address inconsistencies between the DDA and health and safety requirements. It does not appear necessary to amend the DDA to include a specific exemption for health and safety matters at this stage.

FINDING 12.7

Potential exists for conflict between the Disability Discrimination Act 1992 *and health and safety laws and other requirements. A range of options is available for addressing this issue.*

12.6 General conclusions on exemptions

The DDA contains a number of exemptions that mean disability discrimination is not unlawful in specified situations. The Productivity Commission recommends retaining these exemptions. The reasons for retaining these exemptions include:

- to clarify the intent of the legislators regarding the scope of the DDA (for example, that it is not unlawful to discriminate to the benefit of people with disabilities, such as by providing 'special measures' or services for them)
- to provide certainty where the DDA might otherwise be ambiguous (for example, in determining what are the 'inherent requirements' of combat duties)
- to reduce (potentially unnecessary) legal processes and transaction costs
- to address other important Government policy objectives (for example, in migration policies or in the provision of special measures and programs).

However, some clarification of the scope and application of the exemptions seems necessary. In principle, any exemptions that are deemed necessary should be:

- kept to the minimum necessary to address the area of activity identified as requiring an exemption (for Government policy, community or other reasons)
- clearly defined and supported by appropriate explanatory material
- clearly justified for national policy reasons and community-wide benefits
- of a form that does not set up new discriminatory barriers (for example, they should exempt types or areas of activity, rather than groups or classes of people)
- able to operate in a transparent, consistent and accountable manner.

On balance, some exemptions from the DDA are appropriate. They must be clearly defined and restricted to only those actions for which an exemption is necessary for public policy reasons.

13 Complaints

The main mechanism for enforcing compliance with the *Disability Discrimination Act 1992* (DDA) is the complaints process established under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The complaints process is directly targeted towards achieving the first object of the DDA—eliminating discrimination on the ground of disability. It also contributes to the second object—ensuring equality before the law—by providing an avenue for people with disabilities to enforce their rights. Similarly, it contributes to the third object, attitudinal change, by promoting awareness of the rights of people with disabilities.

This chapter examines the general strengths and weaknesses of the complaints process and the respective roles of the Human Rights and Equal Opportunity Commission (HREOC) and the Federal Court and Federal Magistrates Court ('federal courts'), and makes several recommendations for improving the complaints process.

13.1 Strengths and weaknesses of the complaints process

The HREOC Act complaints process commences with a conciliation phase conducted by HREOC. If agreement cannot be reached, complainants have the option of proceeding to the federal courts (see chapter 4).

Strengths

The main strength of the complaints process is its ability to address individual instances of discrimination. The existence of a complaints process can deliver benefits, even in the absence of a formal complaint (Disability Council of NSW, sub. 64, p. 15). In some cases it can also address systemic discrimination, although other DDA mechanisms have greater effects at a systemic level (see below).

By first attempting relatively informal conciliation, the complaints process can often redress discrimination without the stress, delays and cost of court proceedings. The complaints process attempts to balance education and awareness raising (through conciliation) with coercion (through the courts).

Conciliation

An initial emphasis on conciliation reflects the DDA's aim of changing attitudes and improving understanding of the rights of people with disabilities. Alternative models that relied solely on adversarial processes could encourage negative attitudes and lead to resentment of people with disabilities (see chapter 10).

Many inquiry participants acknowledged the benefits of conciliation as an alternative to the courts, including the National Council of Independent Schools' Associations (sub. 126), the Investment and Financial Services Association (sub. 142) and the Anti-Discrimination Board of New South Wales (sub. 101).

Confidentiality

There is no legal requirement in the DDA or HREOC Act for all aspects of a complaint to be kept confidential.[1] In practice, the parties are left to agree on how confidential they want to keep the details of the complaint and the conciliation outcome. In most cases, HREOC investigates complaints in a confidential fashion and publishes conciliation outcomes in a 'confidentialised' form that does not identify the parties. Complaints are investigated openly in two situations: first, when HREOC decides to investigate a complaint through a public inquiry; and second, when a terminated complaint is taken to the federal courts for public hearing.

The confidentiality of individual complaints preserves the privacy of complainants and respondents. This might encourage more complaints to be brought forward. Participants such as the Equal Opportunity Commission Victoria noted the importance of confidentiality for some complainants (sub. 129, p. 15).

By avoiding possible negative publicity for respondents, confidentiality might also encourage better outcomes in the conciliation process (Blind Citizens Australia (sub. 72, p. 16). However, confidential conciliation shields respondents from public scrutiny that might encourage future compliance with the DDA.

The Productivity Commission recognises that confidentiality can encourage: complainants to come forward; the parties to contribute frankly to conciliation; and respondents to take remedial action that they might resist if it meant publicly admitting to discrimination. On the other hand, confidentiality can limit the spread

[1] Under the HREOC Act, HREOC has discretion over disclosing details of a complaint (s.14). However, if HREOC decides to hold a compulsory conference, that conference must be held in private (s.46PK(2)). If a complaint is terminated, the President of HREOC may make a written report on the complaint to the Federal Court or the Federal Magistrates Court, but the report must not set out anything said or done in the course of the conciliation (s.46PS).

of useful information. On balance, the Productivity Commission considers that the parties should determine the level of confidentiality, but that HREOC should give as much publicity to outcomes as possible while maintaining that confidentiality.

Weaknesses

The effectiveness of the complaints process depends to a large extent on its accessibility to complainants. The Equal Opportunity Commission Victorian summarised many of the barriers to access:

> … our estimate is that some 70 per cent of people who think they've had their rights abused, generally across the board, in fact elected not to bring a complaint. It might be because of fear of victimisation or the cost. Sometimes it's barriers, it's the nature of the process itself. They fear the legalism, they fear the cost, they fear the exposure that a complaints process can entail. (trans., p. 1895)

General barriers to access are discussed below. Particular barriers to access for people with multiple disadvantages are discussed in chapter 5.

Costs of making a complaint

Although there is no fee for lodging a complaint with HREOC, the process can still involve both financial and non-financial costs. Additional costs are likely if the complaint is heard formally in the Federal Court. Costs can include:

- general costs of learning about the complaints process—many people need assistance from an advocate or lawyer
- costs of preparing a complaint, including the cost of the time required, which could be significant if the complaints process is drawn out
- costs of legal representation (box 13.1) if the person requires it but does not qualify for government sponsored legal aid or *pro bono* (free) assistance from private law firms
- costs associated with losing at court. If the complainant loses, there is a risk that they will have to pay the respondent's costs
- significant 'intangible' (non-monetary) costs, particularly related to stress (box 13.1).

Box 13.1 **Costs of making complaints**

There can be substantial tangible costs associated with making a complaint, especially if the complainant proceeds to the federal courts. Costs of legal representation in the federal courts are generally higher than those faced during HREOC conciliation.

> Advice to HREOC from specialist legal firms operating in this area suggests that costs for one party alone are likely to be of the order of:
>
> $5,000–$10,000 for a HREOC conciliation process; and
>
> $30,000–$40,000 for a Federal Magistrates Court hearing, typically lasting two days. (Australian Building Codes Board 2004, p. 22)

The Australian Taxi Industry Association noted:

> A major metropolitan network advised that in one case initiated by an individual that has so far proceeded to the Federal Magistrates Court, its legal costs have exceeded $76,000, with the risk of escalating costs depending on the outcome of the case and any subsequent appeals. (sub. DR311, p. 5)

There are also intangible costs associated with making a complaint. It can be stressful for both parties, but particularly for complainants unused to such processes (Queensland Council of Carers Australia in Carers Australia sub. 32).

Many people with disabilities have conditions that can be exacerbated by the stress associated with making a complaint. Advocacy Tasmania noted:

> If people have a mental health disability which is active at the time, they often find the stress of making a complaint to the Commission too stressful on top of managing their mental health problems. Alternatively they are fearful that taking up a complaint will put too much stress on them and they may then become unwell. (sub. 130, pp. 2-3)

Sources: Advocacy Tasmania sub. 130; Australian Building Codes Board 2004; Australian Taxi Industry Association sub. DR311.

Many inquiry participants argued that concern over costs discouraged disability discrimination complaints, particularly at the court stage (Public Interest Advocacy Centre, sub. 102; Disability Discrimination Legal Service, sub. 76; Law Institute of Victoria, sub. 81; Australian Federation of Deaf Societies, sub. 233). In a survey conducted by HREOC in 2002,[2] 26 per cent of complainants whose complaints were not conciliated stated that they did not proceed to court because of cost. Almost 30 per cent of complainants who settled despite being dissatisfied with the settlement terms did so because they thought the costs of court action would be too high (HREOC 2002f, pp. 18–19).[3]

[2] The survey covered complaints made under the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and the DDA in 2001, but gives a broad indication of the views of complainants under the DDA.

[3] The percentage of complainants whose complaints were not conciliated but who did not proceed to court because of costs is, coincidentally, the same for those who did not proceed to court because of the complexity of the process (26 per cent). Likewise, the percentage of complainants

The Australian Taxi Industry Association argued that 'these percentages are probably not unrepresentative of commercial disputes generally where court costs are a major factor in people settling for less than their ideal outcome' (sub. DR311, p. 4). The Productivity Commission acknowledges that court costs might discourage commercial and other court cases but considers that the financial situation of disability discrimination complainants is likely to make them much more risk averse than parties to commercial disputes. In both cases, parties are influenced by the expected outcome (balancing the chance of winning against the chance of losing and associated outcomes). But discrimination complainants are likely to be much more concerned about the risk of losing, even with the same expected outcome as parties to a commercial dispute.

Even if similar proportions of parties to commercial disputes and complainants 'dropped out' of court action, a distinction should be drawn between decisions based on commercial imperatives and individuals seeking redress for unlawful discrimination. Decisions about defending legislated human rights should not be overly influenced by the financial consequences of losing. Cost orders in the federal courts are discussed in section 13.3.

The Productivity Commission considers that the potential costs could be a significant barrier to some individuals wishing to make a complaint or proceed to court.

Formality of the complaints process

Many people find the complaints process formal, complex, confusing and intimidating. A complaint sets a legal process in motion, and so a degree of formality is inevitable if the principles of natural justice are to be followed.[4]

The onus is on complainants to prove their complaint, and they must collect and document information relevant to their case. This work can be difficult, time consuming and potentially costly, although HREOC's powers to request information from respondents can assist complainants to gather information (section 13.2). A considerable degree of literacy and comprehension is required, creating barriers for many people with disabilities, particularly those with cognitive or communication disabilities, and people with disabilities from non-English speaking or Indigenous backgrounds (Disability Council of NSW, sub. 64).

who settled despite being dissatisfied with the settlement terms because of costs is, coincidentally, the same as for those who settled because of the complexity of the process (30 per cent).

4 The principles of natural justice are general rules that ensure that people subject to the law are treated fairly.

However, the degree of formality depends on how far the complaint proceeds before being conciliated or terminated. Depending on the circumstances of the case, HREOC may attempt informal conciliation at the outset. For example, when a matter is relatively simple or the parties express interest in resolving the complaint quickly, HREOC may suggest early conciliation without lengthy investigation of the complaint (HREOC, sub. 235, p. 3). There might also be potential to encourage informal resolution at an early stage through co-regulatory resolution processes (see chapter 14).

Court processes are the most significant source of formality in the complaints process.[5] In a survey conducted by HREOC in 2002, 26 per cent of complainants whose complaints could not be resolved by conciliation stated that they did not proceed to the federal courts because the process 'would be complex and involve too much time and effort'. Almost 30 per cent of complainants who settled even though they were not satisfied with the settlement terms did so for this reason (HREOC 2002f, pp. 18–19).

As part of a broader reform aimed at making the Federal Court more user friendly, the Federal Magistrates Court was created in June 2000 (see chapter 4). As a court, it is still more formal than the tribunals used in the States and Territories to hear discrimination matters, but the Commonwealth Constitution prevents judicial matters from being heard in an administrative setting such as a tribunal.

The Productivity Commission recognises that the complaints process can seem daunting, particularly in relation to the federal courts. However, if federal anti-discrimination legislation is to be tested in law it must be heard in the courts. The introduction of the Federal Magistrates Court as an alternative to the Federal Court has been a positive step. However, the potential for costs to be awarded against unsuccessful complainants remains (section 13.3).

Inequality in the negotiating positions of complainants and respondents

The basis for successful conciliation is that the two parties meet as more or less equals to reach agreement on how the alleged discrimination might be addressed.

The HREOC Act provides that an individual is not entitled to be represented at conciliation by another person, and an organisation is not entitled to be represented by a person other than an officer or employee of that body, unless the person presiding consents (s.46PK). HREOC noted that it attempts to ensure fair and

[5] Although the HREOC Act states that the courts are not bound by 'technicalities or legal forms' in anti-discrimination proceedings (s.46PR), the Commonwealth Constitution imposes unavoidable restrictions on the way in which courts operate.

adequate participation for both parties rather than necessarily excluding representatives (pers. comm., 17 March 2004). Guidelines in HREOC's complaints handling manual require that participants have adequate notice, representation be allowed and time to arrange such representation be allowed if desired. The guidelines also address the power balance in the conciliation process and in the conference itself.

However, even with this safeguard, the bargaining position of the two parties is rarely equal. Almost inevitably, respondents are better resourced to fund legal representation and more capable of mounting a case than complainants. The Australian Association of the Deaf argued:

> … what the community wants is actually very clear and simple, … but around the negotiating table with lawyers and technical experts this simple situation becomes extraordinarily complicated and tied up in legal and technical jargon and skullduggery. It is very difficult for community representatives and for the ordinary man or woman on the street to have the knowledge and expertise to argue with that level of professionalism. (sub. 229, p. 7)

Although legal representation is not required at the conciliation stage of the complaints process, it is becoming more usual (HREOC 2002f, p. 2). Virtually all complainants who go to the federal courts have legal representation. People with disabilities have options for obtaining legal assistance, ranging from general advice from advocacy organisations to legal advice and representation from government sponsored programs. The Disability Discrimination Legal Services, set up as part of the introduction of the DDA, are particularly important.

But even without formal legal representation on either side, complainants can find themselves in an unequal position in a conciliation meeting:

> … an ordinary person with a disability … having registered that complaint, then goes to a conciliation meeting or a mediation meeting and finds himself sitting across the table from four suits … in those circumstances the complainant finds him or herself in a situation that they didn't think they were getting into. (Physical Disability Council of New South Wales, trans., p. 1244)

HREOC survey data suggest there is a substantial imbalance in the legal resources of the two parties. In 2002, 22 per cent of complainants settled, despite being dissatisfied with the settlement terms, because they were concerned about needing and obtaining legal representation. No respondents gave this reason. In cases that could not be conciliated, 19 per cent of complainants did not proceed to court because of concerns about needing and obtaining legal representation (HREOC 2002f, pp. 18–19).

However, respondents also face incentives to avoid going to court (National Council of Independent Schools' Associations, sub. 126; Australian Taxi Industry Association, sub. DR311; Australian Industry Group, sub. DR326). HREOC's survey found that 51 per cent of respondents who settled, despite being dissatisfied with the settlement terms, did so because they did not want to defend the matter in court (HREOC 2002f, p. 17).

The Productivity Commission considers that inequality between the parties can reduce the effectiveness of the complaints process. Complainants might not be in a position to present their case adequately against better resourced respondents. Concerns about court costs and legal representation can create incentives for complainants to accept less favourable settlements than they might otherwise accept. While facing incentives to avoid going to court, respondents also face incentives not to negotiate in good faith if they believe complainants do not have the resources to proceed to court.

The inequality of resources between complainants and respondents, and the complexity of the complaints process, emphasise the importance of legal assistance for people with disabilities who are making complaints (see chapter 15).

Fear of victimisation

Fear of victimisation (being treated badly because you have made or threatened to make a complaint) can make people reluctant to complain. The Anti-Discrimination Board of NSW noted that the fear of victimisation is real for many people with disabilities (sub. 101, p. 10).

The fear of victimisation can be greater in small communities or institutions where anonymity is rare (DDA Inquiry regional forums) and where complainants are dependent on the person or organisation about whom they would like to complain (Darwin Community Legal Service, sub. 110). Queensland Parents of People with Disabilities (QPPD) noted:

> QPPD is deeply concerned by our contact with families across Queensland who have expressed fear of speaking out against abuse and/or neglect. Many families fear that there will be retribution shown towards their son or daughter if they take action. … Others feel that if they speak out they may lose the little support they may be receiving. This risk is real. (QPPD, sub. DR325, p. 3)

Even if potential complainants do not fear active victimisation, they can be reluctant to complain when they know that their relationship with the alleged discriminator or their community will change irrevocably.

The DDA makes victimisation an offence, with a penalty of six months imprisonment.[6] A person can make a complaint of victimisation to HREOC and have it dealt with as a complaint of 'unlawful discrimination', and if a matter is terminated, the complainant can then pursue the matter to the federal courts. In 2000-01 HREOC received five allegations of victimisation. In both 2001-02 and 2002-03 HREOC received two victimisation complaints. HREOC has no data on whether anyone has pursued a complaint of victimisation as an offence directly with the police. There have been no prosecutions under the DDA's victimisation provisions.

Because victimisation is an offence, a complaint to the police would require the criminal law standard of proof of 'beyond reasonable doubt'. A victimisation complaint to HREOC requires the civil law standard of proof 'on a balance of probabilities'. The DDA also makes harassment (humiliating comments, actions or insults about a person's disability) unlawful in many areas (see chapters 4 and 11). HREOC noted that the lower standard of proof for a DDA complaint might have encouraged people to make complaints rather than go to the police (sub. 219, p. 31).

The Productivity Commission considers that the fear of victimisation can create a significant barrier to people with disabilities using the complaints process. Increased awareness of the anti-victimisation provisions of the DDA is important, but victimisation can be insidious and difficult to prove, and its effects can be difficult to reverse.

Limited role in achieving systemic change

Although largely based on individual claims of unlawful discrimination, complaints can sometimes lead to systemic change (see chapter 10). In some circumstances, complaints can create publicity, from which other people in similar situations can learn. Where cases are heard in the federal courts, complaints can set binding legal precedents. Complaints can also be used strategically to drive broad change. The Deafness Forum of Australia, for example, lodged representative complaints against five hotels and made those complaints public (sub. 71, p. 9).

HREOC has specific powers under the HREOC Act to hold public inquiries where individual complaints have systemic implications. HREOC has used these powers to inquire into a small number of complaints—for example, to investigate captioned television, captioning in cinemas and self-service petrol stations (see appendix D).

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[6] Under the DDA, victimisation includes subjecting, or threatening to subject, a person to any detriment because they have made (or propose to make) a complaint under the DDA (s.42).

However, although some individual complaints have had important systemic effects, several factors limit the role of individual complaints in achieving systemic change.

First, it is difficult for a complaint to be lodged when discrimination is proposed but has not yet occurred—for example, in the design of a new building. The DDA's definition of direct discrimination includes 'proposed' discrimination (s.5(1)), but a complaint can only be made by 'a person aggrieved by the alleged unlawful discrimination'. It can be difficult to show that a person is an 'aggrieved person' when the discrimination has not yet occurred. In addition, the DDA does not cover proposed acts of indirect discrimination (s.6) (see chapter 11).

Second, it is not sufficient for a person to have a 'purely moral or in principle grievance' to make a complaint; complaints must be based on actual instances of discrimination. This is an appropriate limitation for a complaints-based system, but as noted by Joe Harrison, the requirement to be an 'aggrieved person' can limit the DDA's effectiveness as a tool to address systemic discrimination (sub. 55, p. 7).

Third, there might not be sufficient incentive for an individual to complain, even though the complaint could create benefits for society as a whole. Complaints with wider societal benefits (or spillover effects) might not be pursued because no single individual has sufficient incentive to make a complaint.[7]

FINDING 13.1

The main strength of the complaints process is its ability to address individual instances of discrimination on the ground of disability. While individual complaints can sometimes lead to systemic change, there are limits to the extent they can do so.

FINDING 13.2

People with disabilities can face significant barriers to using the complaints process, including:

- *financial and non-financial costs of making a complaint*
- *complexity and potential formality of the process*
- *evidentiary burden on complainants*
- *inequality of the negotiating positions of complainants and respondents*
- *fear of victimisation if a complaint is made.*

[7] Spillover effects occur when people other than those directly involved are affected. For example, one person complaining about lack of access can lead to improved access for many other people.

FINDING 13.3

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

The following sections discuss the respective roles of HREOC and the federal courts, and recommend some improvements to the complaints process.

13.2 HREOC administrative issues

HREOC plays an important role in the complaints process (see chapter 4). This section examines several administrative issues, including: satisfaction with HREOC complaints handling; HREOC's timeliness; the influence of the location of HREOC on the complaints process; HREOC's investigative and advocacy roles; and arrangements with State and Territory anti-discrimination bodies.

Complaint handling

HREOC successfully conciliates a relatively high proportion of DDA cases compared to those State and Territory anti-discrimination bodies that publish comparable data. HREOC noted that:

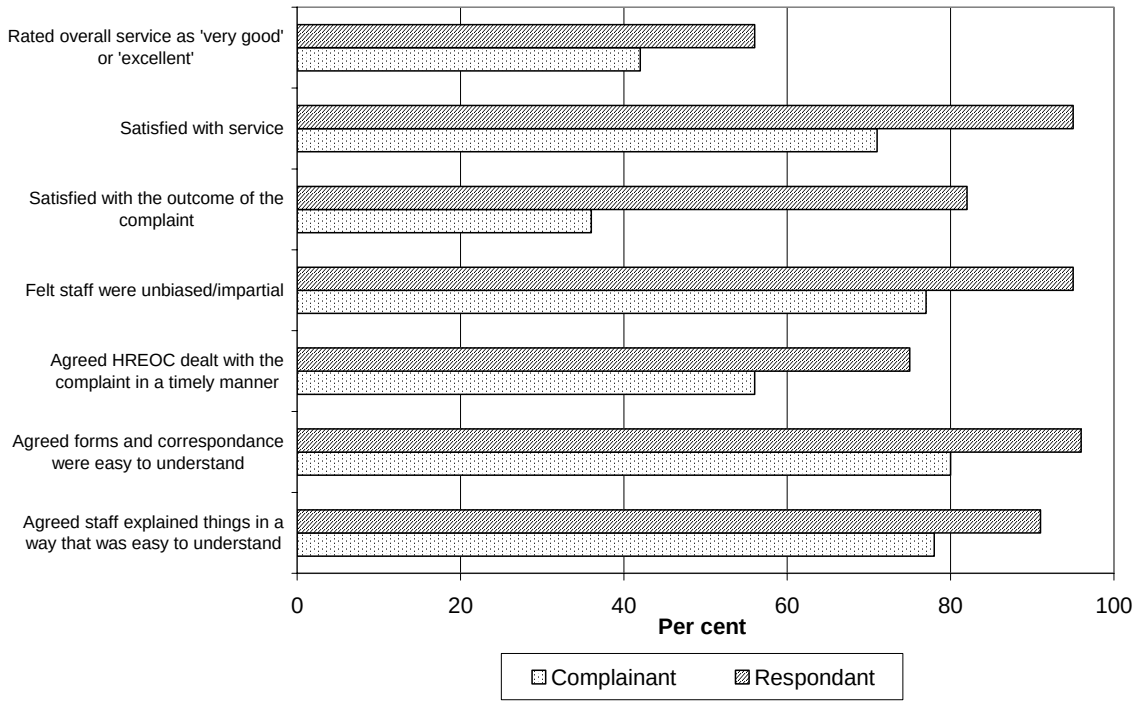
> For example, in 2001-02 HREOC's rate of conciliation across all Acts was 30 per cent and 37 per cent in DDA. [The Western Australian Equal Opportunity Commission] reported 17.2 per cent of their matters were conciliated; [the Tasmanian Anti-Discrimination Commission] reported 25 per cent resulted in a conciliated agreement; [the Equal Opportunity Commission Victoria] reported 21.5 per cent.[8] (sub. 235, att. C, p. 2)

HREOC conducts an annual survey of complainants' and respondents' satisfaction with its complaint handling processes (figure 13.1).

[8] If complaints that were declined as lacking substance were excluded, the success rate for complaints referred to conciliation by the Equal Opportunity Commission Victoria rises to 45 per cent (Equal Opportunity Commission Victoria, trans., p. 2603).

Figure 13.1 **Satisfaction with HREOC complaints handling**

Percentage of DDA complainants and respondents satisfied with HREOC's handling of complaints, 2002-03



Data source: HREOC (sub. 235, att. A, p. 4).

HREOC's stated performance target is for 80 per cent of parties to be satisfied with the overall complaint handling process. For parties to DDA complaints in 2002-03:

- 86 per cent of parties to DDA complaints were satisfied with the service (compared to 84 per cent for all anti-discrimination complaints)
- respondents were more satisfied than complainants with all aspects of HREOC's complaint handling
- more respondents than complainants thought that forms and correspondence and staff explanations were easy to understand
- only 36 per cent of complainants were satisfied with the outcome, compared with 82 per cent of respondents—this might reflect the fact that 65 per cent of survey participants were involved with complaints that HREOC had declined or terminated.

HREOC surveyed parties' perceptions of the conciliator and conciliation processes in 2001. HREOC concluded that 'overall, these ratings paint a positive picture of HREOC's conciliation process' (sub. 235, att. A, p. 8).

- Parties involved in a successful conciliation tended to have positive perceptions of the process—99 per cent of both complainants and respondents stated that they understood the process, and 79 per cent of complainants and 73 per cent of respondents stated that the conciliator helped them reach agreement. Only 3 per cent of complainants and no respondents stated that the conciliator was biased against them.
- In unsuccessful conciliations, where complainants in particular could be expected to be unhappy with the result, the majority of both complainants and respondents understood the process (83 per cent and 100 per cent respectively) and felt the conciliator was assisting the process (59 per cent and 73 per cent respectively). As for successful conciliations, only 3 per cent of complainants and no respondents stated that the conciliator was biased against them.

These surveys appear to indicate that most people who have been party to a complaint are broadly satisfied with HREOC's complaint handling. However, some participants to this inquiry suggested that it would be useful to get more assistance from HREOC in making a complaint, particularly in filling out forms. Others suggested provision should be made for oral complaints (Victor Camp, sub. DR339, p. 3).

FINDING 13.4

Most complainants and respondents appear reasonably satisfied with the Human Rights and Equal Opportunity Commission's complaint handling process.

Timeliness

The benefit of a successful outcome from a complaint is eroded if the complaint takes too long to resolve (The Disability Rights Network of Community Legal Centres, sub. 74, p. 1). Long delays can also discourage people from making complaints (Anti-Discrimination Board of New South Wales, sub. 101, att. 1, p. 21).

In 2002-03, 17 per cent of DDA complaints were finalised in less than three months, and 43 per cent were finalised in less than six months. Over 90 per cent were finalised in under 12 months, well above HREOC's target of 75 per cent and above the 84 per cent achieved for complaints under all federal anti-discrimination Acts. All DDA complaints were finalised within 24 months (HREOC, sub. 235, att. B, p. 2).

Despite these results, several inquiry participants criticised HREOC's timeliness. The National Ethnic Disability Alliance, for example, stated:

> Due to a lack of resourcing, the current waiting time for the processing of individual complaints is so excessive that many people with disability are deterred from even lodging a complaint. (sub. 114, p. 14)

Timeliness also received a relatively low satisfaction rating by parties to complaints in 2002-03, with a marked difference between complainants and respondents. Only 56 per cent of complainants felt HREOC had dealt with their complaint in a timely manner, compared with 75 per cent of respondents (figure 13.1).

HREOC stated that its timeliness is 'comparable with State discrimination bodies, where that information is available' (HREOC, sub. 235, att. B, p. 1).[9]

Some inquiry participants suggested imposing statutory limits on the time that HREOC would be allowed to take for particular processes once the complaint has been lodged. In other jurisdictions, limits apply to the time taken to decide whether to accept or decline a complaint. In the ACT, for example, the decision to commence an investigation must be made within 60 days (ACT Discrimination Commissioner, sub. 151, p. 7).

HREOC's timeliness in accepting or declining complaints depends on the number and complexity of complaints and the available resources. A surge in the number of complaints, coupled with limited resources, can add to delays. In such a situation, statutory time limits could create incentives to discourage complainants or terminate complaints prematurely (Australian Federation of Aids Organisations, sub. 88). The Productivity Commission considers that the absence of formal time limits for accepting or declining complaints gives HREOC some flexibility in meeting fluctuating workloads. However, administrative targets for case management purposes can assist performance monitoring and provide some guidance to parties to complaints.

No jurisdictions place time limits on conciliation. The amount of time required for each conciliation depends on the need for investigation and the requirements of the two parties. Many causes of delay are outside HREOC's control.

FINDING 13.5

Uncertain case loads and investigation requirements make it inappropriate to impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

9 HREOC provided data comparing its complaint handling timeframes with those reported by Western Australian, South Australian and Victorian anti-discrimination bodies in 2001-02. HREOC noted that other jurisdictions do not report comparable timeliness information.

Location of HREOC

HREOC is physically located in Sydney, but must deal with complaints from around Australia.[10] It uses FreeCall telephone numbers, faxes and the Internet to communicate with complainants and respondents. If a complaint requires conciliation outside Sydney, HREOC schedules a number of conciliations to occur at a given time and location.

Some inquiry participants argued that HREOC's location is a barrier to complainants located outside New South Wales (Mackay Regional Council for Social Development in Queensland, sub. 87; ACT Anti-Discrimination Commissioner, trans., p. 718; Tasmanian Anti-Discrimination Commissioner, trans., p. 312).

HREOC argued that its geographic location is not a disadvantage in dealing effectively with complaints (trans., p. 1175). This view is supported by complaint information. HREOC receives a large number of complaints from New South Wales, but when the data are standardised by the number of people with disabilities in each State and Territory, that State does not appear to be overrepresented in DDA complaints data (figure 13.2).

In all States and Territories, the majority of people with disabilities appear to favour their local anti-discrimination body over HREOC (figure 13.2). There could be many reasons for this preference, including familiarity with the local organisation or commissioner, and the less formal approach and lower cost of tribunals used by the States and Territories.

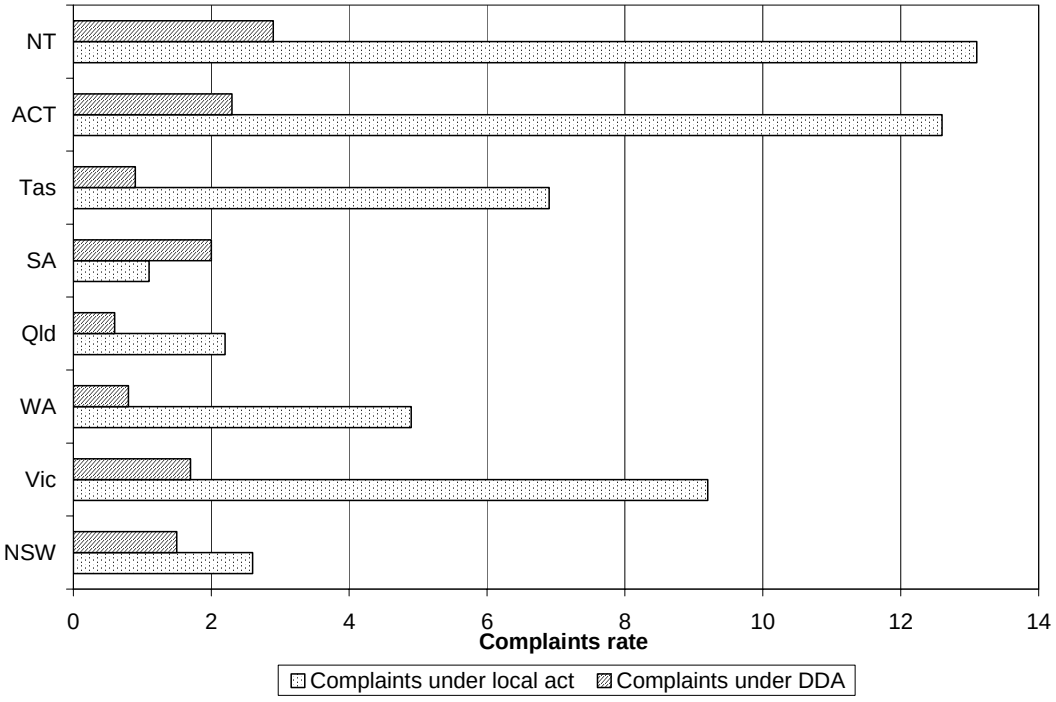
FINDING 13.6

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

[10] In the past, HREOC has had a physical presence in Tasmania, Queensland and the ACT, and various cooperative arrangements with State and Territory anti-discrimination bodies.

Figure 13.2 **Disability/impairment complaints under the DDA and State and Territory legislation, per 10 000 population with a disability[a,b]**

Complaints in 2002-2003, population with a disability in 1998



[a] Different counting rules in different jurisdictions mean that State and Territory complaint rates are not strictly comparable. [b] The ABS Survey of Disability, Ageing and Carers excluded some remote areas of Australia. This is likely to have underestimated the number of people with disabilities in the Northern Territory, in turn overestimating the complaints rate.

Data sources: State and Territory anti-discrimination bodies annual reports; ABS 1999b cat. no. 4430.0; HREOC sub. 235, att. E, p. 1.

Investigative powers and advocacy

As described in chapter 4, HREOC investigates complaints in the first instance, to see if they can be resolved informally. In complex or disputed cases, HREOC conducts further investigations. Some inquiry participants argued that HREOC should make more use of its investigative powers and take on a more active advocacy role.

Investigative powers

As noted above, the complaints process places a substantial evidentiary burden on complainants, who must prove (on a balance of probabilities) that unlawful discrimination occurred. Complainants are assisted in collecting evidence by HREOC's general practice of requesting information from respondents, assessing it

and advising the complainant how the complaint will proceed (HREOC, sub. 235).[11]

Several participants argued that HREOC should provide more assistance to complainants. The Disability Discrimination Legal Service, for example, stated:

> HREOC is not meant to act merely as a conduit of correspondence between the complainant and respondent to a complaint. A comprehensive and rigorous investigation at such stage would greatly assist complainants in weighing their options or accepting a compromise. (sub. 76, pp. 11–12)

The need for investigation varies according to the complaint. It is not appropriate to turn the investigation into a 'mini-hearing', because this would compromise HREOC's role as a neutral conciliator. However, it is important that HREOC is not merely a 'letterbox' for conveying information from one party to the other.

The Productivity Commission considers that the existing statutory powers to request information are appropriate. The Commission is not in a position to assess the adequacy of HREOC's investigations, but has already noted that complainants and respondents are generally satisfied with HREOC's complaint handling, which includes collecting and assessing information. HREOC also appears to be following good administrative practice, with well documented procedures and ongoing monitoring of performance.

Advocacy role

As discussed above, many inquiry participants expressed concern about the inequality of parties involved in complaints (section 13.1). Complainants must make important decisions at various stages of the process, including whether to lodge a complaint (and in which jurisdiction), whether to accept a conciliation offer and whether to proceed with a terminated complaint to the federal courts.

HREOC can assist complainants to lodge complaints but it cannot provide legal advice (other than to assess whether a complaint has sufficient substance to be formally accepted and referred for conciliation). Further, HREOC cannot recommend settlement of a complaint on specific terms—that is up to the parties concerned. HREOC recognised that this created concern for many complainants:

> … many complainants approach HREOC with an expectation that HREOC will advocate for them and are therefore dissatisfied with impartial handling of the complaint. (sub. 235, att. A, p. 4)

[11] The HREOC Act empowers HREOC to require people to provide information or documents (s.46PI) and direct people to attend compulsory conferences (s.46PJ).

Several participants questioned why HREOC does not do more to assist complainants as an advocate. The Physical Disability Council of Australia (sub. 113) suggested that HREOC or its complaints/legal section could cease to be a conciliator in DDA complaints and become the legal advocate for complainants.

In other Australian jurisdictions, some State anti-discrimination Acts grant their anti-discrimination bodies some advocacy functions. Western Australia's *Equal Opportunity Act 1984* specifies that where a complaint is referred to the tribunal and the complainant requests, the Equal Opportunity Commission of Western Australia must assist the complainant in presenting his or her case. Larry Laikind (sub. 70) noted that human rights organisations in other countries can act as advocates for complainants. However, many of these bodies initiate complaints but do not conciliate them.

The HREOC Act makes some provision for addressing inequality of the parties. HREOC must assist a complainant who has difficulty formulating or writing a complaint. HREOC can conduct conciliations as it sees fit, so long as they are held in private (s.46PK(2)) and do not disadvantage either party (s.46PK(3)). This reflects considerations of natural justice that require impartiality. HREOC noted that its 'complaint practice aims to be flexible and responsive to individual complaints' and that 'the conciliation process may take many forms depending on the circumstances of the complaint' (sub. 235, pp. 5–6).

The Productivity Commission considers that HREOC should not be an advocate for complainants, because this would create a potential conflict with HREOC's role as an impartial conciliator. The HREOC Complaint Handling Section appears to be maintaining an appropriate balance between 'flexible and responsive' processes and the requirements of impartiality.

This is not to imply that complainants do not need support. The importance of access to legal assistance is discussed in chapter 15. The potential for disability organisations to play a larger role in making representative complaints is discussed below (section 13.4).

FINDING 13.7

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

HREOC initiation of complaints

Under the original DDA, HREOC was able to initiate complaints. Constitutional concerns meant HREOC never used this power and it was removed in 2000, when the DDA was amended to transfer the power to determine disputes from HREOC to the Federal Court (see chapter 4).

Many inquiry participants argued that transferring the determinations power to the Federal Court greatly reduced any potential conflict of interest arising from HREOC initiating complaints, and that this power should be re-introduced (Queensland Anti-Discrimination Commission, sub. 119; Anti-Discrimination Board of New South Wales, sub. 101). HREOC itself noted that 'a more active HREOC enforcement role could be provided for … by re-instating a revised version of HREOC's ability to initiate complaints itself' (sub. 143, p. 49).

Comparable powers are held by some other government bodies in Australia, including the Australian Competition and Consumer Commission, and by anti-discrimination bodies overseas (HREOC, sub. 219, p. 19). A slightly different approach is adopted in Victoria, where under certain circumstances the Equal Opportunity Commission Victoria is empowered to investigate matters on referral from either the Minister or the Victorian Civil and Administrative Tribunal (s.157(1) of the *Equal Opportunity Act 1995* (Victoria)).

Although HREOC no longer determines complaints, the re-introduction of a power to initiate complaints could still create a potential conflict of interest with its conciliation role. Some participants believed a power for HREOC to initiate complaints would adversely affect the conciliation process:

> Effective conciliation requires trust. There is a potential for conflict of interest and diminished mutual trust between parties to a dispute if HREOC's power to initiate complaints was reintroduced. (National Council of Independent Schools' Associations, sub. 126, p. 15)

HREOC noted:

> …some concerns are also expressed [in submissions] … regarding possible conflict of this role with the conciliation role. HREOC agrees that this concern would need to be addressed in considering reinstatement of a self-start power. (sub. 219, p. 19)

Perceptions of HREOC's independence are important to maintaining confidence in the complaints system. The Australian Taxi Industry Association noted that:

> … our own organisation and others must be concerned about the question mark about HREOC being both, if you like, the prosecution and also the judge, at least during the conciliation period. (trans., p. 2368)

> If HREOC was to be given such powers it should be subject to HREOC establishing to the Federal Attorney General's satisfaction that initiation of the complaint was of sufficient importance to be in the national interest. Our strong preference, however, is that such powers should not be created. (sub. DR311, pp. 4–5)

Blind Citizens Australia had similar concerns about HREOC initiating complaints:

> Given the importance of [HREOC's] complaints handling functions we believe that respondent confidence in the independence of [HREOC] is likely to be compromised. Such confidence is crucial to the respondent participating in the complaint investigation process let alone the chances of a successful outcome. (sub. DR269, pp. 28–29)

To avoid this perceived conflict of interest, HREOC suggested an alternative approach based on a power to proceed directly to the federal courts, bypassing the conciliation stage (trans., p. 2849). HREOC stated that this approach would not apply to trivial issues, and would only be triggered where there was a serious systemic problem.

Such a power could be useful to help enforce disability standards, for example, where a railway operator fails to achieve its required percentage of accessible facilities by the first five-year compliance point under the Disability Standards for Accessible Public Transport. It would be more effective for HREOC to take action rather than rely on an individual complaint, since individuals might have difficulty establishing that they are personally aggrieved (HREOC, pers. comm., 17 March 2004).

The Productivity Commission considers that the potential conflict of interest between HREOC initiating complaints and conducting conciliations makes it inappropriate to reinstitute HREOC's power to initiate complaints. The suggestion that HREOC be able to proceed directly to court has some attraction as a means of addressing serious systemic issues. However, while it lessens the potential for a conflict of interest, it does not altogether remove it. Furthermore, it denies the respondent the opportunity for conciliation.

FINDING 13.8

Reintroduction of the Human Rights and Equal Opportunity Commission's power to initiate complaints or introduction of a new power to commence court actions do not appear to be warranted. Such powers have the potential to undermine its impartiality.

Cooperative arrangements

As noted above, the majority of complainants favour State and Territory anti-discrimination bodies over HREOC. Improved cooperative arrangements with the States and Territories could enhance the effectiveness of the DDA. Cooperation is needed to minimise confusion and ensure complaints are handled appropriately. In chapter 10, the Productivity Commission recommends an expanded role and membership for the Australian Council of Human Rights Agencies to facilitate such cooperation.

Many people with disabilities and many disability groups are unaware that there are both federal and State and Territory systems in place. Those who are aware are often unsure as to which system best suits their needs. The Equal Opportunity Commission Victoria noted:

> … two overlapping statutes dealing with disability discrimination causes considerable confusion for many complainants. Most who know about both schemes do not feel confident that they know the differences between the two. It can be difficult for some people with disabilities to access advice about choice of jurisdiction, and it is probable that many elect jurisdiction without making an informed decision. (sub. 129, p. 36)

In the past, HREOC has had largely informal DDA complaint handling arrangements with the States and Territories. The only formal arrangement (with Victoria) ceased in February 2003 (Equal Opportunity Commission Victoria, sub. 129). However, HREOC and the State and Territory anti-discrimination bodies continue to maintain informal links by:

- referring complainants to each other according to the circumstances
- sharing premises for conciliations (the State and Territory bodies commonly allow HREOC to use their premises to conduct conciliations)
- coordinating public information and education activities—for example, in 2003 all jurisdictions cooperated with HREOC to co-host the local release of *Ten Years of Achievements using Australia's DDA* (HREOC 2003d)
- regular meetings of Commissioners and officers to discuss common issues—for example, the establishment of the Australian Council of Human Rights Agencies in February 2003 (see chapter 10).

Some State and Territory anti-discrimination bodies argued that more formal cooperative arrangements for complaints handling worked well in the past. The Queensland Anti-Discrimination Commission noted that 'as far as arrangements on the ground went it worked well' (trans., p. 255). Similarly, the South Australian Equal Opportunity Commission stated that its previous cooperative arrangement

with HREOC 'was a really good system' (trans., p. 1004). Victoria Legal Aid stated:

> The one-stop shop is good because you have that one initial focus, and then you could make your decision as to which way you wanted to go. I would submit some of that freedom of flexibility has been lost since HREOC has moved. (trans., p. 2747)

The Victorian Government noted that the cooperative arrangement between the Equal Opportunity Commission Victoria and HREOC had been of limited usefulness to complainants and suggested an improved cooperative approach:

> Equal Opportunity Commission Victoria would be willing to further consider a model for co-operative arrangements which would provide a more sophisticated and streamlined service to the community. Equal Opportunity Commission Victoria 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 Equal Opportunity Commission Victoria would provide first stop education and information about the relative benefits and disadvantages of lodging a complaint in a particular jurisdiction. … If the complainant then decides to lodge with HREOC, the Equal Opportunity Commission Victoria would then provide support through this process. (Victorian Government, sub. DR367, pp. 14–15)

HREOC argued that the reintroduction of formal cooperative arrangements was not justified. It cited inconsistent decision making, the generally higher costs of the States' and Territories' complaint handling processes and the need to monitor all complaints as reasons for keeping the process in-house. HREOC also noted that ending previous cooperative arrangements was consistent with amendments to the complaints process in 2000, which, among other things, made the President of HREOC responsible for addressing complaints (sub. 143).

The Productivity Commission considers that appropriate formal arrangements between HREOC and State and Territory anti-discrimination bodies would help overcome confusion about the dual systems and improve the effectiveness of the DDA. A joint presence in each jurisdiction would provide an initial point of contact for people wishing to obtain advice or lodge a complaint under either the federal or local system. The Victorian Government noted the advantages of cooperative arrangements:

> 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 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. (Victorian Government, sub. DR367, p. 15)

Concerns about the consistency of advice could be addressed through staff training and support materials provided by HREOC and the relevant jurisdiction. As in any 'purchaser–provider' model, contract specification can address concerns about the cost and quality of services. However, it would not be appropriate for different complaint handling processes to apply to DDA complaints in different jurisdictions. HREOC should remain responsible for accepting or declining DDA complaints.

There may also be scope for HREOC and State and Territory anti-discrimination bodies to 'pool' conciliators, allowing HREOC matters to be conciliated by local staff. This could increase the local knowledge of conciliators, improve the response time of HREOC conciliations and allow for some savings in travel costs. Again, staff training and support and contract specification of cost and quality would be important to ensure consistency of conciliation services.

The Productivity Commission acknowledges that HREOC could face additional costs in establishing and monitoring cooperative arrangements. However, there should also be scope for some administrative efficiencies and savings—for example, in travel. Issues of HREOC resources are discussed in chapter 15. Most importantly, some of the confusion about the complaints process should be reduced for people with disabilities.

FINDING 13.9

The existence of separate federal and State and Territory complaints handling processes can create confusion for people wishing to make a complaint. Improved cooperation has the potential to minimise this confusion.

RECOMMENDATION 13.1

***The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction but retain responsibility for managing complains under the* Disability Discrimination Act 1992.**

13.3 Role of the federal courts

This section examines the role and function of the federal courts in the complaints process. It addresses the issues of time limits on bringing an action, enforcing conciliated agreements and awarding court costs.

The *Human Rights Legislation Amendment Act 1999*

The *Human Rights Legislation Amendment Act 1999* transferred the power to make determinations (legally binding decisions) from HREOC to the Federal Court (see chapter 4). Many inquiry participants were concerned that the increased formality and the potential for costs to be awarded against complainants by the Court would discourage people from making complaints and from pursuing matters to determination in the Court.

One way of gauging this would be to compare the proportion of 'referred' complaints that went to hearing under the old arrangements with the proportion of 'terminated' cases that proceeded to court under the new arrangements. However, suitable data are not available, as HREOC does not maintain systematic records of terminated cases that proceed to court. In any case, the two situations are not strictly comparable. Under the old arrangements, only complaints with 'no reasonable prospect of conciliation' were referred to a hearing. Under the new arrangements, any terminated complaint can be taken to court (see chapter 4).

HREOC surveyed complainants and respondents under all federal anti-discrimination legislation in the first year of the new arrangements. It found no decrease in the number of complaints brought under federal anti-discrimination law, suggesting there was no significant effect discouraging people from approaching HREOC. The survey also found an increase in the proportion of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the proportion of complaints that were withdrawn (HREOC 2002f, p. 2).

The survey found that respondents were more concerned than complainants about losing at court and the public nature of the determination process. This was supported by the Australian Industry Group, which noted that some respondents settled at conciliation even where they did not believe they were at fault because they were reluctant to become involved in lengthy and expensive court processes (sub. DR326).

The survey also found that costs generally 'followed the event' in the Federal Court (that is, the loser paid the winner's costs). In the Federal Magistrates Court, successful applicants (complainants) were generally awarded costs and unsuccessful

applicants were most likely to have no costs order made against them (parties were ordered to bear their own costs). However, more recent cases suggest that the Federal Magistrates Court is now also applying the 'costs follow the event' rule (HREOC 2002f, p. 2).

Acknowledging the short period considered by the survey, HREOC suggested:

> … the procedural changes introduced by [the *Human Rights Legislation Amendment Act 1999*] have not significantly impacted on the manner in which parties approach complaints before HREOC nor has it deterred complainants from bringing matters under federal anti-discrimination law. (HREOC 2002f, p. 3)

The Productivity Commission considers that the transfer of the determination-making power to the Federal Court and Federal Magistrates Court has not discouraged complaints being brought to HREOC. However, the transfer appears to have increased complainants' and respondents' concerns about proceeding to determination and encouraged conciliation rather than the pursuit of claims to the federal courts.

FINDING 13.10

Transfer of the determination-making power to the Federal Court and Federal Magistrates Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission, but reluctance to proceed to court might have made parties more willing to conciliate.

Time limits

Complainants have 12 months from the time of the alleged discrimination to lodge a complaint with HREOC. Once HREOC terminates a complaint, complainants have 28 days to lodge an application with the Federal Court or the Federal Magistrates Court. The HREOC Act allows for an extension of time if good reason can be shown and the courts have granted such extensions in the past (s.46PO(2)).

Some inquiry participants argued that, despite the possibility of an extension, 28 days is often not enough time for the complainant to decide whether to proceed, particularly given the need to obtain affordable legal assistance.

> It can often take a complainant considerable time to arrange legal advice and support. The current arrangement of 28 days is totally inadequate. (Blind Citizens Australia, sub. DR269, p. 27)

> There are a lot of issues that a person has to weigh up, particularly the potential costs that they may face. People are trying to get information. They try and get to the organisations that can give them relevant information. They might be referred to several different peak bodies or law firms or advisory services before they can actually

> get to someone who actually says, "Okay. Let's sit down and consider the implications for you on this." It's a pretty tight ask to get all of that done within the 28 days and what we're saying is, for some people even 60 is a bit tight. (Disability Council of New South Wales, trans., p. 2259)

HREOC compared the 12 month limit for making an initial complaint with the 28 day limit for applying to the court, stating that the latter:

> … is more demanding in terms of legal process and in relation to the decision whether to accept the risk of a costs order. There might thus be merit in considering the proposal for extension on the time limit for lodgement of complaints with the court. (sub. 219, p. 19)

On the other hand, a time limit on lodging a complaint with the courts limits the period of uncertainty for respondents about whether action will be taken against them. The Australian Industry Group was concerned that the 12 months period to lodge a complaint with HREOC already placed employers in the situation where key staff relevant to the complaint might have left employment or might not be able to recall the details of the alleged incident (sub. DR326, p. 21).

Other jurisdictions allow complainants a longer period to decide whether or not to proceed. Under the Equal Opportunity Act (Victoria), after being advised that their complaint could not be conciliated, complainants have 60 days to request the Equal Opportunity Commission Victoria to refer their complaint to the Victorian Civil and Administrative Tribunal.

An alternative to increasing the time limit would be to allow complainants to file a holding summons similar to that allowed in the New South Wales Court of Appeal (Public Interest Advocacy Centre, sub. 102, p. 11). Under this approach, the complainant would have a relatively short period (say 28 days) in which to lodge a holding summons, and a longer period (for example, three months) in which to lodge an application relating to unlawful discrimination.

The Productivity Commission considers that the benefits of allowing complainants more time to make such a crucial decision outweigh the longer period of uncertainty for respondents. The time constraint appears to be a general issue, rather than being relevant to only a few complainants. Requiring all complainants needing an extension to request a holding summons places an additional burden on them and is an inefficient use of court resources. Increasing the time limit for all complainants is more appropriate.

FINDING 13.11

The 28 day limit to lodge an application with the Federal Court or Federal Magistrates Court following a terminated complaint is too short and has caused

problems for complainants that outweigh the benefits of greater certainty to respondents.

RECOMMENDATION 13.2

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

Enforcing conciliation agreements

Conciliation agreements are private agreements between the parties, and HREOC has no formal monitoring or enforcement role. Depending on their individual circumstances, some conciliation agreements might amount to common law contracts and, if breached, could be enforced through the courts like other contracts. However, the Australian Government Solicitor advised that conciliation agreements do not fall within the jurisdiction of the federal courts, and complainants would have to approach State or Territory courts to determine whether an agreement amounted to a common law contract, and to have that contract enforced (AGS 2004a, p. 5).

HREOC surveyed parties who were involved in conciliation during 2001. It found that 85 per cent of complainants and 96 per cent of respondents reported full compliance with settlement terms (sub. 235, att. A, pp. 7–8). HREOC noted that full compliance might be somewhat higher than these figures indicate, because some complainants might not be aware of the completion of all settlement terms by respondents (sub. 235, att. A, p. 8). However, if complainants cannot verify respondents' actions, it is also possible that compliance might be lower.

Despite this apparently high level of compliance, the lack of a clear enforcement mechanism is a significant issue. Several inquiry participants criticised the lack of enforceability of conciliation agreements, and Women's Health Victoria argued that it is a major deterrent to bringing a claim in the first place (sub. 68, p. 4).

There might be cases where parties do not intend conciliation agreements to be legally binding, and in such cases it is appropriate that the agreement cannot be enforced through the courts. But there might be cases where the parties did intend to create a legally binding contract, but failed to do so for some technical reason. There might also be cases where a conciliation agreement is a contract, but a court might not regard an order to abide by the contract as an appropriate remedy for a breach. (In some circumstances, courts consider the payment of damages to be more appropriate than an order to carry out a contract.)

The Productivity Commission considers that it is not appropriate to rely on State and Territory courts to determine whether conciliation agreements made following DDA complaints amount to enforceable contracts, and to make orders to enforce such agreements.

The Australian Government Solicitor advised that the Australian Government could legislate to give conciliation agreements the force of a legally binding agreement, and to grant the federal courts jurisdiction to enforce them. This would raise no Constitutional issue because the agreements themselves would not take effect as court orders. In the event of a breach of an agreement, complainants would seek an order from a court for its enforcement. Proceedings for enforcement of such an agreement would not involve consideration of the particulars of the discrimination complaint (AGS 2004a, pp. 5, 15–17).

The Productivity Commission considers that, where it is the clear intent of the parties, conciliation agreements should be legally binding and the federal courts should have jurisdiction over such agreements. This could be achieved by including clauses in agreements indicating that the parties intend the agreement to be binding and that the parties understand application can be made to the federal courts to enforce it. The federal courts should have the ability to make a range of orders in respect of a breach of such an agreement, including orders to carry out the terms of the contract.

RECOMMENDATION 13.3

The Australian Government should legislate to ensure that, where it is the clear intent of the parties, conciliation agreements should become legally binding agreements. The legislation should grant Federal Court or Federal Magistrates Court jurisdiction over such agreements. The legislation should also set out the remedies that may be granted by those courts in respect of a breach of such an agreement.

Awarding court costs

The general rule in most discrimination cases in the federal courts is that 'costs follow the event'—that is, the unsuccessful party pays the successful party's costs. However, the courts have discretion in how they award costs and they may take into account the circumstances of individual cases.

HREOC reviewed the federal courts' unlawful discrimination jurisdiction over the period September 2000 to September 2002, and found that although the 'costs follow the event' rule was not always followed, by the end of the review period, the

courts appeared to be applying the principle that 'costs should follow the event … subject to … the proper exercise of discretion' (HREOC 2003b, p. 117).

In *Ball v Morgan & Amor*, Innis FM summarised what appears to be the current approach:

> It is not appropriate for courts to exercise a discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply. (*Ball v Morgan & Amor* (2001) FMCA 127 in HREOC 2003b, pp. 116–7)

As noted earlier, the possibility of facing cost orders can discourage complainants (and respondents) from going to court (section 13.1). The National Disability Advisory Council stated:

> There is also a very real fear that in initiating a complaint there is the distinct possibility of ending up before the Federal Court with all its inherent costs and legal requirements. The cost of taking a complaint to the Federal Court not only involves high initial costs but also the risk of costs being awarded against complainants. The fear of these costs and risks is quite effective in 'frightening off' a number of complaints that should otherwise be lodged. (sub. 225, p. 4)

Although transfer of the determinations power to the federal courts does not appear to have discouraged complaints to HREOC, incentives and outcomes at the conciliation stage appear to have been affected by the possibility of cost orders if the complaint was to be subsequently taken to court. It is therefore likely that some cases of unlawful disability discrimination are not being adequately addressed (section 13.1).

FINDING 13.12

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

The Disability Discrimination Legal Service (sub. 76, p. 11) and others suggested the DDA should provide clear guidelines on how costs should be awarded in disability discrimination cases. Guidelines would reduce uncertainty about cost orders and thereby might encourage complainants to pursue their complaints to the courts. However, it is not possible to know beforehand how the guidelines will be applied in an individual case. As long as the starting point is 'costs follow the event', there will always be a degree of uncertainty about cost orders. And given

their generally risk averse nature, this means many complainants will still be unwilling to pursue their disability discrimination complaints to the courts.

An alternative approach is to make the disability discrimination jurisdiction of the Federal Court and Federal Magistrates Court cost neutral—that is, make the starting point that each party will bear his or her own costs, rather than 'costs follow the event'.

Although the federal courts are established on the 'costs follow the event' principle, they are cost neutral in some jurisdictions already.[12] The various State and Territory Tribunals that hear discrimination cases are also cost neutral. The Family Court of Australia was also directed to be cost neutral, 'to encourage persons to settle their differences' (Family Law Bill Explanatory Memorandum 1974, p. 5348).

Under the cost neutral principle, complainants can be fairly confident that although they will pay their own costs, they will not have to pay the respondent's costs, regardless of which party is successful. As complainants have a degree of knowledge and control over their own costs, this gives them some certainty about the costs of proceeding to court. With greater certainty, complainants may be more willing to proceed to the courts, which in turn might affect the incentives and outcomes at the conciliation stage.

However, the cost neutral principle is not without its own shortcomings. Although the principle that each party bears his or her own costs protects complainants from paying the respondent's costs, it does not address the complainant having to pay their own costs even if they win. The relatively poor resources available to many people with disabilities could prevent some from taking action. The burden of paying one's own costs is the tradeoff for greater certainty about costs. On balance, the Productivity Commission considers that cost neutrality achieves an appropriate balance between placing a burden on complainants to pay their own costs, even if they win, and giving complainants a sufficient degree of certainty about costs to overcome their aversion to proceeding to court. Nonetheless, the Commission emphasises the importance of access to legal assistance to maintain the accessibility of the courts (section 13.1 and see chapter 15).

A related issue is whether cost neutrality would discourage complainants from bringing forward complaints that have a broader impact on the community (often

12 *The Federal Court of Australia Act 1976* (s.43) grants the Court jurisdiction to award costs in all proceedings, at the discretion of the Court, unless another Act provides otherwise. These provisions are mirrored in the *Federal Magistrates Act 1999* (s.79). The Federal Court is cost neutral in its jurisdiction inherited from the former Industrial Relations Court, the Administrative Appeals Tribunal and the Residential Tenancies Tribunal.

referred to as 'public interest' cases). This would occur if the private costs of taking action (bearing one's own costs in the courts) exceed the private benefits. However, bearing one's own costs would seem to be an improvement over the current situation, in which there is no guarantee that cases with a public interest element will avoid the application of the principle that costs follow the event (HREOC 2004c). Allowing disability organisations to make representative complaints (discussed in the next section) might lessen the need for individuals to bring public interest cases forward. Access to legal assistance (see chapter 15) will also influence the ability of individuals to mount public interest cases.

Cost neutrality also places a burden on successful respondents to bear their own costs. As noted earlier, respondents are often reluctant to become involved in lengthy and expensive court processes. As for complainants, similar incentives and disincentives would be at work; bearing their own costs might discourage legal action but would promote certainty.

Reducing barriers to complainants' participation in the courts must be balanced against the burden on respondents and the court system. It is important that courts retain discretion to award costs under some circumstances. Frivolous or vexatious complaints (or defence strategies), for example, impose unnecessary costs on other parties and the court system, and might need to be discouraged by the prospect of costs being awarded in such cases.

The National Council on Intellectual Disability argued:

> We favour the approach that costs should only be awarded against the unsuccessful litigant where they have not demonstrated 'an arguable case' to the court. It is neither fair to the other party nor in the public interest to allow people to litigate cases which do not have a reasonable arguable basis in fact and/or law. (sub. 112, p. 8)

One problem with this approach is that complainants might have difficulty knowing in advance whether their case is arguable. However, the HREOC Act (s.46PH) makes provision for the President to give complainants a termination notice which explains why their complaint was terminated. The reasons for termination are generally more detailed when a matter is terminated on the ground that the complaint was lacking in substance, compared to one which had no reasonable prospect of conciliation (HREOC, pers. comm., 20 April 2004). The explanation of why the complaint was terminated can provide a useful indication to the complainant of whether their case is arguable. Additionally, the HREOC Act (s.46PS) allows HREOC to provide a report to the courts. There might be scope for HREOC to give an indication in this report as to the merit of the case. Such information would be useful for both the complainant and respondent and might help the complainant decide whether to proceed to court.

Alternatively, the Australian Industry Group (sub. DR326, p. 20) proposed that the approach applying to unfair dismissal applications under the *Workplace Relations Act 1996* be considered:

> This involves each party paying its own costs, except where:
>
> - The applicant pursues an application in circumstances where it should have been reasonably apparent that he or she had no reasonable prospect of success; or
> - The applicant has acted unreasonably in failing to discontinue a proceeding or in failing to agree to terms of settlement that could lead to discontinuance of the application. *(Workplace Relations Act 1996,* s.170CJ)

While the Australian Industry Group's proposal provides protection for respondents, it is of little assistance to complainants facing a respondent who acts unreasonably in the proceedings. More balance between the requirements on complainants and respondents would be desirable. For example, guidance might be drawn from the cost order guidelines in the *Family Law Act 1975* (box 13.2).

The Productivity Commission considers the HREOC Act should be amended to establish the principle of cost neutrality in discrimination proceedings in the federal courts, subject to guidelines based on those in the Family Law Act.

RECOMMENDATION 13.4

***The* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the* Family Law Act 1975.**

13.4 Representative complaints

The HREOC Act allows representative complaints to be made 'on behalf of one or more other persons aggrieved by the alleged unlawful discrimination' (s.46P(2)(c)). A representative action can be brought on behalf of a class of members, without having to name the members of the class, specify the number of members or gain their consent (s.46PB).

Where a complaint to HREOC is terminated, any 'affected person' may apply to the federal courts (s.46PO(1)). An 'affected person' means a person on whose behalf the complaint was lodged. Under the *Federal Court of Australia Act 1976*, representative proceedings are allowed, but to bring a representative action, a person must have 'a sufficient interest to commence a proceeding on his or her own behalf' (s.33D).

Box 13.2 **Provision for cost orders in the *Family Law Act 1975***

The general costs rule in the Family Court is that each party should bear his or her own costs (s.117(1)). However, if the court is of the opinion that there are circumstances that justify it in doing so, it may make such orders as to costs and security for costs, as it considers just (s.117(2)).

In considering what cost order (if any) should be made, the court is directed to have regard to:

(a) the financial circumstances of each of the parties to the proceedings;

(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(f) whether either party to the proceedings has … made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and

(g) such other matters as the court considers relevant (s.117(3)).

In addition, if the court is satisfied that the proceedings are frivolous or vexatious, it may dismiss the proceedings or make such order as to costs as the court considers just (s.118).

Source: *Family Law Act 1975*, ss.117, 118.

There was some disagreement about the interpretation of these sections of the HREOC Act. Many disability organisations appeared to consider that they are not entitled to initiate representative complaints in their own right. The Equal Opportunity Commission Victoria stated that 'representative complaints in their current form require affected individuals, or their carers or support persons, to initiate action' (sub. 129, p. 21). Several disability organisations argued that the legislation should be amended to allow them to initiate complaints, implying that they believe that they are not currently entitled to do so (Blind Citizens Australia, sub. 72; National Ethnic Disability Alliance, trans., p. 1388).

HREOC argued that the DDA did not require amendment to address this issue:

> There is already provision in the HREOC Act for representative complaints to be made on behalf of a class of aggrieved persons without needing to identify particular individuals. (sub. 219, p. 19)

The Australian Government Solicitor advised that a disability organisation can lodge a complaint of unlawful discrimination with HREOC on behalf of one or more persons aggrieved by the alleged discrimination, or in some circumstances might be able to lodge a complaint on its own behalf if the organisation is a 'person aggrieved' by the alleged unlawful discrimination (AGS 2004a, p. 3).

However, unless organisations are themselves 'a person aggrieved', they cannot pursue a complaint to the federal courts. This is likely to discourage advocacy organisations from initiating complaints with HREOC. Knowing that a representative complaint could not proceed to the courts unless an 'affected person' is prepared to pursue it might affect the respondent's willingness to conciliate.

FINDING 13.13

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

This confusion could be avoided if disability organisations were entitled to bring actions in the federal courts in their own right. Such complaints could still be regarded as representative complaints, because the organisations would be representing the interests of their constituents in general.

Representative complaints initiated by disability organisations or advocacy groups have the potential to achieve greater systemic change than can be achieved by individual complaints. There are fewer concerns about the confidentiality of the complainant, and disability organisations are more likely to have the experience and resources (although still limited) to tackle the complexities of the complaints system than individual complainants. Many inquiry participants, in stressing the barriers to individuals making complaints, pointed to the potential benefits of representative complaints. The Equal Opportunity Commission Victoria argued that other vulnerable groups had benefited from representative complaints:

> … looking at representative complaints under the Racial and Religious Tolerance Act, many people feel very comforted and reassured by the fact that the complaint is being taken up by another body rather than them as an individual. It lessens their exposure. It lessens their isolation. It lessens their fear of victimisation and backlash. (trans., p. 1900)

The Australian Industry Group, however, raised concerns about widening the existing rights of disability organisations to pursue representative complaints, stressing that 'it is important that cases of alleged discrimination be based on specific facts and issues' (sub. DR326, p. 21).

This appears reasonable, and could be addressed by ensuring that representative complaints be allowed only in relation to specific instances of alleged discriminatory conduct as defined in the DDA—not purely hypothetical or abstract legal questions (Australian Government Solicitor 2004a, p. 10). The complaint would also need to be accepted by HREOC as not frivolous or vexatious.

Some inquiry participants were concerned that giving organisations greater scope to initiate complaints could disempower people with disabilities. ParaQuad Victoria stated:

> … there's always that whole conflict of not wanting to encourage dependency … of not wanting to go back to the old model … people with disabilities are always relying on an organisation or someone else to carry things forward for them. (trans., p. 1859)

The Australian Government Solicitor advised that:

> It would be possible to amend the HREOC Act to enable disability organisations to lodge complaints in respect of alleged unlawful discrimination otherwise than on behalf of any particular 'aggrieved person', and to enable HREOC to inquire into and conciliate such complaints. In our view, there would also be scope to amend the HREOC Act and the federal courts legislation to enable disability organisations to pursue such actions in the Federal Court and the Federal Magistrates Court. (AGS 2004a, p. 4)

The Australian Government Solicitor advised that this could be achieved by means of relatively simple amendments to the HREOC Act to include an extended standing provision for disability organisations that meet specified criteria, as is the case under the *Environment Protection and Biodiversity Conservation Act 1999* (box 13.3).

The Equal Opportunity Commission Victoria suggested defining the appropriate organisations or bodies to bring forward representative complaints by including provisions in the DDA similar to those in the *Racial and Religious Tolerance Act 2001* (Victoria). That Act provides that a representative body may complain on behalf of a person or persons if that body has a 'sufficient interest' in the complaint. Sufficient interest is to be found if:

> … the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to affect the interests of the body or the interests or welfare of the persons it represents. (Equal Opportunity Commission Victoria, sub. 129, p. 21)

Box 13.3 **Extended standing for judicial review under the *Environment Protection and Biodiversity Conservation Act 1999***

(3) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:

(a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and

(b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and

(c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

Source: *Environment Protection and Biodiversity Conservation Act 1999*, s.487.

The Productivity Commission considers that greater use of representative actions could improve the effectiveness of the complaints process, particularly in achieving systemic change. Organisations making representative complaints can avoid many of the barriers faced by individuals wishing to make a complaint, such as fear of victimisation.

The Productivity Commission considers that disability organisations should be permitted to initiate complaints in their own right, at both HREOC and federal courts stages. However, some limitation on this right is necessary to protect the interests and self-determination of people with disabilities. This protection could be achieved by limiting the right to initiate a complaint to organisations with a demonstrated connection to the subject matter of the complaint. Representative actions should also be limited to alleged actual or proposed discrimination rather than hypothetical scenarios.

Organisations will also tend to be limited by the risk of cost orders in the federal courts, although the Productivity Commission's recommendation on cost orders (see above) would give greater certainty in this regard. Some participants requested that a guarantee of no costs in the federal courts be given for representative complaints (Anti-Discrimination Commission Queensland, sub. 119). However, the Productivity Commission considers that the same rules should apply regardless of the nature of the complainant.

The* Human Rights and Equal Opportunity Commission Act 1986 *should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court and Federal Magistrates Court if required.

13.5 Conclusions

This chapter has examined the strengths and weaknesses of the DDA complaints process. An effective complaints mechanism is an essential feature of the DDA, in order to allow individual grievances to be resolved. It can also play a limited role in driving systemic change.

Many inquiry participants acknowledged the strengths of the complaints process, particularly the emphasis on conciliation before proceeding to the courts. In addition, complainants and respondents (with some notable exceptions) appeared to be satisfied with HREOC's complaint handling and conciliation processes.

However, many barriers affect the effectiveness of the complaints process, including the costs and formality of the process, fear of victimisation and the inequality of resources available to the parties. The Commission has made a series of recommendations that aim to reduce some of these barriers.

Finally, there appears to be some confusion and misunderstanding about how the complaints process works. Many people with disabilities and disability organisations appear to be uncertain of how to enforce their rights, and the role of HREOC and the federal courts. HREOC could give further attention to promoting awareness of the complaints process, particularly through cooperative arrangements with State and Territory anti-discrimination bodies.

The HREOC Act complaints process applies to complaints under the *Sex Discrimination Act 1984* and the *Racial Discrimination Act 1975* and will apply to the *Age Discrimination Act 2004*, as well as complaints under the DDA. Recommendations in this chapter therefore will have implications for the handling of complaints under the former three Acts, which are outside this inquiry's terms of reference.

RECOMMENDATION 13.6

The Attorney-General's Department should investigate the implications of this inquiry's recommendations about the disability discrimination complaints process for other federal anti-discrimination legislation.

14 Regulation

Governments use a range of regulatory devices to influence the behaviour of individuals and organisations. The term 'regulation' encompasses a wide variety of instruments. It includes primary legislation (such as Acts of Parliament), subordinate legislation (such as statutory rules), quasi-regulation (such as industry–government agreements and accreditation schemes), co-regulation and self-regulation, and international treaties (box 14.1).

The *Disability Discrimination Act 1992* (DDA) is a significant piece of Australian Government legislation. It contains several high level provisions, making it unlawful to discriminate against people with disabilities on the ground of disability. A variety of other regulatory tools (regulations, disability standards, guidelines and advisory notes) are (or can be) used to supplement the Act.

As a general rule, regulation of any form should be used only where it is the most effective way of addressing a problem and it imposes the least possible burden on those being regulated and the wider community. Good regulation should not be unduly prescriptive—that is, where possible, it should be expressed in terms of desired outcomes, and allow flexibility in how those outcomes are achieved. It should be able to accommodate different or changing circumstances, and to enable those affected to decide how best to comply. It should also be consistent with other laws, regulations and agreements. Inconsistency creates confusion for those organisations bound by the regulations and could undermine the objectives of regulation.

This chapter discusses disability standards, guidelines and action plans, which are used to supplement the DDA, and attempts to assess their effectiveness in achieving the objects of the DDA. The chapter also considers the potential role for other approaches, including self-regulation and co-regulation.

Box 14.1 **Types of regulatory tool**

Explicit government regulation refers to both primary and subordinate legislation and is the most commonly used form of regulation. Primary legislation (Acts of Parliament) receives scrutiny and passage by Parliament. Subordinate legislation can be made in a variety of forms. The three main forms at the federal level are:

- statutory rules, which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples include the Disability Discrimination Regulations 1996 and the Income Tax Assessment Regulations 1997
- disallowable instruments, which are made by Ministers or government agencies and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples are the Disability Standards for Accessible Public Transport 2002
- other subordinate legislation, which is not subject to Parliamentary scrutiny.

Co-regulation typically refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced. This is known as 'underpinning' of codes, standards etc. Sometimes, legislation sets out mandatory government standards, but provides that compliance with an industry code can meet those standards. Legislation may also provide for government-imposed arrangements if industry does not develop its own arrangements.

Quasi-regulation refers to a wide range of rules or arrangements which governments can use to influence businesses, but that do not form part of explicit government regulation. Examples include industry codes of practice, guidance notes, industry–government agreements and accreditation schemes. Federal quasi-regulation can be broadly divided into two categories:

- industry arrangements where industry organisations play a critical role in formulating and/or administering codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory
- other government initiated arrangements that use methods other than direct legislation to encourage compliance.

Self-regulation involves industry formulating rules and codes of conduct, and enforcing compliance with those rules.

Sources: Commonwealth Interdepartmental Committee on Quasi-regulation 1997; ORR 1998.

14.1 Disability standards

The DDA prohibits discrimination on the ground of disability in a number of areas. These prohibitions are expressed in very general terms: for example, section 23 of the DDA states that it is unlawful for a person to discriminate against another person on the ground of the other person's disability by refusing access to, or the use of, any premises that the public is entitled or allowed to enter or use.

However, the DDA does not prescribe the actions that a person or organisation must take to avoid discrimination. This can be an advantage because it allows for flexibility in how discriminatory barriers are removed, but it can create problems, such as the uncertainty experienced by people with disabilities and service providers in how the general provisions will apply to particular areas.

The DDA was designed to address these issues by including the power to introduce subordinate regulation in the form of disability standards. Section 31 of the DDA gives the Attorney General the power to formulate disability standards. These are disallowable instruments that the Federal Parliament must approve and that are subject to the formal regulation impact statement (RIS) process.[1]

Disability standards can:

- set out the requirements implicit in the DDA in a more immediately accessible format
- provide information on the steps necessary to comply with the DDA, and reduce uncertainty for potential complainants and respondents
- provide timetables for complying with the DDA, ensuring changes occur within an appropriate period
- allow input from all interested parties and specify the relationship of standards to other relevant sources of law
- encourage the use of voluntary action plans to meet the deadlines set by standards
- reduce the reliance on litigation and complaint processes because standards provide greater certainty for people with disabilities and organisations covered by the DDA

[1] At the federal level, a regulatory impact statement contains a formal assessment of the costs and benefits of regulation. This process is mandatory for all reviews of existing regulation, proposed new or amended regulation, and proposed treaties involving regulation, that will directly affect business, have a significant indirect effect on business or restrict competition (ORR 1998).

- present, as part of the usual operating environment, measures that facilitate the access and participation of people with disabilities (HREOC 1993b).

The Disability Standards for Accessible Public Transport, for example, apply to public transport vehicles, conveyances, premises and infrastructure, and set out a timetable for adjustment by public transport operators over 30 years, with fixed milestones every five years. They list detailed accessibility requirements including access paths, ramps, boarding devices, allocated spaces, handrails, doorways, controls, signage, information provision and much more (see appendix C).

Many inquiry participants acknowledged the important role that standards play in addressing the discrimination faced by people with disabilities. The Public Interest Advocacy Centre noted:

> Standards would provide certainty and would thus assist those seeking to comply with the DDA as well as those regulating compliance. (sub. 102, p. 9)

The Human Rights and Equal Opportunity Commission (HREOC) (sub. 143) and the ACTU (sub. 134) expressed similar views.

However, inquiry participants did not unanimously support standards. Some were concerned about using disability standards to extend the scope of the Act. Some questioned the suitability of standards for some areas, while others suggested extending the ability to formulate standards to all areas covered by the DDA. Others were concerned with procedural issues, such as formulating, monitoring and enforcing standards. These issues are discussed below.

Consistency with the Disability Discrimination Act

General principles of administrative law require standards under the DDA to serve the same objects and underlying scope as the existing DDA provisions.[2] The Productivity Commission considers that the underlying scope of the Act includes the areas covered by the DDA and the checks and balances it contains (such as unjustifiable hardship and inherent requirements for employment) to ensure that any adjustments generate net benefits.

By contrast, HREOC argued that in furthering the objects of the Act, disability standards can alter the underlying scope by:

- providing obligations greater than those which already exist

[2] The scope of an Act is determined by adopting a construction of its provisions which will promote rather than defeat its underlying purpose or object.

- prescribing obligations for persons who might not already be covered by the DDA
- removing or providing defences or exceptions beyond those that already exist (HREOC 2003e).

HREOC bases its argument on sections 32, 33 and 34 of the DDA. Section 32 states that is it unlawful for a person to contravene a disability standard. According to HREOC, this section implies that a standard may make something unlawful that is not already unlawful (HREOC 2003e). Section 33 states that Division 5 (which contains the exemptions) does not apply in relation to a disability standard. The Australian Government Solicitor interprets this to mean that disability standards need not necessarily include, or be limited to, the exemptions set out in Division 5 (AGS 2000). Section 34 states that if a person acts in accordance with a disability standard, the existing unlawful discrimination provisions (set out in Part 2 of the DDA) do not apply to the person's activity. HREOC interprets this section to mean that a standard may make something lawful that otherwise would have been unlawful, or potentially unlawful (HREOC 2003e). HREOC argued:

> We think the standards power has to mean that it can both make things unlawful that are not or may not be unlawful now, and can make things lawful which are not or may not be lawful now … That admittedly rather strong effect of standards in relation to the Act is why they're subject to a positive parliamentary approval process rather than the standard regulation disallowance provision. (HREOC, trans., pp. 2876–7)

HREOC's position is supported by legal advice from the Australian Government Solicitor to the then Department of Education, Training and Youth Affairs on the draft disability standards for education. The Australian Government Solicitor argued that section 34 of the DDA, which provides that Part 2 of the Act does not apply to a person who acts in accordance with a disability standard, indicates that a standard can apply differently than the Act, provided it is not 'repugnant' to the Act (that is, that the standard does not subvert the objects of the Act) (AGS 2000).

The Productivity Commission accepts that disability standards can make some things lawful that otherwise would have been unlawful. It will be lawful for public transport operators, for example, to discriminate against some people with disabilities because the transport disability standards require that only 25 per cent of buses and trains be made accessible by 31 December 2007. Similarly, the access to premises standards will specify a minimum door width. This specification might not fulfil the needs of every person with a disability, but failure to provide a wider door will not be unlawful.

However, in other instances draft standards, if adopted, would change the application of the DDA in a way that is inconsistent with what the Productivity

Commission regards as the underlying scope of the Act. The draft education standards are a case in point. The unjustifiable hardship defence is limited to enrolment situations under the DDA (s.22(4)). The Draft Disability Standards for Education propose extending the unjustifiable hardship defence beyond the point of enrolment to include all education activities. On the other hand, the draft Access to Premises Standards propose limiting the unjustifiable hardship defence to the owners and developers of existing buildings and excluding the owners and developers of new buildings. Section 23(2) of the DDA does not make this distinction. Further, HREOC would not be able to grant temporary exemptions to organisations covered by the draft access to premises standards. This is in contrast to the public transport standards, which allow for such temporary exemptions.

HREOC argued that including the defence for post-enrolment situations in the disability standards for education was preferable to amending the DDA because the defence is perceived as part of a package of rights and responsibilities:

> Certainly some people in the community that we have spoken to have taken the view that it's preferable to do it in the standard as part of a package, that in return for accepting an expansion of unjustifiable hardship that they will get better definition of rights across the board, whereas if you just amend the Act to expand unjustifiable hardship by itself then people might say, 'Well, what have we got out of that?' on the disability side of the equation. (HREOC, trans., p. 1147)

Some inquiry participants argued that disability standards should not be used to change the fundamental scope of the DDA: Queensland Parents for People with a Disability (sub. DR325); Australian Industry Group (sub. DR326); NSW Office of Employment Equity and Diversity (sub. DR354); Blind Citizens Australia (sub. DR269); and the ACT Government (sub. DR366).

The Productivity Commission acknowledges HREOC's point that subjecting disability standards to positive parliamentary approval provides some assurance that they will not undermine the scope and objects of the DDA. However, the Commission considers that standards should not be used to change the application of the Act in the ways discussed above.

The DDA provides a balance of prohibitions and defences in the areas it covers which, as a matter of principle, should be reflected in the disability standards developed for particular areas. Defences, such as unjustifiable hardship and the inherent requirements test for employment, are important to ensure that the DDA provides necessary checks and balances. These defences encourage changes where the benefits to the community outweigh the costs and discourage changes where costs outweigh benefits. Removing these defences via disability standards could result in regulations that impose significant costs on organisations covered by the DDA (see chapter 8).

It is the Commission's view that important statements of law should be made in the primary legislation, not in subordinate instruments. For example, the Productivity Commission recommends elsewhere in this report amending the DDA to extend unjustifiable hardship to all areas covered by the DDA, including the standards (see chapter 8). If this recommendation were accepted, it would be inappropriate for disability standards to undermine its intention. It is the Commission's view that the purpose of standards should be to clarify the operation of the Act, not remove important defences.

FINDING 14.1

The draft disability standards for education and access to premises have the effect of altering, in a fundamental way, the scope of the Disability Discrimination Act 1992 *provisions concerning discrimination in education and access to premises.*

RECOMMENDATION 14.1

Section 31 of the* Disability Discrimination Act 1992 *should be amended to clarify that disability standards cannot alter in a fundamental way the scope of the Act. The scope should only be altered via amendment of the Act, not via disability standards.

Flexibility

A clear advantage of standards is that they provide a degree of certainty for stakeholders who need to know what actions would be regarded as complying with the legislation. A potential shortcoming of standards, however, is that they can be inflexible, thereby imposing higher costs and requiring constant updating to keep them in line with technological developments.

Some inquiry participants (Job Watch, sub. 215; Australian Taxi Industry Association, trans., p. 1336; Victorian Government, sub. DR367) criticised the inflexible nature of disability standards. By their nature, standards will limit the flexibility with which service providers comply with the DDA and adapt to changing circumstances—that is the tradeoff for creating some degree of certainty through a legislative instrument. However, there are ways of minimising these costs and creating a balance between certainty and flexibility. Where possible, the standards could use performance-based approaches that allow organisations to develop alternative ways of meeting standards, and they could incorporate mechanisms for updating (without continually redrafting) as technology changes. These and other features should be assessed during the drafting process.

Only the transport disability standards have been enacted. The RIS assessed options for improving the accessibility of public transport against six criteria, one of which was flexibility. It acknowledged that disability standards might be less flexible than other options, such as guidelines or the *status quo*, but noted that the transport disability standards incorporated flexible elements (Attorney-General's Department 1999). The draft disability standards for access to premises (released for public comment in January 2004) also provide some flexibility (box 14.2).

The Productivity Commission agrees that it is important for disability standards to be as flexible as possible, both promoting choice and being adaptable over time. As far as possible, these characteristics should be included when standards are formulated. The RIS process, which is designed to facilitate the introduction of good regulation, provides an opportunity to ensure flexibility is considered in the design and implementation of disability standards. This process appears to be working effectively, given that flexibility has been an important feature of the disability standards that have been assessed to date.

Effects on the rights of people with disabilities

Disability standards have been criticised for diminishing the rights of people with disabilities. The Victorian Government argued:

> 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. (sub. DR367, p. 9)

The Anti-Discrimination Commission Tasmania (trans., p. 32), the Anti-Discrimination Commission Queensland (trans., p. 260) and Disability Council of NSW (sub. 64) expressed similar concerns.

Bruce Young-Smith suggested that people with disabilities be given the right to lodge a complaint if the standards do not meet their needs (sub. 80). HREOC objected to this suggestion, arguing that it would undermine the ability of disability standards to clarify the responsibilities of service providers and to provide certainty:

> For example, any standard on access to premises needs to specify a minimum door width. If standards are to be meaningful it is not feasible to add a requirement that it is also unlawful not to have a wider door if anyone requires it. (sub. 219, p. 27)

Box 14.2 **The flexibility of disability standards**

According to the Attorney-General's Department, the Disability Standards for Accessible Public Transport incorporate flexibility in three ways.

- The standards are performance based. That is, generally they are not hardware specific but assume that a variety of solutions will satisfy any potential requirement.
- The standards allow operators and providers to comply with requirements, and thus the DDA, by following the specifications in the document or by providing an alternative means of 'equivalent access'. An operator may choose, for example, to provide equivalent access to bus services by using a high floor bus with a boarding platform rather than a low floor bus with a ramp.
- The DDA provides exemptions in cases where 'unjustifiable hardship' can be demonstrated. This provision allows added flexibility in those cases in which unjustifiable hardship exists.

Section 34 of the standards states that they must be reviewed within five years of being introduced and then every five years. The review, to be conducted by the Minister for Transport and Regional Services in consultation with the Attorney General, must include whether discrimination has been removed and any necessary amendments to the standards.

The Draft Disability Standards for Access to Premises will initially comprise the access components of the Building Code of Australia (BCA) that have been revised to comply with the provisions of the DDA. Like the transport standards, the access to premises standards are performance based. The acceptable performance requirements for buildings and other structures described by the disability standards may be met using:

- deemed-to-satisfy provisions, which are detailed prescriptive technical requirements within the BCA about how to construct and equip buildings
- an alternative solution that can be demonstrated to meet the performance requirements by other means. An administrative protocol has been developed to assist building control authorities assess applications for alternative solutions.

The draft premises standards include a timetable for review (Part 5). The Minister for Industry, Tourism and Resources, in consultation with the Attorney General, must review the effectiveness of the standards within five years of being introduced and then every five years. The review should identify any necessary amendments. The BCA is updated annually, but the access requirements for people with disabilities will not be changed until Parliament approves changes to the premises standards.

Sources: Attorney-General's Department 1999; Australian Building Codes Board (subs. 153 and DR297); ABCB 2001; Disability Standards for Accessible Public Transport 2002; Draft Disability Standards for Access to Premises (Buildings).

Blind Citizens Australia (sub. DR269), the South Australian Government (sub. DR356) and People with Disability Australia (sub. DR359) agreed that service providers complying with disability standards should be protected from complaints.

Compliance with disability standards will not address the needs of every person with a disability where short term tradeoffs are made to achieve better outcomes in the future. The phased introduction of the transport disability standards, for example, means that some people's needs will not be addressed initially, yet those people will have lost the opportunity to seek redress via the complaints process.

However, it is possible that disability standards will meet the needs of a wider range of people with disabilities in a shorter time than if they had relied on each lodging a complaint under the general provisions of the DDA. Elsewhere in this report, the Productivity Commission found that complaints have a limited role in achieving systemic change (see chapters 10 and 13). For example, complaints must be based on actual instances of discrimination, which makes it difficult to extend the outcomes of a case affecting people with mobility impairments to discrimination experienced by people with visual impairments. The outcomes of many complaints are also confidential, limiting their role in establishing precedents. By contrast, disability standards specify the actions that organisations must undertake to remove discriminatory practices affecting a wide range of people with disabilities.

It is important for people with disabilities to have the facility to complain about discriminatory behaviour. Indeed, the complaints mechanism plays a pivotal role in encouraging compliance with disability standards. However, the Productivity Commission considers it appropriate that compliance with disability standards is a defence if a complaint is lodged. People with disabilities need to be aware of the role of disability standards and their effect on the general anti-discrimination provisions of the DDA.

FINDING 14.2

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints made under the general provisions of the Disability Discrimination Act 1992.

Relationship with State and Territory legislation

Some inquiry participants questioned the relationship between disability standards, which are federal legislation, and State and Territory government legislation. For example, the Anti-Discrimination Commission Queensland (trans., p. 260) raised

the desirability of using State anti-discrimination legislation to establish a higher level of compliance in some areas than that negotiated under disability standards.

Section 13 of the DDA states that the Act is not intended to exclude or limit the operation of a law of a State or Territory that deals with discrimination on the grounds of disability that is capable of operating concurrently. That is, so long as there is no inconsistency between the DDA and State and Territory anti-discrimination legislation, both can be used to address discrimination on the ground of disability.

It is likely that State and Territory governments also have other laws and regulations that apply to areas covered by disability standards. It is possible that this legislation could impose a different requirement on a specific matter also contained in disability standards. The DDA is silent on the relationship between the DDA and other State and Territory legislation.

Generally, there are two potential forms of inconsistency between federal and State/Territory laws:

- 'direct inconsistency', which occurs where the State or Territory law would alter, impair or negate the operation of the federal law (including where the two laws are contradictory)
- 'covering the field inconsistency', which occurs where it appears from the terms, nature or subject matter of the federal law that it was intended as a complete statement of the law governing a particular matter, and the State or Territory law purports to deal with that matter (AGS 2004a).

If there is inconsistency between federal and State and Territory laws, section 109 of the Commonwealth Constitution states that federal laws displace the operation of State and Territory laws. This would apply to inconsistencies between the DDA and any inconsistent State and Territory laws, be they anti-discrimination laws or other laws.

The Victorian Government argued that because disability standards are subordinate legislation, they cannot displace State legislation:

> Crown Counsel's opinion is that disability standards are delegated legislation and as such, cannot cover the field and render State legislation invalid. (sub. DR367, p. 8)

According to the Australian Government Solicitor, the reference to laws in section 109 of the Constitution includes regulations and other instruments made under a law, such as a DDA standard (AGS 2004a).

At present, it is unclear what would amount to inconsistency between disability standards and State and Territory legislation. For example, the Anti-Discrimination Commission Queensland (trans., p. 260) argued that an organisation complying with a higher State-based standard would also meet the obligations of the federal disability standards and therefore there would be no inconsistency.

The Productivity Commission is more concerned about an organisation that might comply with the federal disability standards but not the higher standard imposed by the relevant State or Territory government. Allowing States and Territories to impose greater obligations than those contained in disability standards would create uncertainty for organisations subject to inconsistent requirements.

The Australian Government Solicitor suggested that a State law would probably be held to be incapable of operating concurrently with a DDA standard if the State law covering the same matter imposed a higher standard:

> … where there are two distinct requirements, the courts have generally held that there is a clear inconsistency … This is often the case because a law which makes unlawful actions below a minimum standard is generally seen as allowing, or making lawful, actions above that minimum standard. (AGS 2004a, p. 13)

Similarly, HREOC (trans., p. 2870) argued 'that the standards, when they are passed, cover the field'.

This lack of clarity undermines the ability of disability standards to create certainty for organisations. There are a number of options for clarifying the situation. The first approach is to do nothing. The Anti-Discrimination Commission Queensland suggested no legislative intervention is required:

> There is a persuasive argument that where an operational inconsistency occurs, the State Commission would lose jurisdiction to investigate or conciliate, as on those facts the DDA would prevail by virtue of [section] 109 of the Constitution. (sub. DR368, p. 1)

However, this option does not create the required certainty for organisations. A second option would be for State and Territory governments to adopt the DDA disability standards in their own laws. The Anti-Discrimination Commission Queensland recommended this as its preferred solution because it encourages cooperation between the Australian and State and Territory governments and if adopted across all jurisdictions, provides certainty to industry and the disability sector (sub. DR368).

This approach has a number of weaknesses:

- getting the agreement of all States and Territories would be difficult, particularly where some are arguing for higher levels of compliance

- adoption of the standards may be delayed as different States and Territories move to adopt them at different times
- differences in State and Territory anti-discrimination laws may mean the same standards would be interpreted and enforced differently in different jurisdictions.

A third option is to amend the DDA (s.13) to clarify that disability standards displace State and Territory legislation dealing with the same specific matter. This approach was supported by Blind Citizens Australia (sub. DR269), NSW Office of Employment Equity and Diversity (sub. DR354) and People with Disabilities Australia (sub. DR356).

The Victorian Government (sub. DR367) and the Anti-Discrimination Commission Queensland (sub. DR268) rejected this approach, arguing that it undermined the role of State and Territory laws. However, all State and Territory governments are involved in negotiating disability standards. The Productivity Commission considers it to be generally inappropriate for them subsequently to impose higher levels of compliance than negotiated. To the extent that there is any doubt about the primacy of disability standards over State and Territory legislation that deals with the same specific matter (both anti-discrimination laws and other laws), the Productivity Commission considers the DDA should be amended to clarify the position. Disability standards should not override all State and Territory laws dealing with a particular area but, where a DDA standard and a provision contained in State or Territory legislation address the same specific matter, the disability standards should prevail over that provision. The Australian Government Solicitor advised there were no constitutional or other legal obstacles to amending the Act in this way if that was the intent of the federal law (AGS 2004a).

FINDING 14.3

There is some uncertainty about the relationship between State and Territory legislation and disability standards that deal with the same matter.

RECOMMENDATION 14.2

The* Disability Discrimination Act 1992 *(s.13) should be amended to clarify that where disability standards and State and Territory legislation address the same specific matter, the disability standards should prevail.

Areas covered

The nature of disability standards will differ according to the area being addressed. Some areas, like public transport and premises, lend themselves well to prescription and measurement. Others, like employment and education, need a more procedural

approach. Whether these areas need to be clarified through statutory standards or can be adequately addressed through non-binding guidelines is an issue.

Section 31 limits the ability to formulate disability standards to the areas of employment, education, access to premises, public transport, accommodation and the administration of Commonwealth laws and programs (table 14.1). The areas not covered are the provision of goods and services, the purchase and disposal of land, clubs, sport, and requests for information. Further, the Act does not specifically allow for disability standards in areas covered by exemptions (such as insurance and superannuation).[3]

Table 14.1 **Areas in which disability standards may be formulated and the status of each standard, April 2004**

Area of discrimination	*Covered by DDA*	*Standard possible*	*Status of standard*
Employment	ss.15–21	✓	Draft not active
Education	s.22	✓	Second draft rejected by State/ Territory Ministers; Australian Government to introduce standards unilaterally
Access to premises	s.23	✓	Draft released in January 2004
Public transportation	s.23[a]	✓	Approved in October 2002
Provision of goods, services and facilities	s.24	✗	..
Accommodation	s.25	✓	Draft not active
Purchase of land	s.26	✗	..
Clubs and incorporated associations	s.27	✗	..
Sport	s.28	✗	..
Administration of Commonwealth laws and programs	s.29	✓	Commonwealth Disability Strategy implemented

a Public transport is indirectly covered by the access to premises section of the DDA, because vehicles and aircraft are defined as 'premises' (s.4). .. Not applicable.

Sources: DDA; DDA Standards Project nd.

Hastings (1997) suggested that one factor influencing the decision to limit the areas covered by disability standards was concern about the costs to government and business of imposing standards in all areas covered by the DDA. There was no formal mechanism to assess the possible effect of new regulations on stakeholders when the DDA was introduced in 1992. In the absence of such a mechanism, the Government appeared to address concerns about imposing high costs on organisations by limiting the areas disability standards could cover.

3 As discussed earlier however, section 33 states that Division 5 (which deals with exemptions) does not apply in relation to a disability standard.

Now, all new legislation (including subordinate legislation such as disability standards) is subject to a review mechanism through the RIS process. The Productivity Commission considers that this is an appropriate mechanism for assessing whether regulations are the most cost-effective means of achieving the objects of the DDA.

Some inquiry participants argued disability standards cover too few areas:

> Restriction of the areas under which standards can be developed appears too arbitrary and subject to changing views to be enshrined in the Act. (Victorian Government, sub. DR367, p. 7)

The Mental Health Legal Centre (sub. 108), Paraquad (trans., p. 123), and the Equal Opportunity Commission Victoria (sub. 129) expressed similar views. The Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, also questioned the limitation on the provision for standards. He has suggested that progress towards equality and accessibility for people with disabilities would have been 'faster and broader' had the DDA allowed standards to be set in all areas (Ozdowski, 2002b, p. 8).

Previously, the Australian Government responded to changing priorities for disability standards by amending the DDA. For example, the DDA was amended in 2000 to allow for disability standards for access to premises, an area initially not considered for standards development.

Inquiry participants, such as Blind Citizens Australia (sub. DR269), People with Disabilities Australia (sub. DR359), the Disability Services Commission Western Australia (sub. DR360) and the NSW Office of Employment Equity and Diversity (sub. DR354) supported extending the provision to make standards to all areas covered by the Act. HREOC (sub. 143, p. 73) was also supportive but noted that this 'does not involve any conclusion that standards should necessarily be introduced in any particular area, only that it should be possible to make standards if and when this is decided to be appropriate'. The Victorian Government expressed similar views (sub. DR367).

Some inquiry participants noted areas where standards proved unsuitable. Most concerns were raised about disability standards for employment and education. Draft disability standards for employment were prepared following consultations with industry representatives, people with disabilities and government between 1994 and 1998 (see appendix A). These draft standards are not proceeding towards finalisation because interested parties could not agree on the form that they should take:

> … while most participants in the process agreed that prescriptive standards were not appropriate, the principle based draft standards which were produced instead were not seen by all parties as delivering sufficient outcomes. (HREOC, sub. 143, p. 62)

The Australian Industry Group summarised inquiry participants' concerns with disability standards for employment:

> Each business is unique. Therefore, it is very difficult to draft standards which are appropriate for all businesses. … Not only would such standards need to be sufficiently flexible to have application to all workplaces and business operations, a further complication arises due to the vast array of disability which people have. (Australian Industry Group, sub. DR326, pp. 23–24)

The Productivity Commission considers that there are potential benefits from allowing the possibility for standards to be introduced in any area covered by the DDA. Further, the power should extend to areas covered by exemptions such as insurance and superannuation. Expressing the standard power in a general sense provides greater flexibility in determining priorities for future standards development.

Extending the standards-making power does not imply that standards should be made in all areas covered by the DDA. The very considerable costs associated with developing and complying with disability standards should be matched by a realistic prospect that those standards will address disability discrimination in an area better than the general provisions of the DDA. The Commission considers that the rigorous application of RIS processes provides safeguards against costly and inappropriate regulation.

RECOMMENDATION 14.3

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

Given the range of areas disability standards could potentially cover, it is important to establish a rigorous and transparent process for identifying priorities. The Attorney-General's Department could be charged with this responsibility in consultation with HREOC and the relevant stakeholders, including State and Territory government departments and agencies, people with disabilities and organisations covered by the DDA.

Monitoring and enforcement

Section 67(1)(e) of the DDA requires HREOC to monitor the operation of standards and report to the Attorney General, but there is no separate enforcement regime for standards. Non-compliance with a standard is an unlawful act under the DDA in the same way as non-compliance with one of the general anti-discrimination provisions. In each case, a complaint can be made by or on behalf of a person or class of persons aggrieved by the act of discrimination (see chapter 13).

The lack of a specific enforcement regime for disability standards was a concern for many inquiry participants, such as the National Ethnic Disability Alliance (sub. 114), the Disability Council of NSW (sub. 64) and Advocacy Tasmania (sub. 130).

Most participants commenting on this issue recommended that disability standards include both monitoring and enforcement procedures (for example, the Mental Health Legal Centre, sub. 108; Advocacy Tasmania, sub. 130; the Equal Opportunity Commission Victoria, sub. 129; the NSW Council for Intellectual Disability, sub. 117; and the Physical Disability Council of Australia, sub. 113). Some suggested that an independent authority be given responsibility for ensuring compliance with disability standards, while others suggested that HREOC should be resourced to undertake this role.

HREOC disagreed with this suggestion:

> HREOC does not regard these detailed monitoring roles as appropriate or realistically achievable for HREOC, other than through the complaint process as a backup to other regulatory and monitoring processes. In addition to issues of availability of resources for such a role, HREOC considers a more effective model involves responsibility for accessibility to be incorporated as far as possible into the responsibilities of mainstream regulatory bodies for each subject matter. (sub. 219, p. 28)

The Productivity Commission considers that compliance with disability standards should be incorporated into existing regulatory processes where possible. Disability standards can be made in various areas of activity and it is sensible to rely on experts from those areas (with input from the disability community) to develop, implement and monitor standards. The draft building standard, for example, is linked formally to the BCA and thus will be enforced by State and Territory building planning approval processes. The NSW Office of Employment Equity and Diversity supported this approach, arguing:

> This regulatory framework is more efficient than setting up a separate disability standard and separate compliance framework. A similar approach should be adopted for disability standards wherever practical to do so. (sub. DR354, p. 6)

Similarly, compliance with the transport standard will be monitored by a national Ministerial taskforce (see chapter 5). Although formal compliance is still enforced only through complaints, providers should have more incentive to comply and breaches will be easier to identify. HREOC's role should be limited to ensuring monitoring takes place and reporting on the operation of standards to the Minister. Other inquiry participants, such as Blind Citizens Australia (sub. DR269), Andrew van Diesen (sub. DR333), People with Disabilities Australia (sub. DR359) and Disability Services Commission Western Australia (sub. DR360) supported this approach.

RECOMMENDATION 14.4

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

Development process

Aside from concerns about the concept of disability standards, many inquiry participants were also concerned about the process for developing standards. Most concerns related to the consultation process and the timeliness of standards.

Consultation

Consultation with people with disabilities, governments and those organisations with responsibility to implement the standards is vital in developing disability standards that are effective in reducing discrimination. Section 132 of the DDA requires that the comments of State and Territory Ministers responsible for matters relating to disability discrimination must be considered when disability standards are developed, but the DDA does not prescribe how consultation on disability standards should occur.

Many inquiry participants expressed concerns about the consultation process. Industry and State government representatives felt little attention was given to their concerns. The Property Council of Australia (trans., p. 3012) argued many of its comments were ignored while developing the draft access to premises standards.

The Victorian Government emphasised the need for wide ranging consultation:

> 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. (sub. DR367, p. 10)

However, most inquiry participants commenting in this area were dissatisfied with the level of consultation among people with disabilities and suggested that it could lead to standards that compromised their needs. For example, the National Ethnic Disability Alliance stated:

> … the resource imbalance between industry and the disability sector means that it is not an equal bargaining arrangement and there is a risk that standards developed will actually reflect the interests of industry and not the rights of people with disability. (sub. 114, p. 16)

Disability community input into standards development is coordinated by the DDA Standards Project (funded by the Attorney-General's Department). It is a network of organisations that represent people with disabilities throughout Australia (box 14.3). Despite this broad consultative framework, Marrickville Council (sub. 157) and the Disability Council of NSW (sub. 64) criticised the ability of the DDA Standards Project to reflect the needs of people with disabilities accurately, arguing that it represents a narrow range of views and supports the introduction of standards against the wishes of the broader disability community. By contrast, HREOC argued that a broader framework was also used for consulting with people with disabilities:

> Project representatives have put forward a range of community views in standards development processes including views opposed to adoption of particular standards. Consultation on standards to date has in fact been very much wider than peak level. (sub. 219, p. 26)

Box 14.3 **The DDA Standards Project**

The DDA Standards Project is headed by a Steering Committee currently comprising representatives of nine national peak bodies: the Australian Association of the Deaf, Blind Citizens Australia, the Deafness Forum of Australia, the Head Injury Council of Australia, the National Council on Intellectual Disability, the National Ethnic Disability Alliance, the Physical Disability Council of Australia, Women with Disabilities Australia and the National Indigenous Disability Network.

Among other things, the DDA Standards Project consults with people with disabilities during the development of specific DDA standards. It aims to reflect all the views expressed by people with disabilities during consultations and protect the rights of people with disabilities from erosion during standards development processes. It encourages the development of legally binding standards, but will support alternatives if standards are not acceptable to the disability sector as a whole.

Source: DDA Standards Project nd.

The Productivity Commission recognises that it is difficult to obtain unanimous support for disability standards. The process of negotiating standards will

necessarily involve tradeoffs, and consultation with the various stakeholders gives the opportunity for feedback on where those tradeoffs should be made. It is important, therefore, that all sections of the community be involved.

Although consultation is important in developing better, more effective, standards, it is not an end in itself. Consultation is a means to allow different views to be expressed and advice to be sought from the disability sector, industry and governments. It is almost inevitable, however, that translating those views into workable standards will mean that one or more groups will feel that their views have been inadequately addressed. Governments need to play a balancing role that promotes the objects of the Act and the interests of the broader community.

FINDING 14.4

Those affected by disability standards have had sufficient opportunity to consult and comment during their development. The Disability Discrimination Act Standards Project is an important way of engaging people with disabilities in the consultation process and is not their only means for providing input.

Timeliness

Many inquiry participants were concerned about the timeliness of the development of disability standards. The Public Interest Advocacy Centre noted:

> The development of the current disability standards has however proven to be time-consuming and costly to formulate. This has to some extent been a result of a political process which has been driven by competing needs of the various parties. (sub. 102, p. 9)

Similarly, the National Ethnic Disability Alliance argued:

> … developing standards has been a painfully slow process with only one standard adopted and appended to legislation to date … (sub. 114, p. 16)

Only the Disability Standards for Accessible Public Transport (approved in October 2002) are in effect (see appendix C). The draft Disability Standards for Access to Premises and associated RIS were released for comment in January 2004. It is hoped that the standards will be introduced in May 2005 when the BCA is updated, although the Property Council of Australia has suggested that May 2006 is a more likely date (trans., p. 3019). Two major drafts of the Disability Standards for Education and accompanying RISs have been released for public comment (in 2001 and 2003). The Ministerial Council on Employment, Education, Training and Youth Affairs has not agreed on the draft, although the Australian Government announced plans in July 2003 to 'move unilaterally to implement the standards' (Nelson 2003, p. 1).

ParaQuad Victoria proposed amending the DDA to impose deadlines for developing disability standards, as was done in the United States (sub. 77). The Productivity Commission does not support this proposal for a variety of reasons. First, the absence of standards in an area should not be interpreted as an absence of activity. In relation to Commonwealth laws and programs, the Australian Government implemented the Commonwealth Disability Strategy in 1994 (revised in 2000), which operates as a *de facto* standard for Australian Government departments and agencies (see appendix E).

Second, the lack of formal disability standards in some areas is a consequence of genuine disagreements over the form that standards should take. As discussed earlier, many inquiry participants argued against disability standards for education and employment. Imposing deadlines may result in the premature adoption of standards that are ill designed and do more harm than good.

Third, the time taken to formulate standards is also a consequence of the consultation process. As discussed above, some inquiry participants are concerned about the lack of consultation. Imposing deadlines may limit opportunities for interested parties to provide meaningful input to the standards process.

The Productivity Commission notes that formulating disability standards has been a more protracted exercise than envisaged. This delay reflects a tradeoff between developing standards in a timely manner and achieving a consensus between people with disabilities and affected organisations. Any attempts to limit the time taken to develop standards may compromise their effectiveness. However, the Commission's recommendations to allow other regulatory approaches (discussed below) may also result in more timely regulations.

FINDING 14.5

The development of disability standards has been very slow and only one—the Disability Standards for Accessible Public Transport 2002—has been introduced to date. However, imposing deadlines as a way of expediting formulation of standards could constrain the consultation process and result in inferior standards.

As noted earlier, disability standards may not necessarily be suitable for all areas covered by the DDA. Alternatives to disability standards include self-regulation and co-regulation (discussed below) and guidelines (discussed in section 14.3).

14.2 Self-regulation and co-regulation

Although the Productivity Commission has recommended that the power to make disability standards be extended to all areas covered by the DDA, they might not always be the most appropriate form of regulation in some areas. There might be a role for other approaches that draw on greater involvement by organisations to which the Act applies. HREOC stated that 'consideration should also be given to adding to the DDA more explicit provision for self-regulatory and co-regulatory mechanisms such as are provided in more recent Commonwealth legislation, for example in the area of telecommunications' (sub. 143, p. 52).

The voluntary industry standards developed by the banking industry for Internet and phone banking, EFTPOS facilities and automatic teller machines are examples of self-regulation in the area of disability discrimination. The voluntary standards, developed by the Australian Bankers' Association following a HREOC inquiry into the accessibility of electronic banking services, provide details on how to design, install and operate electronic banking services to improve their accessibility.

As the name suggests, self-regulation involves affected organisations, including industry, formulating rules and codes of conduct, and encouraging compliance with those rules. Inquiry participants were concerned about the lack of enforceability of such mechanisms:

> [Blind Citizens Australia] has seen through the *ad hoc* adoption and implementation of the Australian [Bankers'] Association's disability standards that these documents are often considered aspirational rather than mandatory. Moreover, there is no guarantee that industry standards will actually comply with the DDA. (Blind Citizens Australia, sub. 72, p. 13)

Tasmanians with Disabilities submitted:

> … I use the telecommunications industry. They have been required to self-regulate … and the uptake of the various telcos to sign to the various codes has been a really hard, long and arduous process. It's only when [the Australian Communications Authority] was finally given the power to say, 'You must comply,' that in actual fact some of the telcos have been actually complying with some of the codes. (trans., p. 2174)

Similar concerns were expressed by Dorothy M. Bowes (sub. DR386), Barbara Prideaux (sub. DR340), B. Well (sub. DR258) and D. Buckland (sub. DR252).

On the other hand, co-regulation involves a joint approach by organisations and government. For example, an industry (through industry bodies and their members) could develop and administer codes of conduct which the government formally recognises. Such an approach can be flexible and responsive, especially if initiated by industry. A sense of ownership from the development of codes may encourage a

greater awareness of, and willingness among industries to comply with, the requirements of the DDA.

Codes of conduct could be developed by organisations to eliminate discrimination in the provision of products or services and/or in employment in particular industries. This is one mechanism that could be adopted to address concerns that disability standards for employment cannot adequately reflect the variety of workplace arrangements and business practices that exist.

Codes of conduct could be recognised in the DDA in a number of ways. First, compliance with codes of conduct could be considered if a complaint is lodged, as is currently done with action plans. Blind Citizens Australia (sub. DR269) suggested that this is unlikely to provide sufficient incentives for organisations to develop and adhere to codes. However, as noted, codes of conduct already operate in a number of industries, such as the banking and insurance industries and, though not formally recognised by the DDA, could be taken into account in determining complaints.

A second option could be to allow industry bodies with an adequate code to manage complaints of discrimination about their members in the first instance. Any complainant unhappy with how their complaint was handled could then lodge a formal complaint with HREOC. The Investment and Financial Services Association cited a recent example from the insurance industry:

> … all life insurance companies have an established process of internal complaints handling as well as an independent body to hear complaints unable to be resolved internally. Under recent reforms this process is required to meet minimum standards set by [the Australian Securities and Investment Commission]. The adequacy of these arrangements can be demonstrated by the level of complaints made and frequency of referral to external bodies. (sub. 242, p. 21)

Similar processes are used to address complaints about television and radio broadcasting content (under the *Broadcasting Services Act 1992*) and about violations of privacy codes (under the *Privacy Act 1988*). This option might be possible under the *Human Rights and Equal Opportunity Commission Act 1986* complaints process, because HREOC can refuse to accept a complaint if there is a 'more appropriate remedy available' (s.46PH(1)(e)).

Third, organisations developing and implementing a code could be granted temporary exemptions by HREOC under the DDA. Under its current guidelines, HREOC can link exemptions to a satisfactory action plan. These guidelines could be expanded to link temporary exemptions to the development and implementation of codes of conduct. A variation on this approach would to be amend the DDA to allow HREOC to certify compliance with a code as meeting the requirements of the

DDA. It would have the practical effect of protecting an organisation which complies with the code from complaints under the general provisions of the DDA. Organisations implementing a code would be protected from complaints for a period of up to five years. It could be argued that limiting the period to a maximum of five years reduces certainty for organisations, but it also provides opportunities to update codes over time and ensure that the actions taken by organisations to eliminate discrimination remain appropriate.

The Productivity Commission considers that the benefits of co-regulation, particularly its flexibility to deal with a variety of different circumstances and changes over time, are compelling. The Commission is not suggesting that it be mandatory for industry organisations to formulate and implement codes of conduct, just that this form of regulation be an option.

The Commission considers that HREOC should be able to approve and register codes of conduct, including dispute resolution mechanisms, subject to criteria such as consistency with the objects of the DDA and adherence to good regulatory practice. Consultation is fundamental to developing good regulation, including codes of conduct. Codes of conduct should be certified only after organisations have consulted with stakeholders, including people with disabilities and relevant government departments and agencies. Compliance with a registered code could be linked to exempt or deemed to comply status.

FINDING 14.6

Co-regulatory arrangements—including codes of conduct—between organisations and government could increase awareness of, and willingness to comply with, the Disability Discrimination Act 1992.

RECOMMENDATION 14.5

The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.

14.3 Guidelines and advisory notes

Under the DDA, HREOC may issue guidelines (in practice termed ‘advisory notes’ by HREOC) to assist people and organisations with responsibilities under the legislation to avoid discrimination and comply with their responsibilities (s.67(1)(k)). Examples include the guidelines on insurance and superannuation and the advisory notes on accessibility of world wide web pages.

The main advantage of guidelines over standards and other regulatory measures is their flexibility; they can be easily updated to reflect changes in best practice and precedents set in case law. The Anti-Discrimination Board of NSW noted with respect to employment:

> Guidelines provide a more flexible approach to providing guidance and are more amenable to regular updating as knowledge in this area is likely to change rapidly over time. (sub. 101, att. 2, p. 13)

Their greatest weaknesses are that they are not legally binding or certain. Service providers are not obliged to comply with the requirements and responsibilities set out in guidelines; even if they do, compliance with guidelines is not necessarily a defence if a complaint is lodged. The Investment and Financial Services Association noted:

> … because the law does not recognise the guideline in relation to evidence that supports an insurer's decision (that is, underwriting manuals, census statistics or local and international experience), its usefulness in assisting the sensible cost-effective resolution of complaints may be limited. (sub. 142, p. 28)

Some inquiry participants argued that guidelines would be better than standards at clarifying the general provisions in the DDA relating to education and employment:

> does not consider that the DDA draft Education Standards will give the necessary clarity to schools and in their current format offer little practicable benefit to schools. … [The Association] considers that 'guidelines and best practice', instead of uniform standards, will more effectively enhance both the inclusion of students with disabilities into school communities and the operation of the DDA. (Association of Independent Schools of South Australia, sub. DR357, p. 3)

Similarly, the National Council of Independent Schools' Associations stated:

> Given the difficulties inherent in interpreting the processes outlined in the draft Disability Standards for Education, [our] preference would be for a policy of guidelines rather than standards. (sub. 126, p. 14)

Job Watch recommended that guidelines be developed for employment:

> Job Watch favours the development of guidelines/advisory notes which provide a greater understanding and guidance about what is required by the DDA and retain the necessary flexibility for the proper application of the Act. (sub. 215, p. 5)

Presently, no guidelines exist in the area of employment. HREOC has developed 'frequently asked questions' (FAQs), but these have been criticised for providing little practical advice to employers:

> At present, 'frequently asked questions' serves as the educative material in the area of employment. This information is difficult to understand, provides little or no practical examples which an employer can relate to and is not at all user-friendly. The

> ‘frequently asked questions’ information should not take the place of guidelines in the employment area. (Job Watch, sub. 215, p. 5)

Although not legally binding, guidelines are explicitly recognised in the DDA; FAQs are not. It is important that guidelines be developed in this area, that explain clearly the general provisions of the DDA, including practical examples of the adjustments employers could make to workplaces as well as information on assistance programs. This is particularly important given the Productivity 6Commission’s recommendations to introduce a reasonable adjustment duty and expand the criteria for unjustifiable hardship to include steps taken to obtain assistance for adjustments (see chapter 8).

RECOMMENDATION 14.6

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

14.4 Action plans

Section 60 of the DDA allows ‘service providers’ to develop and implement an action plan. Such plans are voluntary and detail the actions that they intend to take to identify and eliminate discrimination in providing goods or services or making facilities available to people with disabilities. The DDA provides only general indications of what an action plan should contain (box 14.4). HREOC has developed detailed guidelines for each sector and an ‘action plan kit’ to assist organisations to prepare plans.

Once developed, a voluntary action plan can be registered with HREOC, which then makes it publicly available. A service provider’s action plan must be considered in determining unjustifiable hardship in providing services or making available facilities to people with disabilities (s.11(d)). The success of an action plan, in terms of eliminating disability discrimination and as a defence against complaints, will largely depend on the effectiveness of the actions taken.

Box 14.4 **What is in an action plan?**

The action plan of a service provider must include provisions relating to:

(a) the devising of policies and programs to achieve the objects of the Act; and

(b) the communication of these policies and programs to persons within the service provider; and

(c) the review of practices within the service provider with a view to the identification of any discriminatory practices; and

(d) the setting of goals and targets, where these may reasonably be determined against which the success of the plan in achieving the objects of the Act may be assessed; and

(e) the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and

(f) the appointment of persons within the service provider to implement the provisions referred to in paragraphs (a) to (e) (inclusive).

Source: *Disability Discrimination Act 1992*, s.61.

HREOC had registered 305 action plans as at 24 March 2004 (table 14.2). Most plans were submitted by local governments (122), State, Territory and Australian government departments and agencies (73), and tertiary education providers (40). Only two non-government schools and one State education department (Tasmania) registered action plans. Nationally, only 38 action plans were registered by private businesses. Many State government departments and agencies make action plans under State legislation rather than under the DDA. No Northern Territory Government agencies have registered an action plan.

Table 14.2 **Number of registered action plans, March 2004**

Location	*Govt*[a]	*Local govt*	*Schools*	*TAFE*	*Universities*	*Non-govt*[b]	*Business*[c]	*Total*
NSW	12	41	0	1	6	..	..	60
Vic.	5	45	1	5	6	..	..	62
Qld	4	6	0	4	4	..	..	18
SA	13	18	1	5	3	..	..	40
WA	3	5	0	0	0	..	..	8
Tas.	2	5	0	1	1	..	..	9
ACT	1	..	0	1	2	..	..	4
NT	0	2	0	0	1	..	..	3
Australian Govt	33	..	..	..	..	..	..	33
National[d]	..	..	..	0	..	30	38	68
Total	**73**	**122**	**2**	**17**	**23**	**30**	**38**	**305**

[a] Australian, State or Territory government. [b] Includes unions, employer associations, community groups, Skillshares, a folk festival and a church. [c] Includes private companies and a small number of government business enterprises. [d] Businesses or organisations that operate in more than one State. .. Not applicable.

Source: HREOC 2004a.

When implemented effectively, voluntary action plans can proactively reduce the barriers that restrict opportunities for people with disabilities, without those people having to rely on the reactive complaints mechanism. Some inquiry participants were very supportive of voluntary action plans. The National Australia Bank stated:

> … in 1997 the National recognised the need to demonstrate leadership and best practice within financial services to provide equal access … to banking and financial service, products, premises and also to employment opportunities … So we did in 1997 develop a disability action plan which was the first to be lodged with the Human Rights and Equal Opportunity Commission under the Disability Discrimination Act, and we still have that disability action plan in place today … (trans., pp. 1610–11)

Disability Action Inc. commented:

> DDA action plans have been a valuable tool for facilitating change and changing discriminatory practices. … The development of a DDA action plan requires an organisation to spend focused time on considering how organisational practice and attitude might lead to discrimination. The very act of reflecting on organisational practice and attitude can lead to a raising of consciousness and attitude change. (sub. 43, p. 3)

Janet Hope and Margaret Kilcullen (sub. 165), the Leichhardt Council Disability Access Committee (trans., p. 1184) and McDonalds (trans., p. 1609) expressed similar views.

Others acknowledged the theoretical benefits of action plans, but questioned their usefulness in practice. Inquiry participants often regarded action plans as 'paper compliance'—that is, service providers develop and lodge a plan but never act on it. The most commonly cited problems with action plans were:

- the small number registered
- their quality and consistency with the provisions of the DDA
- the lack of monitoring and enforcement of those lodged with HREOC.

Inquiry participants made recommendations to improve the effectiveness of action plans. It was suggested that action plans be made compulsory for certain types of organisation (like all Australian Government agencies or all businesses over a certain size) and that implementation of action plans be monitored and enforced. People with Disability Australia argued 'it would be much better that the action plan process was mandatory and that there was some monitoring agency established around it' (trans., p. 1324).

The Northern Territory Disability Advisory Board (sub. 121), the Physical Disability Council of Australia (sub. 113), the Association for the Blind of WA (sub. 83), Disability Action Inc. (sub. 43), the Disability Rights Network of

Community Legal Centres (sub. 74) and Alexa McLaughlin (trans., p. 646) made similar recommendations. Many cited the action plan and monitoring arrangements for State government agencies in Western Australia and New South Wales (arrangements introduced under the disability services Acts in those jurisdictions). They suggested that HREOC take on a similar role monitoring and enforcing compliance with DDA action plans.

However, mandatory action plans that are monitored and enforced by an independent agency, such as HREOC, may not be a cost-effective means of eliminating discrimination. First, some participants argued that mandatory action plans may be counterproductive. SPARC Disability Foundation Inc. (trans., p. 1057) argued that compulsory action plans would foster resentment among service providers.

Second, a focus on action plans incorrectly implies that only those organisations with an action plan are taking steps to eliminate discriminatory practices:

> Many enterprises have their own internal policies for equal opportunity in employment and, while these may not be cast in the precise terms of an action plan as specified by the DDA, they serve to promote equity in those workplaces and operate to maximise equality outcomes. (Australian Chamber of Commerce and Industry, sub. DR288, p. 8)

Few education providers have prepared and lodged action plans, but they have made other significant attempts to reduce the barriers faced by students with disabilities, such as the guidelines adopted by private schools in South Australia (Association of Independent Schools of South Australia, sub. 135).

A requirement for Australian Government departments and agencies to lodge action plans with HREOC was removed following a review of the Commonwealth Disability Strategy. The evaluation of the Commonwealth Disability Strategy argued that existing mechanisms (such as workplace diversity plans, customer service charters, annual corporate planning processes and output-based budgeting and reporting processes) should be used as the primary means to improve the access and participation of people with disabilities (KPMG 1999) (see appendix E).

Third, the monitoring and enforcement arrangements would be costly to comply with and administer. HREOC noted:

> … we would have to be resourced along the lines of the affirmative action agency to do even … what was assessed as a reasonably minimal job of assessing the reports … we don't think that more money and more power for us is the only way forward in this issue … (trans., pp. 1157–8)

The Productivity Commission considers action plans to be a useful way of addressing the discrimination faced by people with disabilities. The small number

registered with HREOC prompted many inquiry participants to recommend that action plans be made compulsory and that compliance with plans be monitored and enforced. However, this approach ignores the other actions organisations take, generally through internal planning processes, to address discrimination and the costs associated with complying with and administering such a scheme. The Commission recommends elsewhere in this report that organisations be required to make reasonable adjustments (see chapter 8). They may find action plans a useful device for outlining how they intend to make such adjustments.

FINDING 14.7

Action plans can be an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of private organisations have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

FINDING 14.8

Making action plans mandatory would not be a cost-effective way to eliminate the discrimination experienced by people with disabilities.

Section 59 of the DDA defines a service provider as someone who 'provides goods or services; or makes facilities available, whether for payment or not'. HREOC interprets the term 'service provider' very broadly to include government departments and agencies at all levels (for example, Australia Post, local councils, municipal services such as libraries and swimming pools, and public schools), private and public businesses and organisations (such as retailers, solicitors, travel agents, cinemas, banks, broadcasters, transport providers and charitable and religious organisations) and individuals (HREOC 2003a).

The Productivity Commission is concerned that this interpretation of a 'service provider' is not reflected in Part 3 of the DDA as it currently exists. Some organisations reading this part of the Act may interpret action plans as only applying to organisations and their activities covered by section 24 of the Act (discrimination in the provision of goods, services and facilities). That is, that organisations covered under other areas of the Act cannot use action plans as a means of addressing discrimination.

HREOC (2003a) concedes that action plans do not cover employment issues, but suggests that organisations review their employment practices when developing an action plan. The Productivity Commission considers there are benefits in formalising this advice.

One approach would be to amend Part 3 of the DDA to describe in greater detail who can develop and submit an action plan (for example, service providers, employers, sporting associations). Alternatively, part 3 could be amended to extend the ability to develop action plans to all types of organisations operating in all areas covered by the DDA. This second option has the benefit of removing any uncertainty about who can develop an action plan or the activities which can be covered by a plan (such as the provision of goods and services or employment practices). The Productivity Commission prefers the latter approach.

FINDING 14.9

Limiting action plans to 'service providers' unnecessarily restricts their usefulness in eliminating discrimination.

RECOMMENDATION 14.7

The* Disability Discrimination Act 1992 *(Part 3) should be amended to clarify that action plans can be developed and registered by any organisation or person covered by the Act.

15 Other issues

Inquiry participants raised many issues that affect equality of opportunity for people with disabilities. Some of these issues cannot be addressed through amendment to the *Disability Discrimination Act 1992* (DDA) in the same manner as the issues discussed in earlier chapters. They might nevertheless have an effect on the ability of the DDA to achieve its objectives. These issues include: funding arrangements for legal services and the Human Rights and Equal Opportunity Commission (HREOC) (section 15.1), and for disability services in education (section 15.2); employment assistance programs (section 15.3); access to disability and other government services (section 15.4); government procurement policies (section 15.5); and copyright arrangements (section 15.6). Some other concerns are outlined more briefly in section 15.7.

15.1 Funding of legal assistance and HREOC

Many inquiry participants noted inadequate levels of Government funding for legal assistance and HREOC as particular concerns limiting the effectiveness of the DDA.

Funding legal assistance

Adequate legal assistance for people with disabilities is essential to achieving equality before the law (see chapter 9) and can influence the ability of people with disabilities to access the DDA complaints system (see chapter 13). The level of Government funding of legal services is an important factor that affects access to legal assistance for people wishing to pursue complaints under the DDA. It affects both the costs incurred by people with disabilities and the availability of legal assistance. To the extent that the level of funding results in excess demand for subsidised legal services, people with disabilities may need to seek more costly legal options. In this circumstance, reviewing rules for the awarding of costs becomes particularly important (see chapter 13).

Disability Discrimination Legal Services (DDLS) in each State and Territory are the main source of legal assistance for people with disabilities, although other sources of legal assistance are also available (box 15.1). Anita Smith (sub. 127, p. 1)

observed that funding of the national DDLS network aims to ensure that the community is aware, and makes use, of the DDA.

Box 15.1 **Legal assistance available to complainants**

Various options for legal assistance are available for people wishing to complain about disability discrimination.

Disability Discrimination Legal Services are a national network of community legal services that specialise in disability discrimination law. They offer free information, advice and assistance to people with disabilities experiencing discrimination.

A small number of other **community legal services** also provide free legal advice and assistance, but few have specialised knowledge about disability discrimination law and most prefer to concentrate on other areas of expertise.

Advocacy groups do not generally provide legal assistance. Advocacy groups and service organisations often form cooperative ventures with Disability Discrimination Legal Services on systemic complaints. The advocacy group refers the case, and might then support the complainant while the Disability Discrimination Legal Service provides legal assistance. A small number of other disability sector organisations provide legal advocacy on disability discrimination matters, but they have very limited resources for doing so.

***Pro bono* assistance** is sometimes available from law firms. The expression comes from the Latin phrase *pro bono publico* meaning 'for the public good'. While most lawyers who undertake *pro bono* work in Australia contribute their time at no cost to the client, some *pro bono* work is not free, but is done at a substantially reduced fee. *Pro bono* schemes are often run through legal aid agencies or the courts.

Legal aid commissions provide legal advice and legal aid, and can represent eligible complainants in court on a broad range of matters. Legal aid is not necessarily free—the person assisted may be required to make a contribution. Because the demand for legal aid greatly outstrips supply, legal aid commissions generally apply a means test and look at the merits of each case. Many DDA cases do not qualify for legal aid.

Under the *Human Rights and Equal Opportunity Commission Act 1986* (s.46PU), a complainant (or respondent) can apply to the **Attorney General** for legal or financial assistance for proceedings in the Federal Court or the Federal Magistrates Court on the basis of facing hardship.

HREOC cannot assist complainants in the federal courts, apart from helping them to prepare the forms required to apply to the court. HREOC's role is limited to shaping the interpretation of the law as *amicus curiae* (friend of the court). In this role, HREOC may assist the court on points of law but it is not a party to the proceedings.

Source: adapted from Rush Social Research 1999.

A 1999 review of the DDLS found that they 'attempt valiantly to keep up with demand, and identify a high level of unmet need for assistance' (Rush Social

Research 1999, p. 16). Most tried to control their case loads by prioritising cases, focusing on systemic or test cases, and balancing other work such as community development and legal education.

Several inquiry participants commented on continuing perceived underfunding and understaffing of the DDLS. Disability Action Inc. suggested the South Australian service was 'stretched to capacity' (sub. 43, p. 3) and Trevor Oddy commented that the ACT service 'cannot even staff their office on a regular basis' (sub. 58, p. 4). Blind Citizens Australia noted that heavy demand on resources limits the extent to which the services offer 'actual support and representation', rather than basic advice (sub. DR269, p. 27). The Victorian DDLS, which receives some funding from the State Government in addition to its federal funding, commented that resource constraints meant it sometimes turned people away, although it 'will always try and refer them to another organisation so that they are given assistance' (trans., p. 1756). It noted further that its:

> … capacity … to assist in a greater number of cases would be enhanced by funding levels, which accurately reflected the level of need … and the level of funding required … to offer a comprehensive Statewide service. (Disability Discrimination Legal Service, sub. 76, p. 3)

Victoria Legal Aid (sub. DR290) referred to problems in the resourcing of other specialist legal services for people with disabilities, and the reluctance of the private legal profession to accept DDA cases on a 'no-win, no-fee' basis. Legal aid grants currently can be made for DDA cases only if the case has strong prospects of providing substantial benefit both to the applicant and to the public or a section of the public. According to Victoria Legal Aid, these 'narrow' guidelines restrict its capacity to provide legal assistance, with the public interest requirement 'primarily responsible' for it making only three grants of aid for DDA cases in the last two years (sub. DR290, p. 7). It argued that this requirement should be removed to improve access to legal representation (in line with a recommendation of a 1998 review by the Senate Legal and Constitutional References Committee). It suggested further that:

> … legal aid services to people with disabilities should be provided by the Commonwealth Government providing additional funding for that purpose to organisations like [Victoria Legal Aid], community legal centres and specialist legal services such as the Disability Discrimination Legal Service. (sub. DR290, p. 6)

It also suggested that additional funding be provided for essential services not involving legal aid grants, such as the provision of seminars and publications, telephone and duty lawyer services and minor casework.

The apparent limited availability of other legal assistance options for those wanting to bring a case under the DDA makes the role of the DDLS particularly important.

However, the need for these (and other legal services) to prioritise cases does not automatically mean that current funding levels are inadequate or that an increase in resources is justified. The Productivity Commission agrees, however, with the general principle that resources allocated to the legal services should reflect the responsibilities that the services are expected to assume.

In terms of legal aid, the application of funding criteria to the granting of aid is necessary to provide a transparent and consistent allocation of funds across cases. Including a 'public interest test' among these criteria is likely to be efficient in the context of general resource constraints—potentially increasing the overall benefit to the community. However, the public interest is not necessarily limited to cases with systemic implications. There is also a public interest in assisting individuals, especially the most vulnerable, to protect their rights—particularly in cases of serious discrimination, where individuals lack the resources or capability to mount without support what may be a complex case.

The Productivity Commission recognises that, where general resources are severely constrained, allocating funds across these cases involves a difficult balancing act. It is important, however, that the public interest test not be applied so narrowly that it prevents 'socially worthy' cases being taken on—such as those involving people with severe disabilities, difficult cases or those involving complex legal considerations. In practice, broadening the criterion may have little effect without appropriate financial underpinning. To the extent that the criterion is currently so narrow that it prevents cases being taken on even where resources would be available, broadening the criterion may not require significant additional funding. Whether increased funding for legal services is justified needs to be assessed in a broader context, including the relative role of the various providers of legal assistance for DDA cases. Nonetheless, given the importance of complaints in enforcing the DDA, inadequate legal support for people with disabilities could undermine the effectiveness of the DDA in achieving its objectives, particularly in pursuing equality before the law and addressing discrimination (see chapters 9 and 13).

FINDING 15.1

The Disability Discrimination Legal Services make an important contribution to the effectiveness of the disability discrimination complaints process, and to ensuring equality before the law for people with disabilities. Inadequate funding of these services could undermine the effectiveness of the Disability Discrimination Act 1992.

FINDING 15.2

Adopting a public interest criterion for granting legal aid is likely to be efficient given funding limitations. However, the 'public interest' should be broad enough to include circumstances where discrimination is serious and individual complainants lack the resources or capability to mount a case.

Funding of the Human Rights and Equal Opportunity Commission

Many inquiry participants commented on the resource constraints faced by HREOC, with some suggesting these were among the main factors limiting the effectiveness of the DDA. The Disability Council of NSW, for example, argued:

> While HREOC is seen to have an educative role it is under-staffed and under-resourced. The lack of resources and the lack of power to enforce compliance with the legislation are two major factors affecting the effectiveness of the DDA. (sub. 64, p. 20)

A number of inquiry participants referred specifically to the impact of cuts to HREOC's budget. Anita Smith, for example, commented on the impact of budget cuts in 1997-98 on the scope of HREOC's work, saying they 'had the effect of really removing most of the … policy development areas and … skimmed HREOC right back to just its legal complaints handling role' (trans., p. 301). Some, such as the Law Institute of Victoria (sub. 81, p. 1) and the Anti-Discrimination Commission Queensland (sub. 119, p. 7), suggested the need to restore funding to at least the levels prevailing before 1997-98.

One reason for budget cuts that year was anticipation of the removal of HREOC's hearings functions (see chapters 4 and 13). HREOC also faced problems with cooperative arrangements with the States and Territories, which it considered added to complaint handling costs. HREOC closed off these arrangements.

The Productivity Commission notes that HREOC needs sufficient resources to perform the functions expected of it. Many findings and recommendations in this report—such as those relating to HREOC's role in education and awareness (see chapter 10), reviewing legislation for consistency with the DDA (see chapter 9), and cooperation with the States and Territories (see chapter 13)—have potential resource implications. The increased use of disability standards (see chapter 14) and introduction of a reasonable adjustment duty (see chapter 8) may also have implications for HREOC's complaints handling role, although their net impact is unclear. On one hand, a reasonable adjustment duty creates another potential ground for complaint. On the other, standards may decrease the need for individual

complaints. However, complaints about breaching standards can still be made, and they may divert complaints from the State and Territory systems.

More effective use of existing resources, such as enhanced links with other organisations, can moderate the extent to which additional resources are required for any additional work. That said, as noted in this section (and chapter 10), inquiry participants suggested that resource constraints have undermined HREOC's effectiveness in some areas. Any significant additions to its responsibilities are, therefore, likely to require additional resources for it to undertake them effectively, particularly given its ongoing role in handling complaints. As noted in chapter 13, the Productivity Commission's preferred approach to reforming the DDA and HREOC's complaint handling process may also have implications for the administration of other federal anti-discrimination Acts. The full impact of the Commission's recommendations on HREOC's resources needs to be assessed in this broader context.

FINDING 15.3

The Human Rights and Equal Opportunity Commission needs sufficient resources to match its responsibilities if it is to undertake its functions effectively. Insufficient funding could undermine the overall effectiveness of the Disability Discrimination Act 1992.

15.2 Government funding for students with disabilities

The number and proportion of students identified as having a disability increased significantly in all education sectors in the 1990s (see chapter 5 and appendix B). Many inquiry participants' concerns about disability discrimination in education related to government funding arrangements for students with disabilities in mainstream schools. Concerns were also expressed about the availability of assistance for tertiary students with disabilities.

Disability funding in schools

Government funding arrangements for students with disabilities attending Australian schools are complex. They involve mainstream and special schools, at both primary and secondary level, that are operated by three major school sectors (government, Catholic and other non-government) and funded by two levels of government (box 15.2).

Box 15.2 **Disability funding arrangements in schools**

Special funding to assist and support students with disabilities in mainstream schools is provided by Australian, State and Territory governments through various programs. The amount of government funding available to assist students with disabilities and their schools can depend on a range of factors, including: the type and severity of the disability; State or Territory of residence; school sector (government, Catholic or other non-government); regional or remote location; socioeconomic status; and other sources of disadvantage that are relevant to school funding programs.

The Australian Government assists schools with students with disabilities on a per capita basis with the Strategic Assistance Programme. Other Australian Government programs that are not directly earmarked for students with disabilities can also be used (DEST 2003; Australian Association of Christian Schools, sub. DR268, att. 1, p. 3). The Australian Government recently announced additional funding for students with disabilities and other disadvantaged school students through a new Special Learning Needs Programme (Nelson 2004).

State and Territory governments operate government schools and provide resources to non-government schools. The level and distribution of resources for students with disabilities varies considerably across States and Territories. This variability is due partly to different eligibility criteria, and partly to different levels of education funding more generally. It is also evident in funding for students without disabilities (SCRGSP 2004).

There is much debate about the level and distribution of government funding to assist school students with disabilities. Funding arrangements for school students with disabilities were considered, among other issues, by the Senate Inquiry into Education of Students with Disabilities in 2002 (Senate 2002). That inquiry recommended the introduction of national disability standards for education, with all governments to contribute to the cost of implementation. It also recommended that the Department of Education, Science and Technology explore a scheme to assist students to purchase assistance equipment. It did not, however, recommend changes to the level or distribution of Commonwealth funding for disability programs or services in schools or other education institutions (Senate 2002).

School funding arrangements elicited comments from many inquiry participants, especially those from the non-government schools sector. Inquiry participants were highly supportive of integrated, mainstream education for school students with disabilities (see appendix B), but were concerned that their integration has not been supported with adequate resources, staff training and specialist education assistance (Australian Education Union (AEU), sub. 39; Action for Community Living, sub. DR330, p. 1; People with Disability Australia, sub. DR359, pp. 11–12, trans., p. 2477; and submissions from various non-government schools associations).

More specific disability funding issues in schools for inquiry participants included:

- the level and distribution of special funding for students with disabilities in non-government schools, relative to government schools, with several participants arguing that students with disabilities in non-government schools receive less financial assistance from governments than if they attended a government school (Association of Independent Schools of South Australia, sub. 135; Association of Independent Schools Victoria, sub. 99; Australian Associations of Christian Schools, sub. 148; National Council of Independent Schools Associations, sub. 126; National Catholic Education Commission, sub. 86; Association of Independent Schools Northern Territory, Alice Springs visit notes)
- the advantages of 'earmarked' government funding for students with disabilities relative to general purpose education funding (including capital works or building maintenance grants), some of which may also be used to make adjustments for students with disabilities, but may be less transparent than 'earmarked' funding (Australian Education Union, sub. DR313)
- different government funding levels across States and Territories for school students with similar disabilities—the Australian Association of Christian Schools claimed, for example, that a profoundly disabled student in a non-government school in Western Australia would have received $17 000 in 2001, while in other States, a student with a similar level of disability 'would have been fortunate to attract $5000' (sub. 148, p. 5)
- the extent to which students with disabilities (in both government and non-government schools), their families and their schools must meet their own adjustment and support costs—the Association of Independent Schools of Victoria claimed, for example, that in its member schools in 2002 the State Government paid 38 per cent of disability assistance costs and 'parents and schools contributed the remaining 62 per cent' (sub. DR320, p. 2)
- shortages in regional areas of accessible school transport, teaching aides and specialist teaching staff in both government and non-government schools (AEU, sub. 39; see also Senate 2002; DEST 2003; Royall 2003).

Effects of funding arrangements on school students with disabilities

Inquiry participants said these education funding issues have had adverse effects on school students with disabilities. Schools associations, disability groups and individuals suggested that the unequal distribution of government resources decreased the educational choices available to students with disabilities, relative to the choices available to students without special education needs. Participants said students with disabilities are encouraged to enrol in government schools, despite

their preference for a non-government school, due to uneven funding arrangements. The Royal Institute for Deaf and Blind Children (sub. 97, p. 5) said its biggest issue in education 'is the inadequacy of funding support … to allow students with disabilities … to opt for integrated education in non-government schools'. Tom Byrnes (sub. 46, p. 2) similarly commented that although students 'are not denied the right of choice under the present funding arrangements … they are certainly severely penalised' if they attend a non-government school.

The consequences for disability discrimination of uneven funding arrangements were highlighted by Queensland Parents for People with Disability, which stated:

> … the non-government sector uses the lack of resources to exclude students with disabilities. … even students with modest support needs are being refused enrolment. ... Some non-government schools actively discourage parents from enrolling by informing them that they cannot afford to support their son or daughter. (sub. DR325, p. 2)

Many participants also complained about more general effects of resource shortages for school students with disabilities. They said these shortages have put pressure on the resources schools can devote to other students or demands (such as upgraded facilities for all students), which can cause tension within school communities. They can also limit the extent to which the educational needs and preferences of students with disabilities can be met, regardless of a school's obligations to make adjustments or provide assistance under the DDA or under education regulations (Association of Independent Schools of South Australia, sub. DR357; AEU, sub. 39; see appendix B). As a result of shortages in specialist resources and professional skills, the National Council of Independent Schools Associations suggested:

> … it may not be appropriate that every individual school be expected to meet the needs of students with disabilities, especially those requiring very specialist assistance. (sub. 126, p. 5)

Conclusions on funding arrangements for school students with disabilities

Funding arrangements for disability support in Australian schools are outside the direct scope of the DDA—that is, the DDA cannot be used to make a complaint about them (section 15.4). Rather than involving disability discrimination *per se*, many concerns described by inquiry participants about disability funding in schools appear to arise from: differences in funding levels across school sectors; differences in funding across States and Territories; and, especially in regional locations, shortages in education resources and skills more generally. These differences in access to government resources appear to be reducing education choices and participation for school students with disabilities, in a way that does not affect other school students.

Nevertheless, school funding arrangements can have indirect implications for the operation of the DDA. They may, for example, expose schools to claims of disability discrimination, to the extent that insufficient resources limit schools' ability to make adjustments for, or supply adequate services to, students with disabilities. On the other hand, funding arrangements may mean that some schools are more likely to be able to argue legitimately that providing adjustments or assistance for students with disabilities would cause unjustifiable hardship. The affected schools would then lawfully be able to exclude those students from enrolment or certain activities (see chapter 8). In these cases, government funding arrangements may contribute to incidences of (lawful) disability discrimination.

The Productivity Commission considers that government education funding arrangements should aim to ensure that school students with disabilities have the same range of education choices as do other students. Their choice of school should be influenced by the same factors—such as location, income, culture, religion and education needs—as for other students. This objective could be assisted by linking a greater proportion of special education funding to individual students, rather than to the school or the sector. In this approach, schools could still receive the special funding, but the funding would 'follow' an individual student with a disability if he or she changed schools (see also the discussion of portable access grants in employment—section 15.3). This would require a degree of flexibility in funding levels and in distribution mechanisms (to allow, for example, for changes in the number and assistance needs of eligible students as they move schools).

On the other hand, it seems more efficient to allocate funding for 'one-off' adjustments (such as to buildings and facilities) to schools or sectors as needed, rather than to individual students. In its response to the Senate (2002) inquiry report, the Australian Government noted that these and other disability funding issues need to be considered within the broader context of education planning, and the many competing demands across all areas of schools education.

FINDING 15.4

To the extent that insufficient resources limit their ability to make adjustments for students with disabilities, schools could be exposed to claims of disability discrimination. Insufficient resources could also contribute indirectly to disability discrimination by leading some schools to claim unjustifiable hardship under the Disability Discrimination Act 1992.

Disability funding in tertiary education

As with schools, funding arrangements in tertiary education involve many education providers (Technical and Further Education (TAFE) colleges, universities and some private colleges) and two levels of government. Most government funding for tertiary students with disabilities is paid to institutions rather than to individual students (Selby-Smith and Ferrier 2003) (box 15.3).

Box 15.3 **Disability funding arrangements in tertiary education**

Funding for individual students with disabilities. Eligible students with disabilities can receive a Disability Support Pension while studying. If their course of study is approved by Centrelink, they are also eligible for a Pensioner Education Supplementary Allowance, subject to income and assets tests (Centrelink 2004).

Funding for vocational education and training (VET) providers. National programs aimed at improving VET opportunities for people with disabilities include 'Bridging Pathways', the Equity Development and Training Innovation Programme, Disability Coordination Officer Programme, Disabled Apprenticeship Wage Support Programme (which provides wage supports to employers taking on an apprentice with a disability), and the New Apprenticeships Access Programme (which assists disadvantaged jobseekers, including those with disabilities, undertake apprenticeships) (DEST 2003; Gillies and Knight 2001). State and Territory governments also provide 'a mixture of base funding to institutions, together with additional funding for special purposes' and students with high support needs (Selby-Smith and Ferrier 2003, p. 4).

Funding for universities. The Higher Education Equity Program targets six equity groups, including people with disabilities (James et al. 2004). Around 10 per cent of this program's funds are spent on Disability Liaison Officers, support services and equipment for students with disabilities (DEST 2003; Devlin 2000). The Additional Support for Students with Disabilities Programme commenced in 2001 to support university students with 'high support needs' (DEST 2002b, p. 94).

Education adjustment costs are typically divided into systemic and individual costs. Institutions typically meet systemic and one-off costs (such as disabled car parking, staff training and building access) from their general budgets. Ongoing support costs for individual students are met by special government programs paid to institutions, by students and by community organisations (in the form of free or reduced cost assistance services) (Andrews and Smith 1992; Jones 1994; Devlin 2000).

Concerns about these various forms of support for tertiary students with disabilities have long been noted. In 1999, a small-scale survey of university students with disabilities found two-thirds of them had difficulties obtaining assistive technologies due to 'lack of resources and the [high] cost of the devices'. Similar

inadequacies have also been noted for disability resources in surveys of TAFE staff and students (Leung et al. 1999, cited in Devlin 2000, pp. 17–19; see appendix B).

Fewer comments were received from inquiry participants about tertiary education than about schools. But, as with schools, participants commented on the resources and support services available to tertiary students, rather than on incidences of discrimination *per se* (People With Disability Australia, sub. DR359, p. 12; ParaQuad Tasmania, sub. 106, p. 3; Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 6; see appendix B). Peter Young (sub. 199, p. 1) questioned the transparency of disability funding paid to tertiary institutions, which he claimed 'comes in a non-transparent packet'.

Some students with disabilities qualify for a supplementary education allowance (box 15.3). ParaQuad Tasmania suggested an additional 'physical disability cost of living allowance' and a 'home computer/software/Internet package' to help people with physical disabilities cover their additional costs (such as for transport and assistance equipment) in education (sub. 106, p. 3).

Disparities in resources for adjustments across tertiary education institutions also appear to be of concern to education staff. Universities that develop a reputation for making adjustments and providing good support services have tended to attract more students with disabilities ('on the bush telegraph') but have not necessarily attracted additional government funding to meet additional support costs (Devlin 2000, p. 21; see appendix B).

As noted in relation to funding for schools, funding for ongoing tertiary education support services might promote equality of choice for students with disabilities more effectively if it were more closely linked to the needs of individual students (for example, in the form of a portable access grant). For other types of adjustment and support costs (typically those that are 'one-off' or that can be effectively pooled), it seems more effective for special funding to be paid on a 'per institution' basis. Both types of funding arrangement—individual and institutional—are currently in place (box 15.3). The Productivity Commission also notes the significant impact that funding for tertiary students with disabilities can have on those students' employment prospects.

15.3 Government employment assistance programs

Governments attempt to improve employment opportunities for people with disabilities in several ways—providing assistance to (potential) employees with disabilities and/or to employers of people with disabilities—in both open

employment and business services.[1] This can complement anti-discrimination legislation by overcoming information failures and partly offsetting the adjustment costs required to allow people with disabilities to take advantage of employment opportunities. The Australian Government currently has several employment programs relating to people with disabilities. There are three sources of assistance for job seekers and/or workers with disabilities—Disability Employment Assistance (DEA) services, Vocation Rehabilitation Services (VRS) and, for those not eligible for either of these, mainstream Job Network services (which also provide some specialist disability services) (box 15.4).

Box 15.4 **Employment assistance provided to people with disabilities**

The Department of Family and Community Services (FACS) provides funding under the *Disability Services Act 1996* for two types of employment services provided to people with (moderate to severe) disability, with access provided through Centrelink.

- Disability Employment Assistance (DEA) services (provided at more than 850, mainly non-profit outlets, Australia-wide) assist people with disabilities to gain and/or retain paid employment in the open labour market (open services), or provide support and employment to people with disabilities in business services. In 2002-03, FACS allocated $303.71 million to these services.
- Vocational Rehabilitation Services (VRS) (provided by CRS Australia through 160 sites nationally) provide vocational rehabilitation programs to help people with disabilities, whose work capacity has been affected by work injuries, to gain/regain unsupported paid work. FACS allocated $113.2 million to these services in 2002-03.

Those not eligible for DEA or VRS can seek assistance through the Job Network, funded by the Department of Employment and Workplace Relations. It provides mainstream employment assistance, as well as services targeted to 'special needs groups', including people with (low to moderate) disability. Individualised Intensive Support can be provided, if needed, with specialist disability Intensive Support providers operating in 27 (of the 1160) sites. Those eligible for Intensive Support may be able to access funding through the Workplace Modifications Scheme (box 15.5) when placed in a job, and can also be referred to complementary programs (including some targeting people with disabilities) provided by Australian and State and Territory governments. People with disabilities comprise around 14 per cent of those receiving Intensive Support. The Job Network is currently helping about 63 000 job seekers with a disability, most of whom have physical disabilities. In 2002-03, almost half those with disabilities were in employment or education/training three months after participation in employment services, but positive outcomes were lower than for job seekers generally.

Sources: Department of Employment and Workplace Relations, sub. DR299; FACS, sub. DR362 and att. 1.

1 'Business services' (previously known as 'sheltered employment') provide government subsidised employment for people who are unlikely to obtain employment in the open market.

There is also an Employer Incentives Strategy—incorporating a Workplace Modifications Scheme (WMS), Wage Subsidy Scheme (WSS), Supported Wage System (SWS), and Disabilty Recruitment Coordinator (DRC) service—to help offset, at least in part, costs faced by employers of people with disabilities (box 15.5).

In addition, the Australian Government provides financial and practical assistance to employers wishing to employ apprentices with disabilities (box 15.3). Overall, the Department of Family and Community Services (FACS) allocated over $400 million in funds to the DEA and VRS in 2002-03, and $7 million to the programs operating under the Employer Incentives Strategy (boxes 15.4 and 15.5). State and Territory governments also operate their own schemes to facilitate public and/or private employment of people with disabilities.

Outcomes of current programs have been mixed. In 2001-02, DEA service providers, CRS Australia and the Job Network helped about 245 000 people with disabilities find jobs and stay in the workforce (FACS, sub. DR362, att. 1). This represented a relatively small proportion of the total labour force with a disability (which was about 1.1 million in 1998 (ABS 1999b)).

A review of the Employer Incentives Strategy (FACS, sub. 362, att. 1) found employers appreciated the single point of contact provided by recruitment coordinators, and were particularly supportive of the WMS and SWS. ACE National Network referred to the SWS as 'an excellent affirmative action initiative … that has open[ed] up doors to integrated mainstream employment for over 5000 workers with more significant disabilities', and saw it as a 'viable alternative to segregated employment through Business Services' (sub. DR361, p. 3).

Various perceived problems with the current arrangements have been highlighted in this inquiry and in other reviews. These include:

- apparent unwillingness of CRS Australia to help an actor with a disability search for employment 'because I'm in the too-hard basket' (Media Entertainment and Arts Alliance, trans., p. 2288)
- cases where specialist disability employment agencies and Job Network services have refused to pay for Auslan interpreters for deaf clients, meaning that some deaf people continue to use specialist employment services offered by Deaf Societies instead (Australian Federation of Deaf Societies, sub. DR363)
- lack of expertise of mainstream employment service providers in relation to people with disabilities, and the lack of resources to provide them with those expertise (ACE National Network, sub. DR361)

Box 15.5 **The Employer Incentives Strategy**

FACS provides funds ($7.0 million in 2002-03) for a range of employer incentive schemes to help with the additional costs of employing people with disabilities. These are available to all employers, including Australian Government organisations.

The ***Workplace Modifications Scheme*** (WMS) reimburses employers for the costs of modifying the workplace or of buying special equipment for new workers with disabilities. A cap of $5000 applies, but this can be varied. Between 1998 and 2002, $2.7 million was paid to 1096 employees, involving 1006 employers (mainly service providers). The average reimbursement per modification was $2200; the highest 20 ranged from $7815 to $14 636. This average varied across disabilities—the highest being for workers with visual impairments, followed by those with psychiatric disabilities. People with visual impairments received the most approved applications between 1998 and 2002, followed by those with physical disabilities. The number of approvals has decreased over time; 25 per cent of applications were rejected in 2002.

The ***Wage Subsidy Scheme*** (WSS), started in January 1998, provides financial incentives for employers to employ workers with disabilities under normal labour market conditions. It allows the wages of a worker with a disability to be fully or partially subsidised for 13 weeks, to a maximum value of $1500. The WSS has helped about 12 400 workers, with over 40 per cent having an intellectual disability. Funding of $2.1 million provided around 2000 job placements at $1088 per worker in 2001-02. Subsidies represented about half the worker's average weekly wage on average. Scheme use and expenditure have decreased over time. Businesses with fewer than 20 employees are most likely to access the scheme.

The ***Supported Wage System*** (SWS) enables people with disabilities to be paid according to their level of workplace productivity in the open workforce. Eligible workers undergo an independent assessment to measure their productivity relative to other workers in the workplace who undertake the same or similar job. Employers pay a wage commensurate to the assessed productivity. Between 2002 and 2003, 3010 employees were involved in the SWS, most having an intellectual disability (people with physical disability and acquired brain injury being the next most represented groups). Most were employed as labourers or factory hands but there are increasing positions in service industries. Overall demand for the SWS is increasing.

The ***Disability Recruitment Coordinator*** (DRC) service helps companies with 100 or more employees to employ people with disabilities. DRCs work across several employers, linking them with a number of DEA providers. They broadcast information about employers' vacancies to DEA providers, pool and quality check applications, refer applications to employers, and work with mainstream recruiters to increase their awareness of job seekers with disabilities and to change recruitment processes. There is a DRC in five States—NSW, Queensland, SA, Victoria, WA. Each uses different methods to achieve contracted outcomes but some work together to meet the needs of national companies. In the two years to 2003, DRCs, funded by $2.2 million, exceeded their 900 contracted placements (no extra funds are provided for exceeding targets).

Sources: FACS, sub. DR362 and att. 1.

- inconsistencies in funding approaches across programs—ACE National Network argued, for example, that applying a cap to the DEA program but not to the Job Network means the Australian Government is treating 'disabled jobseekers who need additional support less favourably than non-disabled jobseekers who have an entitlement to an appropriate employment service' (sub. DR361, p. 5)
- lack of awareness of the various schemes among employers (Australian Chamber of Commerce and Industry, sub. DR288; Australian Industry Group, sub. DR326; ACE National Network, sub. DR361)
- lack of an integrated approach to the various programs (ACE National Network, sub. DR361; FACS, sub. DR362, att. 1)—the review of the Employer Incentives Strategy noting it was not designed as an integrated package, the components originating 'at different times to fulfil specific needs' (FACS, sub. DR362, att. 1, p. 3)
- concerns about the administration of, and access to, the WMS and SWS, and about the quality of SWS productivity assessments (FACS, sub. DR362, att. 1).

Various suggestions to overcome these perceived problems have been made, involving a more integrated approach to program provision, collaborative research and program design, improved marketing and information provision, and improved processes within particular programs (Australian Chamber of Commerce and Industry, sub. DR288; Australian Industry Group, sub. DR326; ACE National Network, sub. DR361; FACS, sub. DR362, att. 1).

A number of inquiry participants also referred to the need to change program funding arrangements (box 15.6). The Anti-Discrimination Commission Tasmania (sub. 136), Job Watch (sub. 215), Blind Citizens Australia (subs 72, DR269) and UnitingCare Australia and UnitingCare NSW.ACT (sub. DR334) were in favour of increased government funding of workplace adjustments, especially in small-to-medium businesses. Janet Hope in conjunction with Margaret Kilcullen (sub. 165), Anti-Discrimination Commission Tasmania (sub. 136), Blind Citizens Australia (sub. DR269) and Ability Technology Limited (sub. DR295) supported the introduction of portable access grants (discussed below).

Increasing resources for disability employment programs might also improve employment opportunities for people with disabilities, but significant funding increases would be required to make substantial inroads into overall unemployment. Although funding of these programs is likely to be a helpful complementary exercise, it might not be effective if people with disabilities continue to face discrimination in the labour market. Moreover, increasing resources in areas such as business services would produce very different outcomes to those that would result from lowering discrimination in mainstream employment. Nonetheless, to maximise

the potential impact of these programs, it is important that they operate as effectively as possible (which may or may not involve increased funding).

Box 15.6 **Inquiry participants' views on funding workplace adjustments**

The broad Government role in funding adjustments

- To avoid delays in provision, governments could fund adjustments based on an estimate of their cost, with the onus on the employer to justify any cost overruns subsequently. (Jobwatch, sub. 215)
- Government funding has the advantage of encouraging employees with disabilities to reveal any adjustment needs they have at the hiring stage. At present, candidates might refrain from doing so for fear of missing out on the job, with detrimental consequences on productivity. (Blind Citizens Australia, sub. 72)

A portable access grant

- 'If you are bringing equipment with you, rather than the employer suddenly having to fund it, then you're much more likely to get a job … than you are if they're going to have to worry about questions of unjustifiable hardship and all the things that come up later' (Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 7).
- Grants should be made available prior to a person with a disability entering the workforce, so the productive potential of a job candidate can be adequately assessed by employers. This would increase both the demand for the labour of people with disabilities—because of greater demonstrated productivity—and the supply of such labour. (Ability Technology Limited, sub. DR295, trans., p. 2307).

The Productivity Commission sees particular merit in government programs that offset, at least in part, the costs to employers of adjustments that might be needed when employing people with disabilities (see chapters 6 and 8). These programs increase efficiency, equity and the opportunities for people with disabilities to participate as equals in society. However, problems with the scope, coordination and awareness of current programs hinder their effectiveness and create uncertainty among employers about the benefits and costs to them of adjustments.

Improving the operation and awareness of these programs is, therefore, vital. Collaborative approaches—such as in research, policy design and implementation—are likely to be particularly effective (see chapter 10).

Changes to program funding also need to be considered. Current arrangements appear heavily skewed to funding job placement activities rather than employers' adjustment costs. Notwithstanding the importance of job placement assistance, the Productivity Commission considers that more emphasis could be given to adjustment cost funding to address problems people with disabilities face in

employment. This is especially the case given the influence employer (mis)perceptions about cost appears to have on their decision to employ people with disabilities (see chapter 10). Merely shifting the emphasis to funding adjustment costs is not sufficient, however. The effectiveness of any arrangements depends vitally on how the funds are allocated—to the employer once an employee is hired, or to an employee prior to employment, for example.

The provision of a portable access grant to individuals prior to their seeking employment could have several advantages. First, it would allow people with a disability to familiarise themselves with adaptive equipment prior to entering the labour force. Thus, when applying for a job, they would be able to be assessed on their full productivity. Second, it would remove any incentives that might exist for job candidates not to seek adjustments because they foresee an employer's negative response. Third, it would reduce delays in the employee reaching full productivity. Finally, portable grants would encourage employee mobility and thus enhance the quality of job matches in the labour market.

The portable access grant would need to be adjusted for the type and severity of the disability requiring adjustment. Where adjustments need to be tailored to a particular workplace, the person with the disability could opt to transfer the money to the employer, to be used in a way that is mutually satisfactory. This could be especially attractive to organisations that specialise in recruiting people with disabilities and have, thus, already made adjustments benefiting a particular type of disability (for example, the purchase of a site licence for a voice-activated typing package). Such organisations could accumulate individual grants to offset the cost of their investment.

Portable access grants might also be effective in education (section 15.2), and other areas.

RECOMMENDATION 15.1

The Australian Government should review the effectiveness of the various schemes it uses to subsidise the costs to organisations of adjustments needed by people with disabilities. This review should consider the merits of portable access grants that would contribute to the costs of adjustments required for participation in employment and education.

The possible role of government procurement policies in promoting employment of people with disabilities is discussed in section 15.5.

15.4 Access to disability and other government services

Many inquiry participants criticised arrangements governing the establishment, eligibility criteria, adequacy and appropriateness of services provided specifically to people with disabilities. Specific concerns raised included the sexual abuse of people with disabilities in institutions, the availability of respite care to alleviate the pressure on families and carers, and institutional and community accommodation for young people with disabilities. UnitingCare Australia and UnitingCare NSW.ACT and Dorothy Bowes (ASEHA Queensland), for example, commented on the impact of housing young people with disabilities in nursing homes, due to a lack of accommodation options specifically for people with disabilities. Dorothy Bowes noted the distress this can cause people with disabilities (trans., p. 1992), while UnitingCare Australia and UnitingCare NSW.ACT commented:

> … 2 per cent of the residents of our aged care nursing home facilities are indeed younger people with impairments, [so] we have to do something about making it possible for those people to have community networks and links which overcome their existing loneliness and isolation … (trans., pp. 2969–70)

The Commonwealth State/Territory Disability Agreement (CSTDA) (the third in a series of such agreements) provides a framework for the provision of specialist disability services, defining the roles and responsibilities of the Australian, State and Territory governments in the provision of certain services to people with a disability. The Australian Government is responsible for the provision of specialist employment services for people with disabilities, while the States and Territories are responsible for all other specialist disability services funded under the agreement, including accommodation support services, respite care services, and community access programs such as day programs (CSTDA).

Among other things, the CSTDA recognises 'that people with disabilities have rights equal with other members of the Australian community, and should be enabled to exercise their rights or be accorded these rights' (CSTDA, p. 2), and it contains measures to protect these rights. The National Disability Services Standards have been adopted by all jurisdictions as the basis of quality assurance for disability services (box 15.7), and the CSTDA requires each jurisdiction to ensure these standards are 'upheld and monitored' (ss.6(3), 6(5)).

There is no automatic right of access to services under the CSTDA. Eligibility for services is assessed on the level of disability and the need for services, and access is often subject to the availability of places. The Australian Institute of Health and Welfare estimated unmet need in 2001 of:

- 12 500 people needing accommodation and respite services
- 8200 places needed for community access services

- 5400 people needing employment support (AIHW 2003b).

Box 15.7 **National Disability Services Standards**

First adopted by all jurisdictions in 1992-93, the National Disability Services Standards were amended in 1997. The current standards are as follows.

1 Service access. Each consumer seeking a service has access to a service on the basis of relative need and available resources.

2 Individual needs. Each person with a disability receives a service which is designed to meet, in the least restrictive way, his or her individual needs and personal goals.

3 Decision making and choice. Each person with a disability has the opportunity to participate as fully as possible in making decisions about the events and activities of his or her daily life in relation to the services he or she receives.

4 Privacy, dignity and confidentiality. Each consumer's right to privacy, dignity and confidentiality in all aspects of his or her life is recognised and respected.

5 Participation and integration. Each person with a disability is supported and encouraged to participate and be involved in the life of the community.

6 Valued status. Each person with a disability has the opportunity to develop and maintain skills and to participate in activities that enable him or her to achieve valued roles in the community.

7 Complaints and disputes. Each consumer is free to raise and have resolved, any complaints or disputes he or she may have regarding the agency or the service.

8 Service management. Each agency adopts sound management practices which maximise outcomes for consumers.

9 Employment conditions. Each person with a disability enjoys comparable working conditions to those expected and enjoyed by the general workforce.

10 Training and support (former standards 10 and 11 amalgamated). The employment opportunities of each person with a disability are optimised by effective and relevant training and support.

11 Staff recruitment, employment and training. Each person employed to deliver services to the service recipient has relevant skills and competencies.

12 Protection of human rights and freedom from abuse. The agency acts to prevent abuse and neglect and to uphold the legal and human rights of service recipients.

The National Disability Service Standards apply to all services receiving funding under the CSTDA. Jurisdictions can impose standards over and above these. Most jurisdictions enter service agreements with providers and link funding to the attainment of objectives closely related to the standards. All federally funded employment services are to be certified against the standards before 31 December 2004.

Source: FACS 2003, pers. comm., 9 September.

The Productivity Commission recognises the importance of access to disability services, which play a significant role in enabling people with disabilities to take advantage of opportunities to participate in the life of the community.

The provision of such services can involve difficult decisions about the allocation of resources. The Productivity Commission considers that the CSTDA arrangements provide a transparent mechanism by which governments determine eligibility criteria and the nature of services to be provided for people with disabilities. The CSTDA's objective (s.4(1)) recognises that government resources are limited and that services must sometimes be rationed, by affirming the governments' 'commitment to the principles and objectives of the *Disability Services Act 1986* (Commonwealth)'. Section 3(2) of that Act refers to the need to have regard to limited resources and to 'consider equity and merit in accessing those resources'.

The Productivity Commission considers that it is not appropriate to require courts to second-guess government resource allocation decisions by expanding the scope of the DDA to cover questions of the establishment, funding or eligibility criteria of disability services (although the DDA should apply to the administration of these services—see chapter 12). Apart from the issues allowing this would raise—such as who would bring the complaint, and who would assess what 'needs' were and whether they were met (essentially political decisions about competing social policies)—there are existing complaint mechanisms for disability services, including State and Territory disability commissions and ombudsmen (see chapter 13).

As well as concerns about the nature and funding of disability services, a number of inquiry participants cited problems in how mainstream government services and programs are administered. Some of these problems related to difficulties meeting standard requirements for social services. These included:

- problems for some people with complex communication needs, who can find it difficult to provide information in particular (for example, written) formats or to meet time limits applied to appointments with agencies such as Centrelink (International Society for Augmentative and Alternative Communication, Australian Chapter, sub. 182, p. 4)
- problems for some people with mental health conditions in meeting activity or participation requirements for welfare payments (Mental Health Council of Australia, sub. 150, pp. 17–18).

Other concerns related to the impact of certain requirements on carers, such as the need to repeat paperwork every few years to ensure payments continue, even for those with 'permanent' disabilities (Jean Young-Smith, trans., p. 84), and a lack of

help to fill in forms, which can be a particular problem for carers from non-English speaking backgrounds (Disability Coalition, trans., pp. 826–7).

The Productivity Commission acknowledges the need to have some standard processes and eligibility criteria for these services and payments. It may not be possible to eliminate the problems that these processes can create in particular cases. Attempts to do so can be made difficult by people's non-disclosure of their disabilities. However, it seems desirable that some flexibility be incorporated into processes to address the particular needs of these groups. In some cases, it may not only be desirable but also an implied obligation under the DDA to make such adjustments, given that it covers the administration of Commonwealth laws and programs (see chapter 4). This obligation would be strengthened by some recommendations of this inquiry—specifically, that decisions made under other laws that have a discriminatory effect (and are not subject to a specific exemption) could be subject to a DDA complaint (see chapter 9), and the introduction of an explicit reasonable adjustment duty (see chapter 8).

FINDING 15.5

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

15.5 Government procurement policies

Some countries have used government procurement policies to try to improve outcomes for particular groups that face discrimination (ILO 2003). Such policies can be used to influence the supply of goods and services (accessible technologies, for example) or the behaviour of vendors as employers.

Influencing the supply of accessible goods and services

Government procurement guidelines are issued by the Department of Finance and Administration and were last updated in February 2002 (DOFA 2002). Their purpose is 'to provide a policy framework to assist and ensure that Government agencies achieve value for money in their procurement activities' (DOFA 2002, p. 4). One section of the guidelines identifies 'additional Commonwealth legislation and policies that may have an impact on procurement decisions', which agencies 'should consider applying … to their outsourced service providers on a case-by-case

basis'. It is noted that 'agency officials must have regard to the Commonwealth Disability Strategy in their procurement decisions' (DOFA 2002, pp. 17–18).

Some see the current approach as inadequate—Jolley (2003, p. 53) noting 'such a tentative first step towards an inclusive procurement policy has been frustrating for consumer advocates'.

This view was echoed by some inquiry participants, who suggested the Australian Government adopt a procurement policy for information and communication technology similar to that in place in the United States and proposed in some other countries (box 15.8) (National Information and Library Service (NILS), sub. 206, pp. 1–2, trans., p. 1942; TEDICORE, sub. 122, pp. 2–3). Jolley (2003, p. 100) noted that the US government 'uses the federal procurement process to ensure that technology acquired by the federal government is accessible', and recommended:

> … HREOC … initiate discussions with the Department of Finance and Administration, and with other relevant organisations, towards an inclusive Federal Government public procurement policy, modelled on section 508 of the Rehabilitation Act in the United States. (Jolley 2003, p. 53)

It has been argued that such a policy would improve outcomes for people with disabilities in the public sector, and have various flow-on benefits. As governments are large purchasers of goods and services (although less so in Australia than in the United States), they can exert significant market influence—on the development of accessible technology, and by indirectly encouraging private sector demand for these technologies—through their procurement policies (HREOC, sub. 143; NILS, trans., pp. 1939, 1942; Jolley 2003).

Other suggested benefits include:

- the potential to increase the productivity of people with disabilities in, and the number with access to, employment (TEDICORE, sub. 122, p. 3)
- improved outcomes for people with sensory and physical disabilities in areas such as education, telecommunications and personal computing (Jolley 2003)
- facilitation of more rapid systemic change than would reliance on a complaints-based system (HREOC, sub. 143; NILS, trans., p. 1940)—HREOC suggested this would also be at potentially lower cost 'since it is generally cheaper if accessible equipment is acquired at the outset' (sub. 143, p. 81)
- preventing 'dumping' of 'substandard equipment or systems' in Australia, given that other countries are adopting inclusive procurement policies (HREOC, trans., p. 1156)

- encouraging smaller companies to develop accessible technologies for the domestic market (where they might tend to focus initially), with subsequent impacts on their international competitiveness (NILS, sub. 206, trans., p. 1938).

Box 15.8 **Overseas public procurement policies**

United States. In 1998, the US Congress amended the Rehabilitation Act 1973, strengthening the access requirements for federal government electronic and information technology (EIT) (s.508). It covers technology such as office equipment, desktop computers, telecommunications equipment and software, and requires that, unless an undue burden would be imposed:

- federal agencies develop, procure, maintain or use EIT that allows employees with disabilities to have access to, and use of, information and data that is comparable to the access and use afforded employees without disabilities
- members of the public with disabilities, who seek information or services from a federal agency, have access to, and use of, information and data that are comparable to that provided to those without disabilities.

The legislation directs the Access Board to develop access standards to form part of procurement regulations. Standards were adopted in 2000, based on the final report of the board's EIT Access Advisory Committee.

An increasing number of US State and local governments are adopting these standards. Perceived benefits include: its influence on change in the information and communication technology sector, particularly given the purchasing power of the US Government; its promotion of awareness of what 'inclusive design' means, including in the private sector; and its potential worldwide flow-on effects.

Other countries. Inquiry participants commented that several other countries are working towards accessible procurement standards. In Europe, however, the Commission of the European Communities rejected amendments proposed by the European Parliament to include accessibility considerations for people with disabilities. Among other things, it stated 'the public contracts directive, the purpose of which is to coordinate procedures, is not the proper instrument for imposing an obligation to prescribe such features'.

Sources: CEC 2003; Jolley 2003; HREOC, sub. 143; NILS, sub. 206; TEDICORE, sub. 122.

The desirability of strengthening Australian Government procurement policies for accessible technology depends on several factors, including:

- the effectiveness of the current approach
- the extent to which changing the current approach would lead to positive changes, relative to the costs of doing so
- the range of other mechanisms through which these objectives could be achieved, such as voluntary action plans, industry codes or industry standards

- the type of technology that would be included in the policies
- whether the policies should apply more broadly than the public sector
- the role of HREOC, if any, in the change process.

These issues are largely beyond the terms of reference of this inquiry. The Productivity Commission notes, however, several potential issues with this type of approach. First, Australia tends to be an importer of information technology, and the Australian Government is not a large purchaser of these products by world standards. Its ability to influence the overall market through its purchasing decisions is limited. Australia could, instead, benefit from the increasing development of accessible technologies abroad (despite some concerns about the 'dumping' in Australia of inaccessible products). Moreover, the development of accessible technologies in Australia might be stimulated by the proposed Australia–United States Free-Trade Agreement (an agreed text for which was released in February 2004), which, among other things, would open the (much larger) US government procurement market (for contracts above a certain value) to Australian firms. In any case, there is a danger that using procurement policies to promote social goals could become *de facto* industry assistance. Even viewed through an industry assistance perspective, encouraging local companies to develop products for the domestic market is not necessarily going to improve their international competitiveness. Finally, procurement policies may not be the best instrument with which to impose accessibility requirements, as the Commission of the European Communities noted (box 15.8).

The Productivity Commission considers that government procurement policies are not generally the most appropriate instrument for trying to improve the supply of accessible technologies for people with disabilities. Making better use of the DDA—through existing provisions or through an explicit reasonable adjustment duty (see chapter 8)—or encouraging the development of industry codes (see chapter 14) are likely to be more effective overall approaches.

HREOC could, however, as suggested by NILS (trans., pp. 1941–2), play a role in raising awareness about the potential impact of procurement decisions, both in the context of DDA obligations and in encouraging dialogue among various interested parties. The ultimate decisions on whether and how such policies are implemented are for governments to make, after consideration of relevant issues and problems.

Influencing the behaviour of vendors as employers

Melinda Jones commented that 'all government contracts should require compliance with the DDA [and] … all tender documents should state that this is one of the

things that is being looked for' (trans., p. 1527). Other inquiry participants did not comment on the potential use of procurement policies to influence the recruitment and other employment practices of vendors.

Such policies can take a number of forms, according to the nature of the requirement or preference to be encouraged, the type of contract or company to which they apply, the mechanisms through which they operate, and the stage of the tendering process at which they apply (Erridge and Fee 2001, p. 54). The Minister for Revenue and Assistant Treasurer, Senator Coonan (2003), has suggested that legal firms 'undertaking government or agency work could be required, as a condition of getting this work, to abide by an equal opportunity briefing policy', commenting that 'nothing induces behavioural changes like incentive'. In the United Kingdom, amendments in 2000 to the Race Relations Act 1976 outlawed discrimination in all functions of public authorities (including procurement). The amendments imposed a positive duty on public authorities to eliminate discrimination, and race equality considerations had to be built into procurement decisions (Commission for Racial Equality nd). The Canadian Government has introduced the Federal Contractors Programme, which:

> … requires contractors to implement employment equity measures to necessitate the identification and removal of artificial barriers to the selection, hiring, promotion and training of the designated groups. Further, contractors will take steps to improve the employment status of these designated groups by implementing special programmes and making reasonable accommodation to achieve appropriate representation of these groups in all levels of employment. (Erridge and Fee 2001, p. 58)

There are mixed views about the merits of such policies, in theory and practice. Erridge and Fee (2001, p. 53) suggested that 'contract compliance', as it is called in the United States, is 'an effective instrument of policy for bringing about significant improvements towards equality'. Suggested benefits to vendors include influencing organisational change, access to a broader range of skills, enhanced employee morale and improved corporate image (Erridge and Fee 2001, p. 59). However, concerns have also been expressed, relating to compliance and administrative costs, and potential problems in finding suitably-qualified workers from specified groups (potentially leading to 'bad' procurement decisions) (Erridge and Fee 2001, p. 60).

The way in which such policies are implemented can significantly influence their effects. However, it has also been suggested that few of the factors necessary for the success of such a policy—such as sufficient time and resources; understanding of, and agreement on, objectives; and perfect communication and coordination—are likely to be met in practice (Erridge and Fee 2001, pp. 65–6). Resource problems appear to have been a factor in Canada, for example, where a five-step process operates (certification, implementation, compliance review, appeal and sanctions). In Ontario, the cycle of winning a contract and doing a compliance review and audit

is supposed to take two years, but takes three years, with resource constraints cited as a factor (Erridge and Fee 2001, p. 62). The effectiveness of the Canadian policy has also been questioned, with groups representing Canadian people with disabilities claiming it did not lead to significant progress for their members in its first few years (Erridge and Fee 2001, p. 60).

The Productivity Commission considers that using procurement policies to influence the behaviour of vendors as employers does not appear to be the most appropriate way to improve employment outcomes for people with disabilities. Their use leads to issues such as the selection of disadvantaged groups to which the policy should apply, and the weight that would be given to particular disadvantaged groups. In addition, these policies can be costly and time consuming to administer, involve other costs (such as compliance costs for vendors), and might not even produce desired equality outcomes.

15.6 Copyright

The availability of information in accessible formats is a particularly important issue for people with vision impairments and other print disabilities, and it is vital in various areas of life (see appendix D). A particular concern relates to the timely availability of accessible course material in education, especially tertiary education. Problems in this area have been cited as contributing to course withdrawals, stress, depression and loss of self-esteem among people with vision impairments (HREOC 2002g; Blind Citizens Australia, sub. 72, p. 21). As noted in section 15.2, outcomes in education can also influence employment opportunities.

The *Copyright Act 1968* contains provisions to facilitate access to material by people with print (and intellectual) disabilities (box 15.9).[2] HREOC (2002g) and some inquiry participants suggested, however, that aspects of the current copyright arrangements affect the availability of accessible material in tertiary education. The need to search for existing accessible versions of a particular text, for example, is said to be made more time consuming by the lack of a single national database of accessible tertiary materials (HREOC 2002g). HREOC (2002d) suggested the lack of a database was likely to be leading to duplication of effort, as well as delaying delivery of accessible materials.

2 Print disability is defined in the *Copyright Act 1968* to mean a person without sight, a person whose sight is severely impaired, a person who cannot hold or manipulate books or focus or move his or her eyes, or a person with a perceptual disability (s.10).

Another perceived problem is the lack of a formal mechanism to allow access to material in electronic formats, from which to produce accessible versions. HREOC noted that although it:

> … understands publisher concerns regarding protection of intellectual property, direct access to digital material (from which in most cases print material is subsequently generated by publishers) would clearly be more efficient as a means of meeting the needs of many people with a print disability than existing systems using permission under the Copyright Act to scan print materials into computer formats. (sub. 219, p. 41)

Box 15.9 **Selected features of the Australian *Copyright Act 1968***

- The statutory licence scheme under Part VB of the Copyright Act allows copyright material to be copied and communicated by institutions assisting people with disabilities, without the prior approval of the copyright owner, upon payment of 'equitable remuneration' to Copyright Agency Limited (CAL), the body that administers the Act. The *Digital Agenda Act 2001* extended these licences by allowing electronic copying and communication of the material. A three-year review of the Digital Agenda Act amendments, including this provision, was flagged in the second reading speech of the Bill.
- As well as various reporting requirements, one condition of a statutory licence is that 'the person who makes the reproduction must be satisfied, after reasonable investigation, that no new version in the form being copied can be obtained within a reasonable time at an ordinary commercial price'.
- Part VB does not prevent a voluntary licence arrangement between a copyright owner and institution to allow copyright material to be copied or communicated without infringing copyright.
- The Act also establishes a legal deposit scheme, whereby a hard copy of any work published in Australia must be deposited with the National Library of Australia and the relevant State library. This requirement does not apply to electronic materials.

Sources: Cordina 2002; HREOC 2002g; NLA 2003.

As a result of these and other issues, inquiry participants suggested the need for reform. The Association for the Blind of WA noted:

> … the intent of the DDA could be enhanced by specific provisions within the Copyright Act requiring publishers to make all their publications available in electronic or other accessible formats. (sub. 83, p. 4)

It also called for the establishment of a central repository of electronic formats of books (trans., p. 795).

As well as resulting in significant time and cost savings in the production of accessible material (see, for example, NILS, trans., p. 1944), the Association for the

Blind of WA suggested a further benefit of a central (legal) deposit system for electronic copies would be:

> … where a book may not be a current edition and the publisher wipes routinely its electronic publication files. They don't hang onto them necessarily … a legal deposit system would get around that because there would always be a copy. (trans., p. 798)

It does not appear that such a system would impose a significant additional burden on publishers. They are already required to lodge hard copies of any work under the legal deposit scheme (box 15.9) and, as noted by HREOC (sub. 219), most of their printed material is already generated from digital formats. The major required change might be to the file format used, if a standardised format—as is proposed under the Bill of the US Instructional Materials Accessibility Act—were required.[3]

As observed by Lingane and Fruchterman (2003), however, 'country-specific laws do not allow for distribution of material between countries to individuals with qualifying disabilities'. Thus, changes to the Copyright Act would only influence processes of Australian publishers. This may change in the future, given that:

> The World Blind Union (WBU) and [the International Federation of Library Associations and Institutions'] Section of Libraries for the Blind (SLB) have been lobbying the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), and other key international bodies to move forward the agenda of enabling access to accessible material across international borders by people with disabilities … recognizing that agreements at the international level are necessary for such changes to take place. (Lingane and Fruchterman 2003)

To the extent that international cooperation occurs, the benefits to Australia are likely to be substantial, by potentially greatly increasing the range of accessible materials available. Australia's inclusion in such efforts would require Australian accessibility requirements to be similar to those in the other countries involved.

Changes to the Copyright Act are beyond the scope of this inquiry. The Productivity Commission notes, however, that the potential benefits of a central electronic book repository could be substantial, without necessarily imposing significant additional burdens on publishers. Any additional administrative costs involved could be reduced by using the framework of the existing national deposit scheme for hard copies. Further, as noted by HREOC (2002g), potential solutions could involve

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[3] Under the US Bill of the Instructional Materials Accessibility Act, publishers are required to prepare instructional materials (for elementary and secondary schools) in a uniform electronic file format, and provide a copy of each textbook in this format to a central repository (a national instructional materials access centre). This would enable State and local agencies, publishers, schools and others to acquire these materials more quickly (American Foundation for the Blind 2002; Richert and Siller 2002). Twenty-six US States already require the provision of electronic copies of textbooks, but there is no agreed file format (Petri 2003).

voluntary codes of practice or best practice guidelines by the publishing industry. These approaches may be more effective than legislative approaches (see chapter 14), and also need to be considered. Pursuing international solutions may also be beneficial. Among other things, this would potentially broaden the range of accessible material available to Australia.

The Productivity Commission also notes HREOC's efforts to encourage progress in this area, such as through roundtables and forums. HREOC has also held discussions with Copyright Agency Limited, which then began developing a database of material produced under the statutory licence provisions of the Copyright Act (HREOC 2002g). Such initiatives, and others that may result from the recommendations of HREOC forums (HREOC 2002d), can be effective ways of facilitating change in this area. The Association for the Blind of WA, for example, noted that a similar process undertaken in the United States resulted in the Bill incorporating changes for educational publishing and electronic depositories (trans., p. 795). The general benefits of cooperative approaches were noted in chapter 10.

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

15.7 Other concerns

Several other concerns, which are not addressed through the DDA, were raised by inquiry participants. These covered a broad range of issues.

Jan Hammill (sub. 116, sub. DR341) commented on foetal alcohol syndrome in Indigenous communities. She noted that children with the syndrome display hyperactivity, attention and cognitive defects, learning disabilities, language problems and poor impulse control, but cannot access disability services because they have not been diagnosed with a disability (and parents often do not have the resources to cope with these problems). She noted that the lack of diagnosis and treatment, and behavioural problems that result, lead these children into trouble with the law later in life. According to her, contributing to this problem was the fact that:

> Health authorities have no data on prevalence rates and there are no cross disciplinary teams to perform basic screening and assessment for FAS/E [Foetal Alcohol Syndrome/Effects]. Likewise, there are no management strategies or structures across the various service agencies to ensure that children with FAS/E are positioned to reach their maximum potential. (sub. 116, att. 1, p. 1)

K.F. Pennefather (trans., pp. 2203–5) pointed to problems with the (over)allocation of disability carpark permits (logos) in Tasmania. Holders of the logos can place them on their car dashboards, allowing them to use parking spaces reserved for people with disabilities. The problem highlighted with the scheme related to the allocation of logos to people with temporary medical conditions (such as a broken leg), and the inadequate system to reassess the need for the logos and revoke them once such recipients have recovered. It was suggested that this limited access to shopping and other facilities for those in genuine need of parking close to services (trans., p. 2204). K.F. Pennefather suggested issuing different temporary (renewable when needed) and permanent logos as a potential solution to the problem, but argued that short term cost considerations prevented this type of system being implemented (trans., p. 2205).

Blind Citizens Australia (sub. 72; trans., pp. 1690–3) and the Association of Independent Schools of Victoria (sub. DR320) commented on the implementation of cost recovery by NILS for Braille transcription services in education, which has significantly increased the fees charged for the services. The subsequent negative impacts on students with visual impairments, who face diminished access to Braille material, were highlighted. Financial pressures on NILS were said to have prompted the move to cost recovery (NILS, trans., pp. 1949–51). The Association of Independent Schools of Victoria (citing the experience of a student who moved from a government to an independent school, sub. DR320) suggested these problems have been compounded for students attending independent schools, who cannot access Victoria's Statewide Vision Resource Centre, which is available to those in government schools.

In New South Wales, Dare to Do Australia (sub. DR308) pointed to a lack of competition in the financial management of trusts handling compensation payments of children who acquire disabilities in accidents—claiming an 'unacceptable monopoly' held by the Office of the Protective Commissioner (OPC). Problems attributed to the OPC's service included a lack of support for negotiating an adequate insurance settlement, failure to maintain adequate communication, restriction of care choices, disinterest in clients, failure to manage conflict, and a lack of transparency. In the case cited, the guardian was not allowed to take on a different fund manager, even if it could have provided better outcomes, prompting the comment that:

> It is appalling that … [a] … once only payment and … lifetime capital should be depleted by legal proceedings that are seeking to save him money and in circumstances where a poor performing entity … has unjustified precedence. (sub. DR308, p. 6)

It was, therefore, suggested that:

> The law concerning disability discrimination must be changed to ensure existing and

> future trustee relationships are flexible so that the most vulnerable people in our Australian society are protected from victimisation and provided with choice. This change would deliver that simple protection and freedom to choose. (sub. DR308, p. 6)

Broader issues relating to the management of financial trusts for people with disabilities are discussed in chapter 9.

Brian O'Hart (subs 85, DR293, trans.) highlighted the disadvantages faced by parents who purchase housing for their adult children with disabilities, if the accommodation is not placed in trust at the outset. He and his wife face restricted pension eligibility, and have been denied various rebates and concessions normally available to disability and aged pensioners, because holding the house in his name means it is included in asset tests. He would, however, incur significant stamp duty and capital gains liabilities if he now transferred the property into trust. As a result of his experiences, he prepared an information booklet with a law firm, but has not had his particular issue resolved.

15.8 Conclusions

Many of the issues raised in the context of this inquiry and discussed in this chapter are, strictly speaking, beyond the terms of reference for the inquiry. These issues can, nonetheless, significantly affect outcomes for people with disabilities in various important areas of life, and the Productivity Commission views them as sufficiently important to have warranted comment here.

Making changes to the DDA, as recommended in this report, will help improve the experiences and opportunities of people with disabilities.

Just fixing the DDA is not, however, going to be enough to address the range of serious issues that continue to affect outcomes for people with disabilities. Regardless of whether these issues are areas of State/Territory or federal responsibility, it is vital that they be addressed—whether this be through cross-jurisdictional mechanisms, such as the Council of Australian Governments or the CSTDA, or by measures within jurisdictions. Making progress in these areas is, therefore, an important complement to the reforms to the DDA recommended in this report. This multifaceted approach will allow true progress be made—both in improving the quality of life and opportunities for people with disabilities, and in making Australia a more productive, inclusive and diverse community in which to live.

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