
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

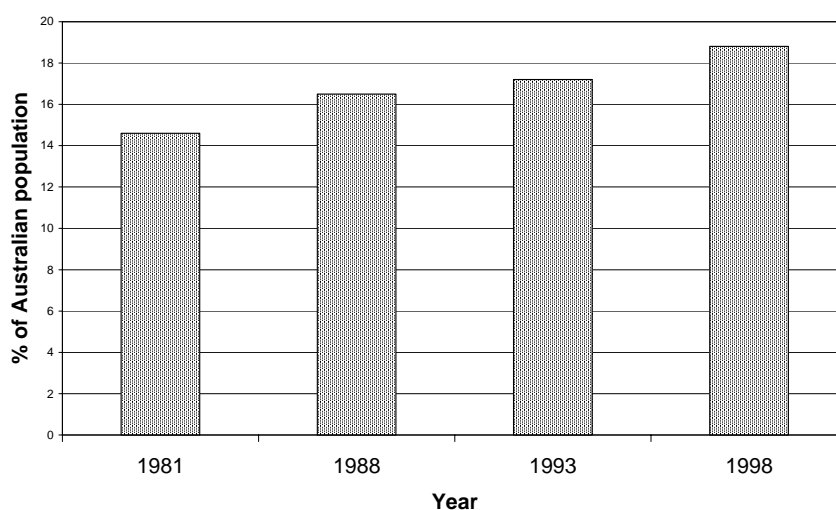
and is more likely to:

- 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

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- 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).

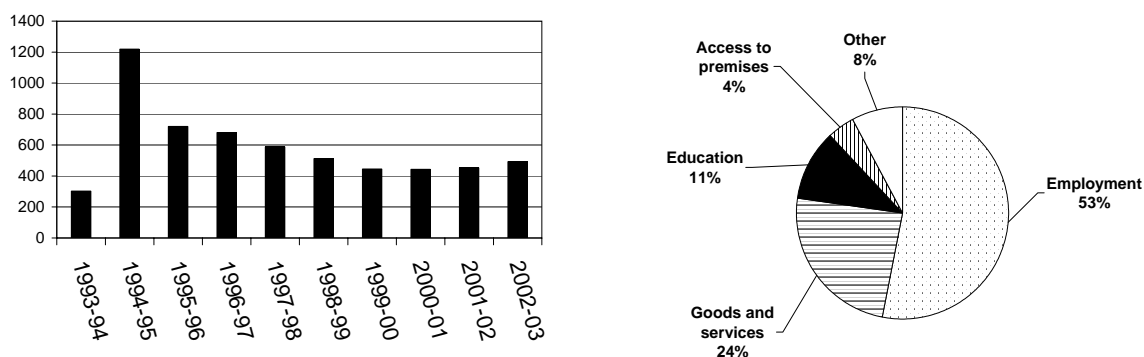
After allowing for other influences, the DDA appears to have achieved mixed results in different areas of activity. The DDA appears to have been:

- 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 ...

... and they are dominated by employment^a



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

^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.

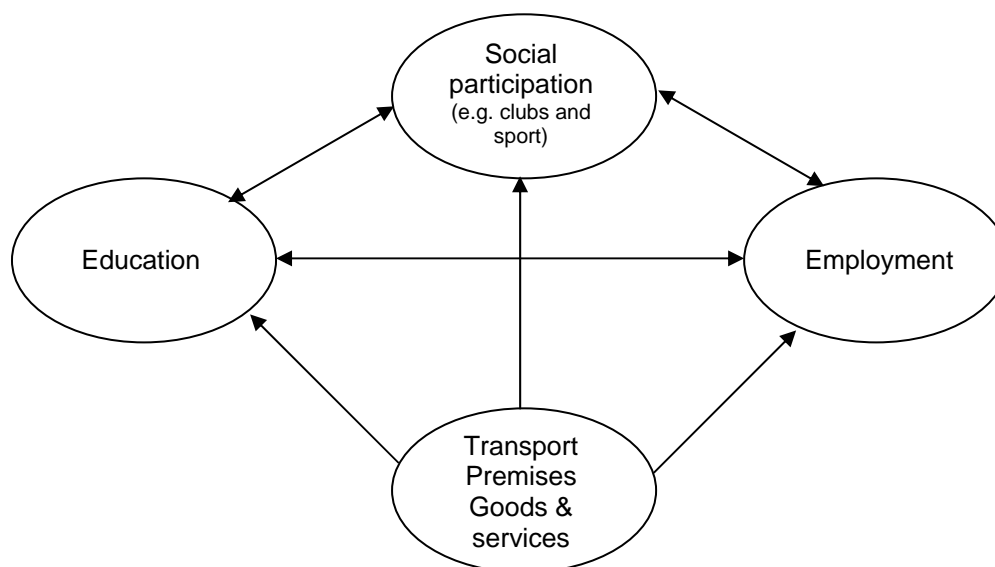
Many groups may benefit from improvements to the DDA, but there is a limit to how far it can address the disadvantages that some face. The nature of some people's disabilities may be such that they cannot take advantage of the

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.

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- 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 a 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.