
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.