
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 that 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).