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## 4 Disability discrimination legislation

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

### 4.1 Enactment of the Disability Discrimination Act

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

#### Reasons for enacting the Disability Discrimination Act

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

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#### Box 4.1 **International conventions and declarations**

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

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

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

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

#### *Public consultation and debate on the Disability Discrimination Bill*

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

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

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

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

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

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

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

Sources: HREOC 2003d; Tyler 1993.

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

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

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

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

### *Parliamentary debate on the Disability Discrimination Bill*

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

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

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

### **Amendments to the Disability Discrimination Act, 1992–2003**

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

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

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

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

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

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

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

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

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

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## 4.2 Key features of the Disability Discrimination Act

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

### Objects of the Disability Discrimination Act

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

- a. to eliminate, as far as possible, disability discrimination in the areas of activity to which the DDA applies
- b. to ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community and
- c. to promote community recognition and acceptance of the rights of people with disabilities (s.3).

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

### Definition of disability in the Disability Discrimination Act

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

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

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

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

### **Areas of activity covered by the Disability Discrimination Act**

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

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

#### *Exempted areas of activity*

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

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

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

### *Discretionary exemptions*

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

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

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



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## **Actions made unlawful by the Disability Discrimination Act**

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

### *Direct discrimination*

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

### *Indirect discrimination*

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

- a. with which a substantially higher proportion of people without the disability can comply
- b. that is not reasonable, having regard to the circumstances of the case, and
- c. with which the person with a disability does not or is not able to comply. (s.6)

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

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<sup>4</sup> Unlawful is not the same as illegal. Unlawful acts are not necessarily a criminal offence.

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## *Harassment*

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

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

## *Requests for information*

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

## **Inherent requirements in employment**

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

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

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

### **Inherent requirements in other areas of activity**

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

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

### **Making adjustments for people with disabilities**

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

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

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

### *Unjustifiable hardship*

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

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

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

## **4.3 Disability discrimination regulations**

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

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

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

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

## **Disability Discrimination Regulations 1996**

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

## **Disability standards**

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

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

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

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

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

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

### **Voluntary action plans**

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

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

### **HREOC guidelines and advice**

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

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## 4.4 The complaints process

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

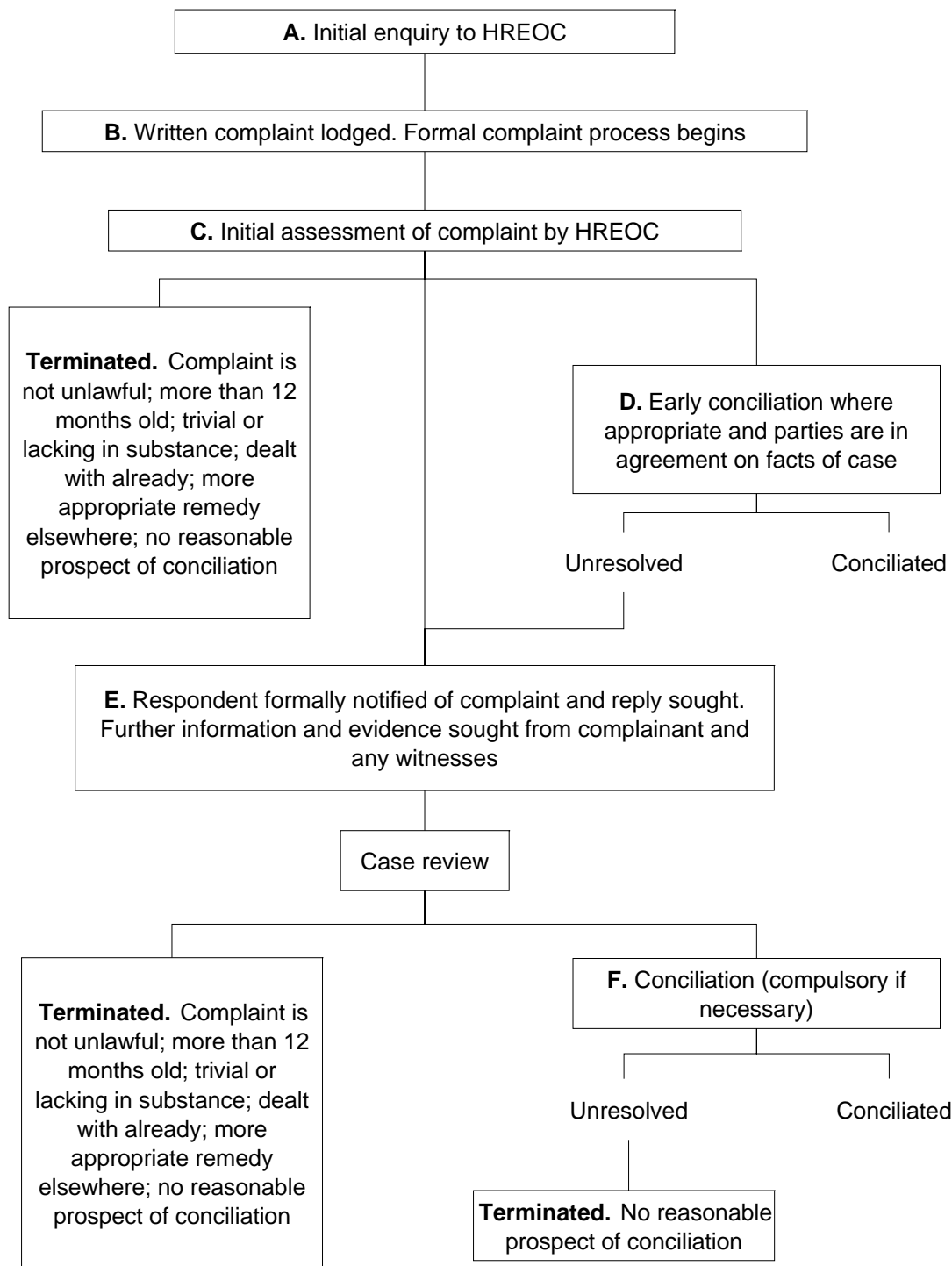
### Stage 1: HREOC investigation and conciliation

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

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

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

Figure 4.1 HREOC's complaints handling process<sup>a</sup>



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

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



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

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

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

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

## **Stage 2: Federal Court and Federal Magistrates Court**

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

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other benefit card. With the permission of the Federal Court, HREOC can act as an *amicus curiae* (friend of the court) in cases involving discrimination (s.67(1)).

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

#### **Box 4.2 Federal Magistrates Court**

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

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

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

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

Sources: Federal Magistrates Court 2003; HREOC 2003c.

## **Offences and penalties**

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

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

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

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

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

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

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

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

## **4.5 Administration of other Disability Discrimination Act functions**

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

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

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

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

### **HREOC inquiries into disability discrimination**

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

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

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

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

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

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## **The Attorney-General's portfolio**

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

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

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

## **4.6 Future developments in discrimination legislation**

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

### **Disability Discrimination Act Amendment Bill 2003**

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

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

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

The Senate Committee made three recommendations:

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

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

### **Australian Human Rights Commission Legislation Bill 2003**

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

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

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

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

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

### **Age Discrimination legislation**

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

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

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

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

### **Proposed UN convention on human rights for people with disabilities**

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

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

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

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

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