

---

## 7 Necessity and focus of the DDA

The previous chapter (chapter 6) addressed the first two questions raised in Competition Principles Agreement (CPA) legislation reviews: Does the *Disability Discrimination Act 1992* (DDA) restrict competition? and What are the costs and benefits of the DDA? This chapter addresses the third question of the review: Can the objectives of the DDA only be met by restricting competition, or are there alternative approaches which would place fewer restrictions on competition and efficiency?

This chapter begins with a review of the social and economic reasons for government action to address disability discrimination (section 7.1). The following sections examine whether non-regulatory alternatives can take the place of anti-discrimination legislation (section 7.2); and discuss two broad regulatory alternatives—relying on State and Territory anti-discrimination legislation (section 7.3) and introducing an omnibus federal anti-discrimination Act (section 7.4). Section 7.5 examines the current objectives of the DDA and what, if any, changes are required.

Finally, section 7.6 addresses the third element of the CPA test and summarises the Productivity Commission’s conclusions on applying the CPA to the DDA. The remaining chapters of this report address improvements to the current regulatory structure and other issues.

### 7.1 Reasons for government intervention

This section examines the social and economic reasons for government involvement in combating disability discrimination.

#### **Social reasons**

Three groups of ‘social arguments’ support government action to tackle disability discrimination. At the broadest level, a set of social values or principles underpin government actions to ensure equal treatment. The second group of arguments supports government action to implement the ‘social model’ of disability. The third

---

group is based on the Australian Government's obligations under international agreements.

### *Underlying values or principles*

Over time, legislatures and courts in many jurisdictions around the world have considered the practical pursuit of 'equality'. Fredman (2002, pp. 17–22) examined international attempts to articulate a set of values or principles informing the 'equality principle', and identified four intertwined themes.

First, she found general agreement with the principle that human dignity is inherent in the humanity of all people, regardless of characteristics such as race, gender or disability. All individuals, including people with disabilities, are entitled to equal dignity, and this implies that they are entitled to equal concern and respect. This is summed up in the UN Declaration on the Rights of Disabled Persons (1975), which explicitly states:

Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities, have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible. (s.3)

However, the nature of 'equal concern and respect' is subject to debate. It clearly encompasses concepts such as 'equality before the law' and 'formal equality' (see chapter 2). But limiting 'equal concern and respect' to formal equality could result in wide disparities in outcomes. There is debate over whether this is consistent with 'the right to enjoy a decent life'.

Second, she found that social and political recognition of injustice stemming from previous discrimination can lead to a restitutionary notion of redressing past disadvantage. Traditionally, the restitutionary functions of law have been based on finding individual fault and ordering individual restitution—for example, providing a mechanism for resolving individual complaints of discrimination. The enactment of the DDA explicitly endorsed the creation of:

... a fairer Australia where people with disabilities are regarded as equals, with the same rights as all other citizens, with recourse to systems that redress any infringement of their rights ... (Australia 1992a, p. 2754)

Moving beyond restitution for specific acts of discrimination to a more general restitutionary principle based on redressing past disadvantage is more controversial, and overlaps with Fredman's third principle—'redistributive justice'.

---

The principle of redistributive justice argues for government action to achieve a ‘fairer’ distribution of benefits. Fredman found some support for redistributive policies where wide disparities in outcomes were regarded as incompatible with ‘equal concern and respect’. There are some ‘redistributive’ elements to the DDA; for example, disability standards can direct substantial community resources towards activities that primarily benefit people with disabilities.

However, debate surrounds principles of redistributive justice. How should a ‘fair’ distribution of benefits be defined—does it mean equality of opportunity or equality of outcome? How should redistribution be achieved—by supplying additional resources or through preferential treatment?

Finally, Fredman found general agreement that where past discrimination has blocked political participation by particular minorities, legal rights might be needed to compensate for this absence of political voice. Otherwise, minorities are vulnerable to having their interests overlooked and their entitlement to equal concern and respect violated. The Office of the Public Advocate noted the lack of political power of people with disabilities:

People who have a disability are not politically strong and their capacity to claim a sufficient share of government resources to improve their quality of life is very limited. (sub. DR310, p. 3)

Jack Frisch provided a reasoned explanation for this lack of political voice:

... the median voter in the median electorate dominates the political agenda. People with impairments are ignored because they are dispersed through all electorates, are marginal in every electorate, and are heterogeneous as a group and therefore do not have a single voice. (sub. 196, pp. 1–2)

Overall, these social arguments reflect strong support for government intervention to require, at a minimum, formal equality. Formal equality would assist those who can participate on an equal basis once stereotyping and stigma are removed. But, as Fredman notes, formal equality will not improve the position of the most disadvantaged:

For those whose capacities are either innately limited or have themselves been limited by the effects of cumulative disadvantage, an equality conditional on merit might well be a false promise. (2002, p. 19)

The redistributive and participative principles discussed above imply a role for government beyond formal equality. However, there is no clear consensus on the nature or extent of that role—that is, whether it implies substantive equality or equality of outcome. This might be because these principles are drawn largely from discussions of race and sex discrimination. Although many race and sex anti-discrimination Acts imply requirements to make ‘reasonable adjustments’ to avoid

---

discrimination, there is a lack of agreement on the extent to which differential treatment is justified. This is a significant issue for disability discrimination, where the nature of disability makes a clear articulation of the role of differential treatment in anti-discrimination legislation essential.

The redistributive and participative principles raise issues about government responses that go beyond anti-discrimination legislation, such as the direct provision of resources and disability services, and affirmative action policies that require preferential treatment of people with disabilities. Mandating preferential treatment involves difficult decisions about equity and the allocation of resources.

### *Implementing the social model*

The social model is based on the principle that all members of society are entitled to equal opportunities to participate in the economic, social and political life of the community. Rather than focusing on the disabling effect of an impairment, the social approach views disability as arising from barriers erected by society that exclude people with disabilities from participation. The Disability Council of NSW noted:

According to the social model, a person has a disability because the society in which they live does not recognise disability-related requirements, and does not assist their access to and/or participation in society. Disability thus results from the response of a society towards impairment. (sub. 221, p. 2)

In effect, the social model requires substantive equality—differential treatment for people with disabilities where this is necessary to achieve equal access to opportunities. This can require government action to dismantle physical and attitudinal barriers. The development of anti-discrimination legislation was largely due to the widespread acceptance of the social model of disability (see chapter 2). Legal Aid Victoria, for example, noted:

The enactment of the DDA is both a consequence and a cause of changing attitudes towards disability discrimination in Australian society. These attitudinal changes reflect an underlying expectation that people with disabilities should be entitled to participate equally in society. (sub. DR290, p. 4)

The pursuit of substantive equality is also consistent with the ‘capability’ approach endorsed by Nussbaum and Sen (Robeyns 2003 and see chapter 2). The capability approach emphasises improving people’s ‘capabilities’ that is, their effective opportunities. These opportunities are expanded by removing barriers to participation (although supporters of the capability approach might also call for greater resources to be devoted to allow people to take advantage of those opportunities). Implementation of the social model does not require equality of

---

outcome. Differential treatment is limited to overcoming barriers, after which individuals are treated on merit.

### *International agreements*

Australia is a signatory to several United Nations and International Labour Organization (ILO) declarations and conventions that promote equal rights and opportunities for people with disabilities (see chapter 4). These agreements reflect an international consensus on the role of governments in protecting and enhancing human rights.

As a matter of law, international agreements do not automatically apply in Australia; once ratified by the Australian Government they must be incorporated into domestic legislation to take legal effect. However, as noted by Mason CJ and Deane J in the *Teoh* case:

... ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. (*Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273)

On signing declarations and conventions that promote the rights of people with disabilities, Australia undertook to give them effect in Australian law. The second reading speech for the Disability Discrimination Bill specifically noted that the DDA was a 'significant step in fulfilling Australia's international obligations' (Australia 1992a, p. 2751).

### *Conclusion*

The Productivity Commission considers that the social arguments outlined by Fredman provide clear support for government action to achieve formal equality for people with disabilities. However, Fredman's principles provide only limited guidance on the extent to which governments should go beyond formal equality to pursue a 'fairer' distribution of resources.

In contrast, the social model of disability is premised on achieving substantive equality for people with disabilities. Acceptance of this model requires government intervention to ensure that disadvantaged groups have equal access to the opportunities that are available to others. However, once equality of opportunity is achieved, the outcome achieved by each individual still depends on merit. The social model of disability does not require equality of outcome.

---

Finally, the Australian Government is a signatory to international agreements that promote equal rights and opportunities for people with disabilities. The Australian Government therefore has accepted a moral (if not legally enforceable) obligation to ensure those agreements are given force in domestic law.

## **Economic reasons**

The social arguments outlined above provide the main grounds for government action to tackle disability discrimination. However, several authors argue that government intervention also can be justified on economic grounds. There is considerable debate about the economic merits of such intervention, and it is useful to start with a discussion of the ‘pure’ neoclassical economic model, before examining how far this theory applies to disability discrimination in the real world.

### *The neoclassical model*

The neoclassical model assumes that, in most circumstances, a freely operating market will result in socially optimal outcomes. The discussion below focuses on the neoclassical view of the employer/employee relationship, but analogous arguments apply in many other areas of activity, such as the provision of goods and services.

Neoclassical economic theory assumes that employers are solely driven by profit maximisation. ‘Rational’ employers will always hire the candidate with the highest expected productivity, taking guidance from characteristics such as qualifications, experience and enthusiasm. To discriminate on the basis of a person’s characteristics that are apparently unrelated to productivity (such as race, gender or disability) would be irrational, because it would not maximise the benefits the employer derived from that employee’s labour. The theory further assumes that workers will be paid according to their productivity and economic efficiency will result.

This analysis does not change if some potential employees have disabilities that require adjustments to the workplace or to work practices. Employers whose sole motivation is profit will compare the potential costs and benefits associated with each job applicant and select the person whose net contribution to the firm’s profit is greatest. Adjustments will be undertaken voluntarily if their cost is more than offset by the improvement in productivity that they allow. In this scenario, expenditure by employers on adjustments would be efficient, because it would allow production of goods and services of greater net value than could otherwise be achieved.

---

In the neoclassical model, discrimination would be driven out of the market by competitive pressures. For example, prejudice might lead to some employers paying workers without disabilities more than workers of equal productivity who happen to have disabilities. But employers who discriminate would incur higher costs than non-discriminators. Over time, competition would lead to an efficient outcome, where only non-discriminators remain.

The neoclassical model of the economy suggests that discrimination is ‘irrational’ and will be automatically stamped out by the market in the long run. The market will also ensure that adjustments are made voluntarily in response to special needs, where it is efficient to do so. There is nothing that governments could do which would improve on the outcome generated by well functioning markets.

Moreover, authors such as Epstein (1992) argue that, where the conditions for such markets exist (itself a highly controversial area of debate), disability discrimination legislation is not only unnecessary, it is also harmful. For example, legislative requirements that ‘reasonable adjustments’ be made for workers with disabilities where a firm would not voluntarily have made the adjustments is inefficient, because it ‘requires social expenditures that could be avoided if the firm refused to hire the handicapped worker’ (Epstein 1992, p. 491). A market-driven solution would see only some firms provide adjustments, and only for some types of disability. These firms would be able to reap economies of scale from making adjustments that benefit a specific type of disability. In effect, the employment approach recommended by Epstein extends the current ‘business services’ model (supported employment services) to all employees that require disability adjustments. (This model has parallels in education and housing, where it could be argued that it is more efficient to concentrate people with disabilities in special schools and institutions).

A market solution would also allow workers with disabilities to accept lower wages than their counterparts with no disability, as a tradeoff for adjustment costs. Such a tradeoff would be ‘efficient’ because each worker’s wages would reflect their net contribution to the firm. Setting wages at a level that reflected each individual’s net contribution to the firm could also result in more people with disabilities being in employment than at present. Epstein’s views have found echoes amongst critics of the employment effects of the US Americans with Disabilities Act 1990 (see chapter 5 and appendix A).

The neoclassical analysis above is based on several assumptions about the nature of the market. If those assumptions apply, there is no *economic* argument for governments to intervene to address disability discrimination (although the social arguments outlined above continue to apply).

---

However, several authors argue that some of the assumptions underpinning the neoclassical model do not apply in the real world. At the simplest level, the neoclassical model is based on ‘rational’ behaviour. However, in dealing with emotive issues such as discrimination, a degree of ‘irrationality’ is likely. If that irrationality is biased in one direction (for example, widespread prejudice against people with disabilities), the assumptions underlying the neoclassical model do not hold, and there may be benefits from government intervention.

Even within the neoclassical paradigm, there can be market failures that make anti-discrimination legislation both necessary and efficient (Verkerke 2002; Stein 2003). Some possible sources of market failure are outlined below.

### *Information failure*

The neoclassical model assumes that all relevant parties have equal access to adequate information on price, quantity, quality, timing, etc. This is rarely the case, because of the uncertainty inherent in any transaction, and because uncovering information can be costly.

Information failures can include situations of ‘imperfect information’, where neither party to a transaction has adequate information. For example, in the absence of prior experience, employers might assume that the costs of accommodating disability are higher, and the likely productivity of people with disabilities lower, than is actually the case. If they believe their assumptions are correct, they might not seek better information, even if it would be in their interests to do so. Similar arguments could apply to people with disabilities, who might be deterred from seeking employment in the first place.

Information failures can also take the form of ‘asymmetrical information’, where parties to a transaction do not have access to the same information. Jack Frisch, for example, argued that information failures meant that there was no market for insuring against the additional costs due to long-term and permanent disability (sub. 120, p. 1).

Verkerke (2002) and Stein (2003) have argued that information asymmetry detracts from the efficiency of the labour market for workers with disabilities. According to these authors, information asymmetry in the labour market for people with disabilities takes a number of forms.

- Workers with disabilities have more information than potential employers about the nature of their disability and the way in which it affects their productivity. They also have better knowledge than employers about how particular adjustments would improve their productivity.



- 
- Employers have more information than employees about the feasibility of some adjustments, for example, a change in work schedules. Moreover, they also know better than anyone else how much such adjustments would cost.
  - Both employers and employees with disabilities have less information than governments about the public subsidies and programs that exist to facilitate workplace adjustments.

Such information asymmetries mean that, if left entirely to the market, the matching of employees with disabilities with jobs will not be efficient. Verkerke (2002) argues, for example, that the presence of information asymmetries about hidden disabilities can lead to forms of market failure known as ‘churning’ and ‘scarring’ (see chapter 6). Both he and Stein (2003) view disability discrimination legislation as a corrective device which coerces information from the relevant parties, and thus leads to greater labour market efficiency. During preliminary negotiations, conciliations or court proceedings, employers and employees are forced to reveal information that only they hold. Governments assist in this exchange of information by offering free mediation, counselling and advice about adjustments and subsidies. This helps reduce the transaction costs associated with the uncovering of information. Without legislation imposing and assisting such information disclosure, inefficient outcomes would result: workers with disabilities who could be employed productively would remain unemployed, and the productivity of those who are employed would be impaired by inappropriate or non-existing adjustments.

The existence of information failures does not mean that government intervention to correct them will always be efficient. Imperfect and unevenly distributed information is a feature of most markets, wherever the costs of obtaining additional information exceed its benefits. This explains why employer strategies such as statistical discrimination, which economise on the need to uncover information, have emerged (box 7.1). This form of discrimination could be regarded as an efficient response to information failure if the costs imposed on organisations and individuals by the information revealing process (enforced conciliation, etc.) outweighed the efficiency gains generated by, for example, better job matches.

---

**Box 7.1 Statistical discrimination**

The theory of statistical discrimination argues that where it is difficult or expensive to gather full information about an individual's productivity, it is in the employer's interests to identify 'cheap' indicators of productivity that may be used when choosing new employees. Common indicators in employment decisions include years of schooling and relevant experience. Statistical discrimination results when employers use an indicator, such as disability, to predict an individual's performance. That is, perceptions of the average person with a disability are used to predict an individual's performance.

If these perceptions about the productivity of the average person with a disability are inaccurate, then a whole group of potentially productive employees will be overlooked. On the other hand, if the employer is correct in their perceptions, then their decisions on average will be efficient (for the employer). The employer might not hire the best applicant every time (if the best applicant happens to be an 'above average' member of the overlooked group), but the employer will save on search costs over time. However, this might not be the best outcome for society as a whole. By employers judging groups rather than individuals, potentially productive employees are not employed. This discrimination can lead individuals to change their labour supply decisions—for example, they might not bother to enter the labour market or might not pursue vocational education and training.

Constant rejections can also lead to 'scarring', where a potentially productive employee becomes less attractive (even to non-discriminating employers) as a result of an apparent poor employment history or lack of references.

*Source:* Phelps 1972.

### *Discrimination by employees and customers*

The neoclassical model predicts that employers who are prejudiced against a particular group will be driven out of the market by competitive pressures. However, the market might only drive out discrimination that derives from the prejudices of employers themselves. In cases where an employer discriminates to satisfy the prejudices of his employees or customers, discrimination can be self-perpetuating (Schwochau and Blanck 2000). Not to discriminate in such circumstances would expose employers to industrial unrest and/or loss of market share and would thus be irrational. Where this is the case, government intervention to prohibit discrimination and change attitudes can result in greater economic efficiency.

---

## *Externalities*

In the neoclassical model, individuals are motivated only by self-interest and guided exclusively by price signals. This means that, in deciding who to employ or what to produce, firms generally do not factor in the effects of their decisions on people not directly involved in the transaction. These effects, commonly called externalities, can be beneficial (positive externalities) or detrimental (negative externalities) to those third parties. When transactions generate externalities, the private costs and benefits to those involved in the transaction do not match the costs and benefits to society as a whole. This results in market failure, whereby less (or more) of a commodity is produced than is efficient. Jack Frisch (subs 120, 196) argued, for example, that three types of externalities disadvantaged people who use wheelchairs (box 7.2).

### **Box 7.2 Externalities affecting wheelchair users**

According to Frisch, three main types of externality need to be taken into account when deciding on the efficient provision of wheelchair access ramps:

- Direct externalities—without a ramp, a wheelchair user might not be able to attend an interview for a job or might have to spend time overcoming an obstacle.
- Network externalities—without a reliable accessible transport system, an accessible ramp to an amenity is less valuable because of the difficulties of getting to where the ramp is located.
- Associate externalities—in the absence of either a ramp or an accessible transport system, an associate will need to assist the person with the disability and thereby spend time that could be used in employment.

*Sources:* Jack Frisch, subs 120, 196.

The existence of positive externalities (benefits to third parties) means that, on its own, the market might not produce sufficient quantities of the goods and services that are important to people with disabilities, such as accessible transport and buildings. Because this allocation of resources in the economy would not lead to society's welfare being maximised, this is an inefficient outcome.

## *Conclusion*

The Productivity Commission considers that, while government intervention to address disability discrimination might primarily be based on social arguments, there are also good economic reasons for government action. Neoclassical assumptions about 'rational' behaviour are unlikely to hold when dealing with

---

emotive issues like discrimination, and the existence of market failures means that relying on markets will not deliver efficient quantities of accessible goods, services, employment or education.

However, the existence of market failures does not imply that government intervention will always improve efficiency. Government intervention can be costly and it might create distortions of its own. This is known as ‘government failure’.

Governments have a range of policy tools from which to choose when considering how to intervene to address disability discrimination. These include deregulation, education and moral suasion, the provision of resources and services, as well as legislation such as the DDA that creates enforceable rights. These instruments are not mutually exclusive, but they can be characterised along a spectrum from least interventionist to most interventionist. The following section examines various non-regulatory alternatives to addressing disability discrimination.

#### FINDING 7.1

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

## **7.2 Are there non-regulatory alternatives to the DDA?**

The third element of the CPA test asks whether the objectives of the DDA can only be met by restricting competition. This section examines non-regulatory approaches which could place fewer restrictions on competition and efficiency.

Three non-regulatory alternatives to the DDA are examined below: deregulation, moral suasion and education, and increased public funding.

### **Deregulation**

As noted earlier, the main critic of anti-discrimination legislation in general is Epstein (1992). He argued that—like other anti-discrimination prohibitions—legislation prohibiting disability discrimination should be repealed. His view is based on a combination of libertarian and free market arguments. Libertarian arguments promote the ‘rights’ of employers, customers and co-workers to have discriminatory preferences. Free market arguments are based on the potentially negative effect of anti-discrimination legislation on economic efficiency.

Epstein recommends that disability discrimination legislation be replaced with a system of government subsidies aimed at alleviating the cost of employing people

---

with disabilities. This, he argues, would introduce fiscal discipline into the disability accommodation process, and ensure that scarce public funds are used where they are most beneficial. He foresees such a system resulting in *de facto* specialisation, whereby governments would fund adjustments selectively, so that some workplaces would be accessible to wheelchair users, others to the sight impaired, and so on. Under this system, employers would only have to employ people with disabilities and make adjustments for them if they chose to do so (with or without government financial support).

Epstein's views have been refuted on both moral and economic grounds. First, as argued by Stein, it is unusual, in any analysis of social welfare, to 'give weight to preferences arising from socially undesirable criteria', such as illegal tastes or objectionable preferences (2003, p. 121). Thus, the fact that some members of society prefer to discriminate against people with disabilities should carry no more weight in deciding what is socially beneficial than, say, the views of racial supremacists on race equality.

Second, there are sound economic reasons for imposing disability discrimination legislation to address the market failures outlined in section 7.1. Not only can such legislation improve social welfare, it can also promote the private interest of organisations themselves.

Moreover, one participant argued that, even in the absence of market failures, Epstein's arguments in favour of employee segregation are flawed in that they do not account sufficiently for the diversity of the population with disabilities (Jack Frisch, sub. DR331). As noted earlier, Epstein assumes that it would be efficient to concentrate, for example, all wheelchair users in a few specialised firms. This ignores the fact that wheelchair users' skills differ as much as those of other employees. It cannot be assumed, therefore, that a concentration of wheelchair users within one firm would produce the appropriate mix of skills. Epstein's model also ignores the fact that any economies of scale enjoyed by the firm might be offset, from society's point of view, by the increased transport costs incurred by employees with a disability travelling over longer distances.

### **Moral suasion and education**

Governments can use moral suasion and public education to change attitudes and behaviours (see chapter 10). This was the position in Australia between the passing of the *Human Rights Commission Act 1981* and the passing of the DDA in 1992.<sup>1</sup>

---

<sup>1</sup> The *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) replaced the Human Rights Commission Act, but did not create any enforceable rights.

---

The Human Rights Commission Act did not create any legally enforceable rights, only a power for the Human Rights Commission to investigate complaints, seek to resolve them by conciliation, and report to Parliament on matters that could not be resolved. There was no recourse to the courts if conciliation was ineffective.

Moral suasion and education can appeal to the sense of fairness of employers, educators, and other organisations. They tend to rely on schemes that recognise organisations that give people with disabilities ‘a fair go’. One such scheme—the Prime Minister’s Employer of the Year Awards—recognises the achievements of employers of people with disabilities (box 7.3). Another Australian Government initiative, the Gold Medal Disability Access Strategy, operated between 1998 and 2000 with the aim of encouraging business in the four target areas of employment, premises, tourism and transport to improve access for people with disabilities. The use of such schemes could be extended to other areas of life, such as education, sport and entertainment. It could also apply to whole industries or activities, in an attempt to encourage the adoption of voluntary codes of conduct and industry self-regulation. Such schemes would complement the educative role of the Human Rights and Equal Opportunity Commission (HREOC), which could be expected to remain even in the absence of the DDA.

Greater emphasis on education and persuasion was the approach favoured by some inquiry participants representing employers. The Australian Chamber of Commerce and Industry stated:

The administration of anti-discrimination law should not be solely or even substantially based on regulation and prosecution. Effective education, problem solving and voluntary compliance can and must play an important role in the administration of this law. ... Prosecution, prohibition and enforcement based approaches cannot change attitudes and expectations of employers. (sub. DR288, p. 9)

The Australian Industry Group agreed:

HREOC should devote more resources to working with [Australian Industry] Group and other employer groups to educate their member companies about the issues in a positive way, rather than just focusing on legal obligations. ... Education and awareness programs which are channelled through respected industry bodies, such as [Australian Industry] Group, are likely to be more effective than ‘broad-brush’ approaches. (sub. DR326, p. 5)

---

### Box 7.3     **The Prime Minister's Employer of the Year Awards**

The Prime Minister's Employer of the Year Awards scheme was launched in 1990. The scheme gives recognition to employers of people with disabilities in several categories: national corporations, small business, medium business, large business, higher education institution and government agency. Employers can be state-based or operate nationally.

Employers can self-nominate or be nominated by others. Entrants are judged against the following criteria by an independent panel including business, disability, community and government representatives:

- conditions of employment
- length of employment and nature of work
- inclusive practices within the workplace
- initiatives undertaken by the employer to assist employees, and
- promoting and encouraging the employment of people with disabilities.

In 2003, more than 350 employers were nominated for the Awards. All winners are flown to Canberra to attend the Awards ceremony and all participating employers and nominators are invited to attend the Awards ceremony. All participating employers and nominators receive certificates of recognition.

*Sources:* FaCS 2003a, 2003b.

Although moral suasion and community education can play an important part in reducing disability discrimination (with or without an associated system of rewards), this approach is unlikely to succeed without legislative backing, for two reasons. First, the existence of primary legislation prohibiting discrimination is itself a crucial educational tool. The DDA and associated instruments symbolise society's commitment to the eradication of disability discrimination, and so raise awareness in a way that public campaigns alone might be unable to achieve (see chapter 10).

Second, on its own, an education strategy is only effective for certain individuals and organisations. According to Kagan and Scholz (1984), education is the most effective way of convincing 'political citizens' of the merits of a law or regulation. 'Political citizens' are those organisations and individuals that are initially unconvinced that the law is a sensible one and are inclined to disobey it. However, education will not change the behaviour of 'rational calculators' who defy the law because they decide that the benefits of non-compliance exceed the expected costs of being detected. Experience in the area of equal opportunity for women in the workplace has shown that 'naming and shaming' is not sufficient to get some organisations to comply with anti-discrimination legislation. For this group,

---

legislation involving deterrence and penalties represents the best strategy for inducing compliance. As the Equal Opportunity Commission Victoria commented, there will always be employers ‘who aren’t convinced by educative measures and who aren’t convinced to comply proactively’ (trans., p. 2599).

### **Increased public funding**

Governments have a number of instruments at their disposal with which to alleviate disability discrimination and its manifestations. They can provide resources or services directly to people with disabilities, or indirectly through organisations ranging from advocacy services to employers and educators. Current government aids include income support, disability services, taxi vouchers, companion cards, and wage, accommodation and operating subsidies. Broadly speaking, their aim is to compensate people with disabilities for any disadvantages they suffer and help them achieve equal participation in the community.

Undoubtedly, the combined effect of the panoply of government measures in this area results in improvements in the quality of life of people with disabilities, both materially and psychologically. These measures might also mean that people with disabilities are better placed to fulfil all their capabilities for ‘being and doing’ (see chapter 2).

It might be argued, therefore, that increased government funding of disability services could replace disability discrimination legislation. In employment, for example, governments could provide all employees with disabilities with the kind of intensive human and financial assistance that is currently provided by open and supported employment services (see chapter 15).

However, such an approach has a number of shortcomings. First, it does not address discriminatory behaviours and attitudes, thus doing little to remedy situations where people are discriminated against because of pure prejudice.

Second, although subsidies might improve access in some situations, they are not always sufficient. For example, providing subsidies to individual people with disabilities is unlikely to lead to improved access to mainstream public transport. Providing subsidies to service providers directly could improve access in some circumstances but, if there are many providers, it might be difficult to tailor subsidies to each situation. And where there are strong network effects (for example, where the benefits are dependent on coordinated action by several parties) subsidies might have to be underpinned by regulation to prevent ‘hold out’ problems (where one party refuses to cooperate).



---

Third, substantial funding might be required to compensate people with disabilities for the consequences of discrimination. This could potentially cost the community more than removing discriminatory barriers. People with disabilities would also continue to bear the personal costs of discrimination.

Fourth, increased reliance on subsidies could also lead to a situation of ‘moral hazard’, whereby employers and employees take advantage of information asymmetries to exaggerate their needs and claim excessive subsidies from the government.

Finally, such an approach is likely to be considered a return to disability policy as ‘welfare’ or charity, rather than enhancing equality.

Funding issues are examined in more detail in chapter 15.

## **Conclusion**

As noted in chapter 6, disability discrimination legislation such as the DDA has the potential to restrict competition. In accordance with its terms of reference for this inquiry and the requirements of CPA reviews, the Productivity Commission therefore has considered possible non-regulatory alternatives that would place fewer restrictions on competition and efficiency.

In essence, non-regulatory alternatives would rely on a combination of market forces, community education, self-regulation and increased funding. These may or may not be augmented by a system of government awards and subsidies, designed to create incentives for organisations to refrain voluntarily from discriminating.

The Commission considers that these alternatives are not adequate substitutes for anti-discrimination legislation such as the DDA. There are sound human rights and economic reasons for having some form of legislation prohibiting disability discrimination, and requiring the parties concerned to negotiate efficient solutions. Complementary policies have an important role to play in reducing disability discrimination and its effects, but they cannot entirely substitute for the symbolic and material benefits of an Act.

FINDING 7.2

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

---

## 7.3 Federal or State responsibility?

Section 7.2 concludes that anti-discrimination legislation is necessary. However, such legislation could take different forms. A fundamental issue is determining the appropriate level of government responsibility—a regulatory alternative to the DDA would be to rely solely on State and Territory anti-discrimination legislation to address disability discrimination.

All jurisdictions have adopted similar complaint-based anti-discrimination legislation, but their Acts have important differences. This report touches on many of these differences, including the definitions of disability and discrimination, the coverage of organisations, and the wording of exemptions. This section looks at the advantages and disadvantages of having both national and State and Territory legislation covering the same field, along with options for a national approach.

### Disadvantages of the current arrangements

There are several disadvantages to the current arrangements, many related to their lack of uniformity.

First, many inquiry participants stated that there was confusion about the respective roles of each level of government (The National Disability Advisory Council, sub. 225, p. 3; The Equal Opportunity Commission Victoria, sub. 129, p. 36; Disability Rights Victoria, sub. 95, p. 3; Carers Australia, sub. 32, p. 5). The Northern Territory Disability Advisory Board, for example, argued that:

... this creates unnecessary confusion for people with disabilities. It provides an avenue for the passing on of responsibility by levels of government. It is hard to imagine why we need separate Commonwealth and Territory/State legislation when we are dealing with the same target group. (sub. 121, p. 4)

Many people are not aware that they have a choice of jurisdiction in which to make a complaint. Those who are aware of their options might not appreciate the differences between the laws of different jurisdictions. This lack of awareness can cause serious problems for complainants, as a complaint inappropriately initiated under State or Territory Acts cannot be reheard under the DDA. This creates potential for complaints to go unheard, if a State or Territory body accepts a complaint, and then realises that the complaint should be handled by HREOC. Such situations have arisen in Tasmania (Anti-Discrimination Commission Tasmania, trans., p. 311).

Second, lack of uniformity can add to the compliance costs for organisations. In any one State or Territory, organisations must comply with two potentially conflicting

---

statutes and deal with different complaint processes. This issue is exacerbated greatly for businesses that operate in more than one State. National organisations are required to comply with nine different Acts (eight different State and Territory Acts and the DDA). The Australian Industry Group stated:

... employers are required to comply with anti-discrimination legislation which differs between the Commonwealth and the States and differs from State to State. It is essential that the Commonwealth, States and Territories continue to strive to achieve consistency amongst anti-discrimination laws. (sub. DR326, p. 20)

Third, the administrative costs of nine separate agencies administering nine parallel Acts are likely to be more substantial than those of a nationally uniform approach. Other costs arise from educating the public and training advocates about the different Acts. However, a national approach would not be costless. Negotiating a uniform approach among the jurisdictions would take time and effort, as would efforts toward improving that common approach over time.

Fourth, the current lack of uniformity means that people in different Australian jurisdictions are afforded different levels of protection. Complainants (or respondents) in one State might suffer injustice compared to complainants (and respondents) in other States or when compared to protection existing under the DDA. Nolan (2000) noted practical examples of such situations in Australia, and argued that something as fundamental as human rights should not vary from jurisdiction to jurisdiction, and it is the responsibility of the Australian Government to uphold those rights, not the States and Territories. A nationally uniform approach would better articulate and demonstrate the international obligations of the Australian Government. As Nolan (2000) observes, it accords better with the essence of our human rights obligations.

Finally, lack of uniformity means that case law in one jurisdiction is not necessarily applicable in other jurisdictions. Given the relatively small number of disability discrimination cases taken to court (see chapter 13), uniform legislation in each jurisdiction would help to establish useful precedents more quickly.

The Anti-Discrimination Board of NSW summarised many of the issues in a submission to an Australian Law Reform Commission inquiry:

Uniformity or, at a minimum, greater harmonisation of federal, State and Territory anti-discrimination legislation is crucial to an effective legislative regime to provide protection against genetic discrimination. It would ensure that people are afforded equal protection under the Australian law, regardless of which State or Territory people reside [in] and where the conduct occurs within Australia. Uniformity would reduce the complexity of jurisdictional decisions about whether to proceed under State/Territory or federal legislation for the would-be complainants. It also supports greater certainty about people's rights and responsibilities under anti-discrimination law, rather than

---

such understanding being undermined by uncertainty which arises when there are inconsistencies between different federal, State and Territory laws. Uniformity of anti-discrimination legislation would enhance certainty by increasing the likelihood that case law from one jurisdiction is applicable in another and for precedent to be applied. (ALRC 2003, p. 317)

## **Advantages of the current arrangements**

There are some significant advantages in both the Australian Government and States and Territories having anti-discrimination legislation. First, the States arguably have clearer Constitutional power to legislate in this area than is possessed by the Australian Government. The Australian Government has no specific Constitutional power in this area, but relies on various heads of power such as the external affairs and corporations powers in the Commonwealth Constitution. For example, as noted in chapter 11, doubts about the Australian Government's constitutional power could limit its ability to legislate to address disability vilification. State and Territory legislation provides a valuable 'second line' of protection if the DDA were to face Constitutional challenge.

Second, the national DDA supports State and Territory legislation by providing a national framework, and by providing coverage of federal departments and agencies. These were cited as two important reasons for introducing the DDA (see chapter 4) and remain valid.

Third, the current arrangements have important symbolic value. State and Territory governments play a major role in many facets of people's lives, and anti-discrimination legislation is an important statement about the human rights principles that underpin their view of society. Many federal systems of government have human rights protections at different levels of government (Degener and Quinn 2002a).

Fourth, in some areas, State and Territory legislation might be superior to the DDA—for example, in relation to senior State government appointments and complaints of discrimination on multiple grounds (including grounds that are not covered by federal discrimination legislation). As jurisdictions review their legislation over time, there is an opportunity for regulatory benchmarking and learning by example. These processes can encourage innovative solutions.

Finally, the presence of two legislative processes enables users to choose the Act that best suits their needs. HREOC argued that choice of jurisdiction might give complainants more options or different coverage:

HREOC is not convinced that choice of jurisdiction presents a major barrier to people lodging complaints, any more than consumer choice in markets should be viewed principally as presenting confusing barriers rather than opportunities. (sub. 219, p. 25)

---

Currently, the large majority of complaints are made under State and Territory Acts—perhaps because the tribunal-based State processes are more accessible to people with disabilities (see chapter 13). However, a significant group prefer to make complaints under the DDA, especially where the action to which they object relates to a federal agency or has a national dimension (such as for interstate transport).

## **A national approach**

The Productivity Commission has considered whether a uniform national approach might address some of the above disadvantages. There are several ways of establishing such a national approach: the States and Territories could adopt a ‘legislative compact’, under which identical mirror or template legislation is passed in each jurisdiction; the States and Territories could refer their powers in this area to the Australian Government; or the Australian Government could unilaterally move to take over the field. None of these approaches would be easy to implement.

### *A legislative compact*

Australian governments could agree to adopt a legislative compact—this approach has been adopted in other areas to introduce uniform legislation at the State and Territory level, most recently in relation to uniform gun laws. This option would have to be complemented by an abbreviated DDA that covers the federal level. However, it is likely to be very difficult to negotiate agreement on such sensitive legislation for several reasons.

- Despite some convergence of the various Acts, they still contain notable differences. This is an historic accident in part, but differences might also reflect the genuine desires of some jurisdictions to tailor otherwise similar legislation to their own purposes. The fact that some State and Territory Acts rely on a comparator for defining direct discrimination and some do not presumably reflects real differences in opinion about which approach is best suited to the needs of that jurisdiction.
- The State and Territory Acts are all omnibus Acts that cover discrimination on a number of grounds. It would be impossible to negotiate a uniform approach to disability without including those other grounds. As this report has illustrated, there are some substantial differences in the way in which the different federal anti-discrimination Acts approach similar issues.
- Most State and Territory Acts significantly predate the DDA, some having been introduced during the 1970s. Achieving consensus in this environment would be

---

difficult as some jurisdictions are likely to be reluctant to give up hard won rights for disadvantaged groups.

- The Australian Government does not have the same bargaining strength in this field as it has had in others. It was able, for example, to obtain the agreement of the States and Territories to implement (relatively) uniform disability service Acts through the broader Commonwealth State Disability Agreement (CSDA) negotiations, which also included federal funding for disability services.

### *Referral of powers*

Under section 51(xxxvii) of the Commonwealth Constitution, the Commonwealth Parliament may make laws on matters ‘referred’ to it by the Parliament or Parliaments of any State or States. However, the difficulties in negotiating a legislative compact between governments discussed above also apply to the option of the States referring their powers in this area to the Australian Government.

### *Federal law ‘covering the field’*

The third option is based on the operation of section 109 of the Constitution, under which federal laws displace the operation of State and Territory laws to the extent of any inconsistency between the two (assuming the Australian Government has Constitutional power to legislate in an area). Inconsistency can arise either directly—where the two laws would lead to different results—or through the federal law being found to be intended to ‘cover the field’ and not leave any room for State laws to operate. This makes it (theoretically) possible for the Australian Government to ‘take over the field’ and extinguish the role of the State and Territory governments in this area.

The DDA was never intended to ‘cover the field’. It expressly states that it is not intended to displace State or Territory laws that deal with disability discrimination that are capable of operating concurrently with the DDA (s.13). Although the Australian Government might be able to act unilaterally, this approach would unnecessarily strain government relationships in an area in which cooperation and goodwill are essential ingredients of effective anti-discrimination policy. In addition, this approach would also put more reliance on the Constitutional power of the Australian Government to legislate in this area—an ability that is not as clear cut as it is for the States.

---

## Conclusions

The problems of trying to negotiate a uniform national framework and the disruption that this effort would cause suggest that the best course of action is for both levels of government to continue to legislate in this area.

Convergence of anti-discrimination legislation in different jurisdictions is likely to reduce the disadvantages of current arrangements over time. HREOC stated:

... overlapping coverage of the DDA and State and Territory discrimination have lessened in recent years with most jurisdictions now having coverage and definitions very similar to those of the DDA. (sub. 143, p. 42)

The development of DDA disability standards and industry codes in an increasing number of areas will drive further convergence of the DDA and State and Territory anti-discrimination legislation (see chapter 14). Over time, people with disabilities and organisations will benefit from increasing uniformity and certainty. It is possible, therefore, that a uniform national approach will emerge by default, as the disability standards become the overarching regulatory framework governing compliance by organisations. There is nevertheless some confusion about the impact of DDA disability standards on State and Territory legislation (this issue is discussed in chapter 14).

There is also scope for government action to reduce confusion and to improve cooperation. Clarifying the relationship between the federal and State/Territory approaches to anti-discrimination, and improving cooperation across jurisdictions, will improve the efficiency and effectiveness of anti-discrimination laws and programs, and lead to better outcomes for people with disabilities.

The Productivity Commission has addressed some of the areas in which further cooperation could pay dividends. Given that all jurisdictions have similar goals, working together in education and awareness initiatives is encouraged (see chapter 10). The Productivity Commission recommends that the Australian, State and Territory governments improve cooperative arrangements at the ‘shopfront’ level, to provide a single point of contact for members of the public (see chapter 13). This approach would help address the unnecessary confusion among complainants about where to direct their complaint.

FINDING 7.3

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

---

## 7.4 A separate Act or omnibus legislation?

The Australian Government has legislated separately for different grounds of discrimination (sex, race, disability and, under a recently passed Act, age). This occurred partly because the Government progressively introduced various anti-discrimination Acts as it signed related international agreements. Linking each Act to specific agreements gives it greater protection from constitutional challenge.<sup>2</sup> As noted, the States and Territories have no such constitutional limits in the area of anti-discrimination law, and all have chosen to introduce omnibus legislation that covers discrimination on a number of grounds.

The advantages of an omnibus Act might include a reduction in the volume of material that businesses and their advisers have to apply, and the removal of inconsistencies in the approach of discrimination laws passed at different times. These inconsistencies could include differences in definitions, coverage and defences, and in the functions or powers available to HREOC. There are also some advantages in administrative handling of cases involving discrimination on a number of grounds. However, inquiry participants tended not to support an omnibus anti-discrimination Act (box 7.4).

HREOC argued that many advantages of the omnibus approach can be gained without the need for a single Act. An amending Act, for example, could harmonise provisions in separate anti-discrimination laws to whatever extent is justified, while leaving separate laws (sub. 143). This approach has occurred in relation to complaints, with the consolidation of complaints provisions into the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act).

HREOC also noted that the State and Territory omnibus laws, in most cases, are structured with separate divisions for the different grounds of discrimination. Further consolidation of federal anti-discrimination Acts would be likely to follow a similar structure, which would not necessarily make using and understanding federal anti-discrimination laws significantly clearer (sub. 143).

Although difficult to quantify, the symbolic importance of the DDA should not be underestimated. Many inquiry participants emphasised this point, and their views are well represented by the comments of Elizabeth Hastings, the first Disability Discrimination Commissioner:

People who are accustomed to segregation into specialised services and facilities may not believe that a mainstream general anti-discrimination law actually is intended for

---

<sup>2</sup> The Australian Government does not have explicit power to legislate on human rights, but largely relies on the external affairs power to legislate to implement international agreements (see chapter 4).



---

their use. In this sense having a specifically named Disability Discrimination Act may serve in a way analogous to the access symbol on the door of a structure ... (Hastings 1997, p. 10)

**Box 7.4 Inquiry participants' views on an omnibus Act**

The Equal Opportunity Commission Victoria stated that community members had mixed views. An omnibus Act would:

- more clearly acknowledge that some people experience discrimination on various grounds concurrently, and better reflect the intersection of types of discrimination and disadvantage as they impact upon people's lives; and
- be consistent with jurisdictions such as the United Kingdom and Northern Ireland, which have moved or are moving from distinct age, sex, race and disability discrimination legislation to a single equality statute.

However, strong views were expressed ... in favour of retaining the DDA as specific disability discrimination legislation. These views were mainly based on the perception that the existence of disability-specific legislation is empowering for many people with disabilities. (sub. 129, p. 38)

The Anti-Discrimination Commission Queensland supported the current approach:

The Commonwealth legislation has a high public recognition factor because it is individually titled. This is particularly important for many people with disabilities who may have less access to information than others. In State and Territory anti-discrimination legislation, disability is just one ground amongst many—often more than a dozen. (sub. 119, p. 5)

The Physical Disability Council of Australia saw no benefit in omnibus legislation:

Sex, race, disability, age and other forms of discrimination may share some antecedents and characteristics. But there are subtle (and not so subtle) differences. ... we feel strongly that federal law should continue to apply the principle of horses for courses. Anti-discrimination laws should remain distinct and separate but share a common commitment to eradicate discrimination in whichever way it is made manifest. (sub. 113, pp. 8–9)

The Public Advocate in Victoria supported a stand-alone DDA:

The DDA is better known and understood precisely because it is not part of omnibus legislation. (sub. 91, p. 2)

The Disability Services Commission supported the current approach:

There are concerns that the disability specific focus and mechanisms of the DDA, which are so effective in redressing discrimination, would be lost if the Commonwealth adopted omnibus legislation similar to that used by the States. (sub. 44, p. 6)

The Productivity Commission considers that there are good reasons to retain the present suite of Australian Government anti-discrimination Acts. Perhaps most significantly, a stand-alone Act is a powerful symbol of the Government's commitment to people with disabilities. In addition, redrafting the Acts would require considerable resources for perhaps little gain. It is possible that the process of redrafting might lead to some watering down of rights contained in the individual

---

pieces of legislation. However, it is also possible that some rights might improve. Finally, the Australian Government's powers to legislate in this area are not as clear as those of the States, and consolidating all grounds into one Act might make it more vulnerable to constitutional challenge.

## 7.5 What should be the objects of the DDA?

The CPA states that a legislation review should 'clarify the objectives of the legislation' (CPA p. 20). Although the terms of reference for this inquiry do not explicitly require the Productivity Commission to clarify the objectives of the DDA, it is still important to assess whether they adequately reflect the social and economic reasons for government involvement (section 7.1), and whether any changes are required.

The DDA has three stated objects: to eliminate disability discrimination; to ensure equality before the law; and to promote community acceptance (see chapter 4). Most inquiry participants said these objects are clear and appropriate, or did not comment on them. The Mental Health Legal Centre echoed the words of several inquiry participants in declaring 'the objects of the Act are clear and concise' (sub. 108, p. 2). The Queensland Anti-Discrimination Commission noted:

The objects of the DDA are obviously aspirational, verbalising a desired community standard, as is appropriate for legislation of this kind. (sub. 119, p. 11)

Other inquiry participants raised issues regarding the objects of the DDA. First, HREOC said the current objects are appropriate and workable (sub. 143, p. 35), but suggested that 'the object of eliminating discrimination could be supplemented with a more positive equality object' (trans., p. 1148). The Equal Opportunity Commission WA (sub. 236, p. 2) also 'suggested the object "equality" be promoted' in the DDA.

The first object in the DDA—to eliminate discrimination (as far as possible) in the areas to which the DDA applies—aims to remove the barriers that impede equality of opportunity for people with disabilities. The DDA appears to imply a requirement for limited differential treatment to remove such barriers (substantive equality), but it does not go so far as to require equality of outcomes.

Substantive equality is the appropriate goal for anti-discrimination legislation. Improved outcomes for people with disabilities are important, and should ultimately flow from the improved opportunities made possible by the DDA. However, the nature of some people's disabilities may be such that they cannot take advantage of the opportunities created by the DDA, without additional disability services or preferential treatment. The establishment, funding or eligibility criteria of disability

---

services should not be subject to the DDA (see chapter 15). Similarly, any attempt to improve outcomes through preferential treatment should be pursued directly, not through the DDA (see chapter 8).

A second issue regarding the DDA's objects was raised by the Darwin Community Legal Service. It questioned the qualifications that appear in the first two objects:

We question why the objects (a) and (b) contain the words 'as far as possible' and 'as far as practicable'. We believe those words perpetuate stereotypes of persons with disabilities as 'different' and that there is some qualification to the absolute right to be treated in a non-discriminatory fashion and equally before the law to be afforded to people with disabilities. (sub. 110, p. 3)

These qualifications reflect the 'aspirational' quality of the objects, while also recognising that the elimination of all disability discrimination in all circumstances is not achievable in practice. They are reflected throughout the DDA, through devices such as the requirement to meet the 'inherent requirements' of employment, the 'unjustifiable hardship' limits on the provision of adjustments, and the 'reasonableness' test for indirect discrimination (see chapter 8). In addition, there are practical limits to achieving equality before the law for some people with cognitive disabilities (see chapter 9). Similar qualifications are featured in the objects of the Age Discrimination Act recently passed by both houses of Parliament.

A third issue was raised by the New South Wales Council for Intellectual Disability, which said 'the objects of the DDA need to be broadened' to acknowledge the special needs of people with intellectual disabilities in the legal system (sub. 117, p. 5). The DDA seeks to eliminate discrimination and promote equality before the law for all people with disabilities. It clearly includes people with intellectual disabilities in its broad definition of disability (see chapter 9). It would be inappropriate for the objects to single out the special needs of one group of people with disabilities, however valid they might be.

Fourth, the Aboriginal and Torres Strait Islander Commission (ATSIC) wanted the objects of the DDA to acknowledge the special needs of Indigenous people with disabilities:

While ATSIC considers that the objects of the DDA (s.3) are of sufficient scope, it wants the section to specifically recognise the situation of Indigenous people with disabilities. It therefore proposes that section 3 of the DDA should include the specific aim of ensuring that Indigenous people with disabilities are fully able to exercise their rights, recognising that, in the case of Indigenous people, disadvantage associated with disability is compounded by highly adverse social conditions involving a range of negative factors concerned with matters such as health, education, employment and infrastructure services. (sub. 59, p. 3)

---

HREOC agreed that Indigenous people with disabilities face greater disadvantage than other people with disabilities, but argued that these disadvantages should be addressed directly through improved delivery of health, education, employment and other services, rather than indirectly through the DDA. HREOC further suggested that it might be beneficial to include a provision in relevant laws:

... requiring powers and functions to be exercised having regard to the needs and rights of Indigenous people with disabilities. ... HREOC is also currently considering possible areas for inquiry regarding particular disadvantages experienced by Indigenous people with disabilities. (sub. 219, pp. 3-4)

The Productivity Commission agrees with HREOC on this issue. The disadvantages faced by Indigenous people with disabilities in Australia are significant and require redress. However, amending the objects of the DDA is unlikely to be an effective method of ensuring improvements in the provision of health, education and other services for Indigenous people with disabilities. As noted by HREOC, the DDA could be used, for example, to improve assistance and adjustments for the education of Indigenous children with hearing loss, but it cannot be used to prevent the hearing loss in the first instance (sub. 219, p. 4). Such deficiencies in the provision of crucial services need to be addressed directly.

The DDA addresses discrimination against all people with disabilities, including Indigenous people with disabilities and other people with multiple disadvantages. In some instances, where an incidence of discrimination is based on race and/or disability, the *Racial Discrimination Act 1975* might be a more direct and appropriate avenue for addressing discrimination against Indigenous people with disabilities.

A fifth issue raised by some inquiry participants was a desire for the DDA to address discriminatory attitudes and behaviour in an ‘holistic manner’, to promote a truly inclusive community. For example, Dorothy Bowes (trans., p. 1987) said the DDA should focus more on ‘social conscience’ and ‘social issues’ as well as business and economic issues. In a related vein, Val Pawagi (sub. 191, p. 1) said the DDA should also address the personal sphere by encompassing ‘dignity and respect, self-determination (decision making and choice), personal relationships, sexuality, marriage, parenthood, financial management, culture and religion’.

These concepts could be regarded as aspects or examples of achieving full community acceptance. There are risks in seeking to spell out aspects of the objects of the DDA in too much detail, particularly when they encompass aspects of private life that are not (or cannot be) addressed by the substantive provisions of the DDA. As noted, the DDA is about eliminating discrimination and promoting substantive equality of opportunity. It is not practical—and probably not feasible—for an anti-discrimination Act to go beyond these objects.

---

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

## **7.6 Competition Principles Agreement conclusions**

Chapter 6 addressed the first two questions of a CPA legislation review. It concluded that:

- The DDA appears likely to have produced net benefits for the Australian community to date. But care needs to be taken in the way the DDA is implemented through standards if it is to continue to produce net benefits in the future. This will require an appropriate balance be kept between requirements and safeguards.
- Although the DDA has the potential to restrict competition in the Australian economy, current restrictions on overall levels of competition appear negligible.

This chapter addressed the third and final question of the review, and concludes that:

- The objectives of the DDA can only be met by such legislation. Non-regulatory approaches can complement the operation of anti-discrimination legislation, but cannot substitute for it.
- State and Territory anti-discrimination legislation can complement the operation of the DDA, but cannot substitute for it.

Overall, the Productivity Commission is satisfied that the DDA has, to date, met the requirements of CPA legislation reviews and, with appropriate amendments, will provide net community benefits into the future. The remaining chapters of this report examine ways of enhancing the benefits of the Act and minimising its costs, in order to ensure it continues to provide net benefits to the Australian community as a whole.

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