
8 Eliminating discrimination

The first objective of the *Disability Discrimination Act 1992* (DDA) is concerned with eliminating discrimination. In chapter 7, the Productivity Commission argued that this can require substantive equality between people with and without disabilities. This chapter looks at the case for including a duty to make reasonable adjustments that would give effect to this principle. Making adjustments to create substantive equality involves important efficiency and equity issues. The chapter accordingly looks at the major safeguards in the DDA, and at issues concerning who pays for adjustments. (The second and third objects of the DDA are addressed in chapters 9 and 10 respectively.)

The DDA currently contains many provisions to promote the rights of people with disabilities not to be discriminated against on the grounds of their disability. For example, it makes it unlawful to discriminate on the ground of disability in a number of different areas, such as employment, education, and access to premises. The DDA also contains provisions to introduce disability standards which can elaborate on the way the Act should apply to particular areas; it encourages organisations to prepare action plans; and while it includes some penalties, its emphasis is on conciliation and attitudinal change.

All of these features need do no more than underpin its role as an instrument for upholding formal equality. But the DDA goes further than this, or at least it appears to. Although it does not contain an express obligation to make adjustments, it contains features that imply that reasonable adjustments should be made under certain circumstances. These features imply that the DDA is at least in part concerned with creating substantive equality based on reasonable adjustments.

8.1 Reasonable adjustments

No issue caused as much comment during this inquiry as ‘reasonable adjustments’. The many comments the Productivity Commission received on this subject shows that reasonable adjustments can mean different things to different people. To many people, reasonable adjustments embody the very essence of disability discrimination legislation—that the disabling barriers in the community should be

addressed through a duty to make adjustments. To some others, the term meant affirmative action.

In this section, the Commission looks at what the DDA currently says about a duty to make reasonable adjustments; what the Parliament might have intended the DDA to say; how the courts have interpreted the DDA; and how a duty to make reasonable adjustments might be incorporated into the Act. Inquiry participants' views and the way reasonable adjustments are addressed in some other countries are also examined. Finally, consideration is given to whether an additional anticipatory duty on employers is required.

What the DDA says about adjustment

There is no explicit statement in the DDA that says that adjustments must be made to meet the needs of people with disabilities. For example, the term 'reasonable adjustments' (sometimes also called 'reasonable accommodations') does not appear anywhere in the DDA. However, various sections of the Act seem to imply, or have been interpreted, to require that 'reasonable adjustments' be made in certain circumstances. These include the definition of discrimination (s.5(2)), the reasonableness component of the definition of indirect discrimination (s.6(b)), the unjustifiable hardship defence (for example, s.15(4)(b) in relation to employment), and the section 15 prohibitions on discrimination in employment. Drawing on some of these sections, the Human Rights and Equal Opportunity Commission (HREOC) claims that employers are required to make reasonable adjustments (HREOC 2003f, p. 10).

The definition of direct discrimination

The DDA states that circumstances are not considered to be 'materially different' if 'different accommodation or services' are required by a person with a disability (s.5(2)).

There is a long history of debate over whether or not this section implies an obligation to make adjustments by providing different accommodation or services. The meaning of this section has been considered variously by HREOC Commissioners, the Federal Court, and most recently the High Court. In one of the most influential cases, *A School v HREOC and Anor*, Mansfield J rebutted the respondent's argument that the DDA did not impose a positive obligation to treat a person with a disability more favourably than a person without a disability. His Honour commented that:

... it is not necessarily the case that, where the DDA applies to a particular relationship or circumstance, there is no positive obligation to provide for the need of a person with a disability for different or additional accommodation or services. ((1998) FCA 1437)

Subsequently, HREOC Commissioner McEvoy said:

... the substantial effect of section 5(2) is to impose a duty on a respondent to make a reasonably proportionate response to the disability of the person with which it is dealing ... so that in truth the person with a disability is not subjected to less favourable treatment than would a person without a disability in similar circumstances. (McEvoy (HREOC unreported 2000), quoted in HREOC 2003b, p. 75)

By contrast, the opposite view—that section 5(2) does not impose a duty to provide the different accommodations required by a person with a disability—was found in *Clark v Internet Resources* (Commissioner Mahoney, HREOC 2000) and *Commonwealth of Australia v Humphries* ((1998) 1031 FCA).

This issue came to a head when the High Court considered the Purvis case involving alleged discrimination against a student in a NSW school (*Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62). As noted by Lee Ann Bassar, although the majority of judges in this case ‘did not consider the duty to make reasonable adjustments in any detail, the minority considered the issue in some detail’ (sub. DR266, p. 2). Justices McHugh and Kirby, in the minority, concluded, among other things, that s.5(2) does not impose an obligation to make adjustments and that failure to provide adjustments is not a *per se* breach of the Act. They found that the ‘failure to provide the required accommodation goes to the issue of materially different circumstances, not obligation.’ ([2003] HCA 62) According to Lee Ann Bassar, the view of McHugh and Kirby JJ is that:

... in the absence of an express duty to make reasonable adjustments, the Act operates in a negative fashion. According to McHugh and Kirby JJ there is no obligation to make adjustments or accommodations but a failure to make reasonable adjustments may lead to a finding of unlawful discrimination. (sub. DR266, p. 2)

Although this might not be the end of the matter (a majority of the High Court could presumably take a different view in a subsequent case), the Productivity Commission is satisfied that section 5(2) of the DDA cannot be relied upon to imply a duty to make adjustments.

Unjustifiable hardship

A discriminator may escape a finding of unlawful discrimination if he or she can demonstrate that to comply with the DDA would impose an unjustifiable hardship. This seems to imply an obligation to make adjustments where they would not result in unjustifiable hardship, although as noted in the Purvis case by the minority, this

obligation might only be enforceable in the breach. Thus, if a person makes no adjustments or insufficient adjustments and a complaint is made against them, they might not be able to use this defence. In some senses, the unjustifiable hardship defence can be regarded as the inverse of a duty to make reasonable adjustments. If there is a range of adjustments that could be made in a particular case, those that do not impose an unjustifiable hardship could be considered to be reasonable and those that do might be considered unreasonable. However, as noted, it applies in the breach and is not as explicit or as proactive as a duty to make reasonable adjustments might be.

Indirect discrimination

Indirect discrimination can occur where a person is required to comply with a requirement or condition which is not reasonable having regard to the circumstances of the case (s.6(b)). HREOC has argued that the DDA's obligation to make reasonable adjustments is principally based on this section and not section 5 (HREOC 2003f, p. 12). An example might be where it would be considered unreasonable for the owner of a public premise to only provide steps as the means of accessing those premises, because this would discriminate against people who use wheelchairs. A reasonable adjustment in such a case might be to install a ramp, but this would depend on the circumstances.

Conditions of employment

HREOC notes that although not called as such, the concept of reasonable accommodation has been used to support two findings by the Federal Magistrates Court of discrimination in employment under s.15(2)(b) (HREOC 2003b, pp. 76–77). This subsection makes it unlawful to discriminate against an employee by denying or limiting their access to opportunities for promotion, transfer or training, or to other benefits associated with employment. In essence, these cases turned on the Court deciding that the respective employers had not offered the persons concerned sufficient support in the workplace.

Draft standards

The draft disability standards for education introduce the concepts of 'reasonable adjustment' and 'unreasonable adjustment'. These two concepts are not defined in the draft standards, except as being 'not the same as unjustifiable hardship' (s.10.1(2)) (see chapter 11 and appendix B). This approach appears to differ from the draft disability employment standards that say a 'reasonable' or 'appropriate' adjustment is simply one that does not cause an unjustifiable hardship (see below).

In negotiating the draft disability standards for education, some States warned that confusion and problems might arise from this interpretation of ‘reasonable adjustment’ (see chapter 14 and appendix B).

Summing up

Although there is no explicit provision in the DDA requiring (reasonable) adjustments be made to accommodate the needs of people with disabilities, it is implied in various sections of the Act. However, the net effect is that the degree of obligation is uncertain, especially given the recent Purvis decision in the High Court.

FINDING 8.1

Various sections of the Disability Discrimination Act 1992 imply that reasonable adjustments must be made in order to avoid discriminating against people with disabilities. However, a recent High Court decision has questioned this presumption and appears to have narrowed significantly the protection that the Act was thought to provide.

What the Australian Government said when the DDA was introduced

Although the DDA does not contain an explicit duty to make reasonable adjustments, the Australian Government appears to have had such a duty in mind when the DDA was introduced. The explanatory memorandum and second reading speech both use the equivalent term ‘reasonable accommodation’ in the context of the unjustifiable hardship test (box 8.1).

Participants’ views

Many inquiry participants supported the general principle that the DDA should include an obligation to make reasonable adjustments. For example, the Equal Opportunity Commission Victoria, stated that it:

... considers that the inclusion of a duty to make reasonable adjustments is central to effective disability discrimination legislation. Without modification to premises, equipment, practices or job design, for example, the duty not to discriminate against people with disabilities will have minimal effect. (sub. 129, p. 30)

The Anti-Discrimination Board of New South Wales commented similarly that:

... there could be a clear duty to ‘reasonably accommodate’ a person with a disability in order to enable them to carry out the inherent requirements of a position, access

services, facilities, premises and accommodation. What amounts to ‘reasonable accommodation’ should require a consideration of all the circumstances including those which are presently considered under the defence of unjustifiable hardship. (sub. 101, p. 12)

The Physical Disability Council of New South Wales said it:

... believes strongly that the concept of ‘reasonable adjustment’ should be clearly articulated and defined within the DDA. (sub. 78, p. 15)

Box 8.1 What the Australian Government said about reasonable adjustments

The outline of the explanatory memorandum to the *Disability Discrimination Act 1992* stated that:

The Bill also provides that only reasonable accommodation needs to be made for people with disabilities, and persons against whom complaints are made will be able to argue that the accommodation necessary to be made will involve unjustifiable hardship on that person. In relation to employment an employer will be able to argue that a person with a disability is unable to carry out the inherent requirements of the job.

In explaining unjustifiable hardship, the explanatory memorandum stated that:

When determining whether or not a person should be required to make a reasonable accommodation for a person with a disability, if the person making the accommodation provides some evidence that the provision of such accommodation will cause unjustifiable hardship, HREOC and if required the Federal Court will have to decide whether or not requiring a person to make the accommodation will involve that person in unjustifiable hardship.

In addressing the definition of direct discrimination the explanatory memorandum states that:

... circumstances will not be regarded as being materially different because the discriminator has to provide different accommodation or services to the aggrieved person. Whether, in fact, the discriminator will be required to provide the different accommodation will be determined when the issue of unjustifiable hardship is dealt with.

From the second reading speech:

... employers, providers of accommodation, education, goods and services, clubs and sporting groups would be able to argue that action necessary to accommodate the needs of people with disabilities would impose unjustifiable hardship.

.... there is an exemption which does not prohibit discrimination if the person is not able to perform adequately the inherent requirements of the job, even where reasonable accommodation has been made.

Sources: Australia 1992a, pp. 2751–53; *Disability Discrimination Act 1992*, Explanatory Memorandum.

The Northern Territory Disability Advisory Board said:

It is essential that reasonable adjustment be clearly defined within the DDA. Currently there does not appear to be any requirement within the Act for reasonable adjustment.

In not doing so the DDA provides a loophole for all providers and developers of goods and services. The DDA needs to enforce the duty of care providers have in relation to the Act. (sub. 121, p. 2)

People with Disabilities Australia were strongly supportive of including a duty to make reasonable adjustments in the DDA, to be consistent with the intentions for the Act. Commenting on the High Court Purvis case, it said that the DDA needs amendment:

... if it is to have the effect intended by Parliament of providing substantive equality for people with disability in the areas covered by it. The inclusion of such an obligation would clarify and give effect to the intended position at law, and would result in real and practical changes to the current, inadequate state of compliance.

... Indeed, People With Disabilities Australia considers that the Productivity Commission's various findings to the effect that the DDA has a 'mixed report card,' so far as its effectiveness is concerned, are linked directly to the failure of the DDA to expressly require such adjustments. ... it is now hard to see how the DDA's objective "to eliminate, as far as possible, discrimination against persons on the ground of disability" in certain areas, can ever be achieved without such an obligation. (sub. DR359, p. 8)

Comments about a duty to make reasonable adjustments from the business community were very limited (though some commented on the related issue of an anticipatory duty on employers (see below)). It is significant that no strong opposition to the concept of reasonable adjustment was evident in submissions to this inquiry.

Reasonable adjustments in other countries

Disability discrimination legislation in other countries typically embodies an obligation to make adjustments, sometimes much more explicitly than in the DDA, other times in equally opaque ways. Models of some relevance to the Australian context include the United Kingdom, the United States and Canada.

In the UK DDA, subsection 6(1) places a duty on employers to identify arrangements and physical features that place the disabled person concerned at a substantial disadvantage, and to take reasonable steps to prevent such disadvantage. Subsection 6(2) gives examples of ways in which the employer can comply including:

- (a) making adjustments to premises;
- (b) allocating some of the disabled person's duties to another person;
- (c) transferring him to fill an existing vacancy;
- (d) altering his working hours;

-
- (e) assigning him to a different place of work;
 - (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment;
 - (g) giving him, or arranging for him to be given, training;
 - (h) acquiring or modifying equipment;
 - (i) modifying instructions or reference manuals;
 - (j) modifying procedures for testing or assessment;
 - (k) providing a reader or interpreter;
 - (l) providing supervision.

A test of reasonableness applies.¹ The UK DDA and supporting legislation² similarly require providers of goods, facilities and services and educational authorities to make reasonable adjustments.

The Americans with Disabilities Act 1990 (ADA) also is more explicit about the obligations placed on employers. It states that the failure to make reasonable accommodation amounts to discrimination (subsection 102(5A)). Like the UK DDA, it gives examples of what is meant by reasonable accommodation, and is bounded by an ‘undue hardship’ test. Subsection 101(9) states that reasonable accommodation may include:

- (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

By comparison the Canadian Human Rights Act 1976-77 does not contain an explicit obligation to make adjustments. It is however implied. Thus, discriminatory practices are only permitted in employment if there is a *bona fide* occupational requirement and in other areas if there is *bona fide* justification but:

¹ Interestingly, the test requires, among other things, that regard be had to the ‘availability to the employer of financial or other assistance with respect to taking the step’ (s.6(4)(e)). As this implies that the absence of such financial assistance might make it unreasonable to make the adjustment, the funding of such schemes would appear to be an important determinant of firms’ exposure to the Act.

² The UK DDA was amended by the Special Educational Needs and Disability Act 2001 to include education within its provisions.

... it must be established that accommodation of the needs of an individual or a class of individuals affected would impose undue hardship on the person who would have to accommodate those needs, considering health, safety and cost. (s. 15(2))

The Productivity Commission's view

The Commission considers that the task of eliminating discrimination cannot be adequately addressed in the absence of a duty to make reasonable adjustments. If disability discrimination legislation only went as far as formal equality, it would entrench existing disadvantages. For example, an employer who is concerned only with the productivity of employees and the costs of employment will have a commercial incentive to overlook candidates with disabilities if he or she can recruit someone who might be no better qualified but does not require additional workplace adjustments. This might sometimes be an efficient response from the employer's perspective, but it might not be either efficient or equitable from a broader community perspective.

A duty to make reasonable adjustments would be an important means of creating more substantive equality between people with and without disabilities (see chapter 7). Adjustments are sometimes necessary to allow people with disabilities to achieve more equal access to opportunities. In the employment example above, substantive equality would be achieved if the employer were prepared to make the adjustments to enable the person with the disability to compete on merit for the job. Substantive equality is consistent with the social model because it addresses the environmental barriers that are so disabling to people with impairments.

The concept of reasonable adjustments in an employment context was well summed up by Val Pawagi, who noted that in an employment context it is:

... any form of assistance or adjustment that is necessary and reasonable to counter the effects of an employee's disability in the workplace. It is intended as a means of bringing people with disability to the point at which they can compete against others without the disadvantaging effects of the disability, i.e. to compete on their merits and to perform effectively in the workplace. (sub. 209, p. 5)

This reflects the widely held view that a duty to make reasonable adjustments is meant to get people with disabilities to the same notional 'starting line' as people without disabilities. It is not meant to give an advantage to people with disabilities, but to remove a source of disadvantage that arises from their disability. Thus, for example, the provision of a screen reader for a person with a visual impairment might address the disadvantage faced by that person, but does not amount to preferential treatment because the screen reader would be of little or no use to a person without a visual impairment. The Productivity Commission considers that

reasonable adjustments can be distinguished from affirmative action, which is explicitly based on assigning preferences to one group at the expense of another.

The Commission notes that a duty to make reasonable adjustments is consistent with the intentions of the Australian Government when the DDA was introduced and can be implied from some existing sections of the DDA. However, two judges in a recent High Court decision concluded that the definition of direct discrimination does not contain an obligation to make adjustments. Although the remaining sections of the Act might continue to imply some obligation to make adjustments, they offer at best an incomplete approach. Remedial amendment is required.

There are two broad ways of proceeding. First, the definition of direct discrimination could be amended to include a requirement to provide the ‘different accommodation or services’ already mentioned in section 5(2). Second, a specific reasonable adjustments obligation could be introduced.

Amending the definition of direct discrimination would address the weakness in the DDA that has been revealed by the High Court, but would mean that the duty would continue to be expressed in a piecemeal and indirect manner. It also does not lend itself well to lay interpretation.

Many inquiry participants favoured including a specific obligation to make reasonable adjustments, and not just because this would make explicit what had previously been presumed. The Equal Opportunity Commission Victoria noted that the duty:

... would serve a useful educative function. Many respondents remain focussed on an understanding of non-discrimination as meaning refraining to act in particular ways. The concept that compliance with the DDA also requires more active steps can be difficult to convey. (sub. 129, p. 30)

The Physical Disability Council of New South Wales similarly noted that the duty would make the DDA a ‘genuinely enabling piece of legislation’ (sub. 78, p. 15).

Commenting on the duty to make reasonable adjustments in the UK’s DDA 1995, Marrickville Council said:

There is also a subtle yet importance difference, with reasonable adjustment the focus is on the responsibility of all the society to remove barriers as opposed to a focus on what is considered unjustifiable to alter. (sub. 157, p. 5)

The Commission agrees: an explicit duty to make reasonable adjustments should be included in the DDA. This would not only clarify the DDA but also subtly reposition it as a more positive force for change. The duty would reinforce the roles

played by the prohibitions on direct and indirect discrimination. Thus, failure to provide a reasonable adjustment could itself be unlawful discrimination and the subject of a complaint. This would put the Act on a more proactive basis, by focusing on what needs to be done to avoid charges of direct or indirect discrimination.

The Commission has considered how the duty might be included: generally; or in each area of activity. There are advantages and disadvantages in each approach. A general statement would be clear but might not be able to capture the subtle nuances that might be possible by tailoring the duty to meet the specific circumstances of each area of the Act. The Commission favours a combination of the two approaches, with the duty expressed as a stand alone provision with examples of how it might be met in each substantive section. The examples contained in the UK DDA employer's duty, and the various (actual or proposed) standards and guidelines (for example, HREOC's Frequently Asked Questions on employment; HREOC 2003f) already drafted under Australia's DDA might be drawn on for this purpose.

Other drafting issues might concern whether the duty should be described in terms of reasonableness or not; and the need to identify who might be required to make adjustments.

Whether the duty is described as requiring 'reasonable adjustments' or just 'adjustments', the defence of unjustifiable hardship would apply. As long as reasonable adjustments are defined to exclude adjustments that would lead to unjustifiable hardship, confusion between what is reasonable and what is not unjustifiable should be avoided (unjustifiable hardship is addressed in section 8.2). Blind Citizens Australia agreed with this view:

If the DDA was amended to include a positive obligation to provide reasonable adjustments then the term would need to be defined and should include adjustments which do not result in an unjustifiable hardship. (sub. 72, p. 8)

The Commission favours expressing the duty in terms of 'reasonableness' as this would immediately convey to the reader of the Act that the duty is not an unlimited one and hence would aid interpretation. It would also emphasise that, where a range of possible adjustments could be made, affected organisations are only required to make those that are reasonable in the circumstances. That is, there is no obligation to provide complex and expensive adjustments if simpler and cheaper alternatives are available.

The issue of who might be required to make adjustments would have to be addressed in the DDA. In some cases, there is likely to be some confusion about who the responsible party might be. In areas like public premises, accommodation

or sport it might be the person who engages in the relevant conduct, for example, the person who refuses entry to the building, or the coach who excludes a person from the sporting team. The alternative preferred by the Commission would be to place the responsibility on those with the authority to change practices or the environments, such as the building owner or the club that conducts the sport.

RECOMMENDATION 8.1

The Disability Discrimination Act 1992 should be amended to include a general duty to make reasonable adjustments.

- *Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.*
- *The person or persons on whom the duty would fall should be identified.*
- *Examples of how the duty might apply should be included in each area of the Act.*

Eliminating discrimination in employment: are additional measures needed?

One of the driving forces for introducing disability discrimination legislation here and overseas was to address discrimination in employment.

Non-discriminatory participation in the labour market is an important social and economic issue. Employment not only provides income to facilitate other forms of social participation, but also contributes to an individual's sense of self-worth and to others' perceptions of that individual. It is an important source of social interaction and networking. The Intellectual Disability Services Council, for example, commented that employment is an important means to many ends, including a better lifestyle and greater opportunities for socialising and integration (sub. 162). Ronnit Redman emphasised the importance of work in defining a person's identity (sub. DR348).

In chapter 5, the Productivity Commission examines the effectiveness of the DDA in achieving its objects, concluding that disability discrimination in employment remains a significant issue, and that the DDA appears to have been relatively ineffective in this area (see chapter 5 and appendix A). However, if the many recommendations that the Commission is suggesting are adopted, the Commission considers that the DDA will become a much more effective instrument. Questions then arise as to the need for additional measures to address employment and, if so, whether the DDA is the appropriate place for them.

The case for addressing employment of people with disabilities is accentuated by the increasing acceptance of the notion of ‘mutual obligation’, and by the Australian Government’s proposed tightening of the conditions for obtaining the Disability Support Pension. Mutual obligation might result in fewer people being eligible for that pension and more people with disabilities looking for employment. This increases the pressure to find ways to improve employment prospects for people with disabilities. The OECD has noted that mutual obligation offers a way of breaking the link between disability benefits and permanent withdrawal from economic activity. It cautions, however, that its implementation, while placing obligations on benefit recipients, also requires society to do more to help people with disabilities achieve reintegration (OECD 2003).

Affirmative action

As discussed in chapter 2, there are different views on the meaning of affirmative action. The International Labour Organization says that affirmative actions ‘may consist of giving some advantage to members of target groups, where there is a very narrow margin of difference between job applicants, or of granting substantial preference to members of designated groups’ (ILO 2003, p. 64).

Larry Laikind addressed the difference between discrimination legislation and affirmative action. Affirmative action, he said:

... simply means policies, practices or laws to favour persons with disabilities (for example). It has been called many things in the past such as positive action, special measures or even reverse discrimination. Whereas anti-discrimination legislation is equality legislation designed to remove barriers for more equal participation, affirmative action directly favours a particular group because of the attribute or quality. (sub. 70, p. 2)

Affirmative action can therefore include a range of policies such as:

- a commitment by employers to recruit more widely or to meet voluntary employment targets for minority groups
- mandatory planning, reporting and auditing techniques to ensure employers implement complying policies
- a legislative requirement to recruit/employ fixed quotas of minority group members.

Some inquiry participants expressed support for various forms of affirmative action. For example, the Disability Council of New South Wales (sub. 64) and the New South Wales Council for Intellectual Disability (sub. 117) supported the use of quotas. Other participants supported more flexible forms of affirmative action, such

as voluntary targets applying to either the public sector or throughout the economy (New South Wales Office of Employment Equity and Diversity, sub. 172; Council for Equal Opportunity in Employment, trans.; Dennis Denning, trans.; Mark Hunter, trans.).

Some participants recommended the adoption of an employment equity approach, inspired by recent developments in Canada, Northern Ireland and the United Kingdom (box 8.2) (Equal Opportunity Commission Victoria, sub. 129; New South Wales Anti-Discrimination Board, sub. 101; Anti-Discrimination Commission Queensland, sub. 119). The essence of this approach is that designated (usually public sector) employers are required to develop plans for greater employment of the target group, and that regulators have powers to audit these plans and direct employers. An administrative model already operates in the New South Wales public service (New South Wales Anti-Discrimination Board, sub. 101; New South Wales Office of Employment Equity and Diversity, sub. 172).

At their most extreme, affirmative actions take the form of mandatory quotas that require designated employers to employ a certain percentage of people with disabilities. The Commission does not favour mandatory quotas. Quotas are distortionary, blunt instruments, susceptible to problems in definition and administration, and to the extent they override the merit principle of selection, would be detrimental to workplace productivity. The diverse range of disabilities in the community would make it difficult to specify the target group. If it were all people with disabilities, employers might be biased towards those types of disabilities with the highest productivities. On the other hand, if targets were expressed in terms of particular disabilities, tradeoffs between groups become a problem.

There are also data problems. Some disabilities are apparent, or might need to be divulged to the employer if they are relevant to the job, but in many cases they are not. Employers therefore could never be sure about the precise number of people with disabilities present in their workforce at any point in time and hence might not know if they are complying with the quota. The OECD (2003, p. 105) has noted that quota fulfilment in all countries that have quotas is ‘relatively low’, due to problems with eligibility criteria, quota specifications and administration (see appendix E).

Affirmative action policies need not extend to quotas. Other more subtle approaches are possible. Noting the absence of evidence that quota systems work effectively, HREOC saw the employment equity approach ‘as more promising’ (HREOC, sub. 219, p. 34) However, the Productivity Commission notes that these programs also lack many of the features of good regulation. Although potentially less distortionary than quotas, and well intentioned, they impose vague obligations on the target firms, are bureaucratic in nature, and rely more on coercive measures than incentives.

Box 8.2 Employment equity measures in Canada, the United Kingdom, Northern Ireland and South Africa

In **Canada**, the Employment Equity Act 1995 aims to address disadvantage in employment experienced by women, visible minorities, Aboriginal people and persons with disabilities. The legislation imposes on federally regulated private and public employers of more than 100 persons a duty to achieve proportional representation of minority groups (that is, a quota), through the adoption of employment equity plans designed to remove barriers to employment participation. The Canadian Human Rights Commission has the power to audit employer performance to ascertain whether an employer is complying with the legislation. If the employer is not in compliance, then the commission can issue a compliance notice or, if non-compliance persists, ask a tribunal to issue an order of compliance.

In the **United Kingdom**, the Race Relations Act 1976, as amended by the Race Relations (Amendment) Act 2000, places a general statutory duty on a wide range of public authorities to promote racial equality and prevent racial discrimination. The Commission for Racial Equality, any other organisation or an individual can apply to the High Court for judicial review of a public authority's failure to comply with the general duty. If the commission is satisfied that a public authority is not complying with its specific duties, it has the power to serve a compliance notice requiring the authority to take action. If, after three months, the authority has not taken action as directed, the commission can apply to a court to order compliance.

Affirmative action provisions in **Northern Ireland** are based in the Fair Employment and Treatment (Northern Ireland) Order 1998 and the *Northern Ireland Act 1998*, which legislate affirmative action to combat discrimination against racial and religious minorities in the private and public sectors. Employers have to adopt 'equality schemes' and review their employment policies periodically. Public authorities are also required to publish equality impact assessments detailing whether the work of the authority has had any adverse or positive impacts on the promotion of equality. The Equality Commission has the power to monitor compliance and to issue a legally enforceable direction in some cases.

In **South Africa**, the Employment Equity Act of 1998 requires designated employers to take affirmative actions. Affirmative actions are defined broadly but are meant to 'ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer' (article 15).

Source: ILO 2004.

Like other affirmative actions, to the extent that these measures favour people with disabilities over other applicants, they may create resentment and prove counterproductive. This was the view of both the Australian Chamber of Commerce and Industry (ACCI) and the Disability Discrimination Legal Centre of NSW. ACCI opposed affirmative action in general:

Largely because, in terms of the examinations we've seen, we are not convinced they work, for a range of reasons. Now, by 'work' I mean in terms of across the entire workforce, and whether in fact there are actually negative implications of doing this sort of arrangement or not. (trans., p. 694)

The Disability Discrimination Legal Centre of New South Wales was concerned about the message that affirmative actions can convey:

If we start saying, 'Employ people with disability as a positive duty' and with less emphasis on merit, you will find society becoming resentful of the fact that a person with a disability, who perhaps doesn't quite have the ability to do the job, is being given the job over and above others who do have the qualifications. Then we are breeding resentment against people with disability. We promote equality, in terms of equality of opportunity. If our merits are equal, and we are able to do the job as a person with a disability, and what we then need to assist us to do it is a bit of reasonable accommodation, then that's what we want. (trans., p. 2523)

It is also arguable that affirmative action policies, with their emphasis on outcomes and not discrimination, exceed the scope of discrimination legislation. To the extent that they may be considered appropriate in the circumstances, they should be considered through other policies.

An employers' duty

The Productivity Commission's draft report for this inquiry canvassed the introduction of an 'employers' duty' in the DDA. This duty would require employers to take 'reasonable steps' to identify and be prepared to eliminate barriers which limit opportunities for people with disabilities. Such a duty would be different from the duty to make reasonable adjustments. The duty to make reasonable adjustments would require that adjustments be made as the need arises, whereas the employers' duty would oblige some action to be taken irrespective of what subsequently happens.

In practice, 'reasonable steps' could include:

- examining recruitment practices for potential indirect discrimination
- looking at characteristics of current staff and reasons for any underrepresentation of people with disabilities
- considering access issues or undertaking an access audit
- developing a voluntary action plan.

Such a duty could be enforced through the complaints process, with HREOC and the courts required to have regard to the steps taken by the employer before the complaint arose.

This duty would have some parallels with existing occupational health and safety duties that require employers to provide a safe workplace, but its *ex ante* nature also means there are important differences. The benefits of the duty from the point of view of potential employees is that it would place a greater onus on employers to be disability aware and have a complying workplace. To the extent that employers became aware of the duty and implemented it, it could help lessen discrimination in recruitment, which is where the Commission suspects the problems are greatest.

There are some parallels between this idea and that proposed for inclusion in the UK DDA by the Disability Rights Commission (DRC 2003a). The DRC has proposed, among other things, that:

... employers should be subject to a duty to anticipate the requirements of potential disabled employees and applicants, and to take reasonable action to remove barriers in advance of individual complaint. (DRC 2003a, p. 27)

Compliance with the duty would be ‘considered when an individual requires a particular reasonable adjustment’ (DRC 2003a, p. 30). However, there are some important contextual differences between the UK and Australian Acts that must be considered. The UK DDA, for example, does not contain a prohibition on indirect discrimination, whereas the DDA does. The DRC acknowledges that a prohibition on indirect discrimination (in relation to race and gender) is a means of addressing ‘systemic’ discrimination and encouraging ‘employers to proactively examine their policies and practices to determine if they inadvertently disadvantage particular types of employee’ (DRC 2003a, p. 28). Why it did not advocate for an indirect discrimination prohibition instead of, or in addition to, the employers’ duty is not clear.

The employers’ duty raised in the draft report struck a sympathetic chord with some participants. For example, ACE National Network (sub. 361) and Ability Technology Limited (sub. DR295) supported its adoption.

However, the Productivity Commission acknowledges that there are some major problems with this type of duty. For example, it would often be difficult to anticipate how an employer should respond and the costs of compliance for small firms could be substantial. The Australian Industry Group noted that:

It is unreasonable for employers to be required to identify and develop strategies to remove barriers to the employment of people with disabilities when the employer does not know what form of disability a potential employee may have. It is equally unfair to expect an employer to develop strategies to remove barriers when a person with a disability may never apply for a job with the employer. (sub. DR326, p. 26)

The Australian Chamber of Commerce and Industry (sub. DR288) and the Department of Employment and Workplace Relations (sub. DR299) commented

similarly. For example, the Department of Employment and Workplace Relations stated:

Given the range of disabilities, it would be very difficult and costly for an employer to be prepared to eliminate the barriers to employment proposed by every form of disability. (sub. DR299, p. 21)

The Australian Chamber of Commerce and Industry was more broadly critical of the employers' duty regarding it as costly and unjustified. It said that such regulations carry 'the prospect of being inimical to the interests of persons with disabilities' (sub. DR288, p. 6).

The Productivity Commission acknowledges that there are problems with operationalising such a duty and has decided not to recommend this approach. Many of the recommendations it has made should make the DDA more effective, in particular that there be an explicit duty to make reasonable adjustments. And as many participants have commented, there is much to be gained by educating employers about their responsibilities (see chapter 10). The Commission notes too that, unlike the UK DDA, the presence of a prohibition against indirect discrimination in Australia's DDA provides some assistance in addressing systemic discrimination in work arrangements.

8.2 What checks and balances are required?

The Commission accepts the argument that there are good reasons for treating people with disabilities differently by creating a duty to make reasonable adjustments. But duties like these are not costless. To some extent they involve tradeoffs between the rights of different groups. People with disabilities benefit but only by putting a corresponding duty on the employer, the shopkeeper or whoever it is who must provide the accommodation. As illustrated elsewhere in this report many adjustments are relatively simple and inexpensive, but it is also true that some are not. A mechanism is needed to ensure that adjustments are reasonably proportionate to the situation. This is also sensible in a broader sense. The community has a limited capacity to supply adjustments, hence it is important to ration them across all possible adjustments to achieve the best overall outcome. Ways of spreading the cost burdens are addressed in section 8.3.

The Commission has recommended that the adjustment duty be expressed in terms of reasonableness and that reasonable adjustments be explicitly linked to unjustifiable hardship. However the unjustifiable hardship test does not currently apply universally across the DDA, and may be overridden by standards.

The other major safeguard in the Act is the inherent requirements test contained within the employment provisions. The effect of the inherent requirements test is that employers can lawfully discriminate against a person with a disability if they are unable to carry out the inherent requirements of the particular employment.

Of course, other features of the DDA also provide safeguards of one form or another, for example, the reasonableness component of the indirect discrimination definition, and the various exemptions (see chapters 11 and 12).

Unjustifiable hardship

Many of the DDA's prohibitions on discrimination in particular activities—including those that address employment, education, access and goods and services—are subject in whole or in part to the defence of 'unjustifiable hardship' (see chapter 4). Section 11 of the DDA specifies that:

For the purposes of this Act, in determining what constitutes unjustifiable hardship, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned; and
- (b) the effect of the disability of a person concerned; and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship; and
- (d) in the case of the provision of services, or the making available of facilities—an action plan given to the Commission under section 64.

Rationale for an unjustifiable hardship defence

The unjustifiable hardship defence has the effect of capping the obligation to make adjustments so that the response is reasonably proportionate to the circumstances of the case. Thus, the benefits and detriments to all persons concerned must be considered, but even if this comes out favourably, a court could find that unjustifiable hardship existed because of the financial effects on the person who has to provide the adjustments.

In the second reading speech for the Disability Discrimination Bill 1992, the then Minister said that, in recognition of the potential adjustment costs the Act would impose, an unjustifiable hardship defence in the DDA would be:

... very significant in terms of the overall effects of this legislation on service providers, businesses and employers. (Australia 1992a, p. 2751).

The intention was to provide a balance to the Act's obligation to make adjustments.

There were many views on including an unjustifiable hardship defence in the DDA. Some inquiry participants questioned the validity of an unjustifiable hardship defence (for example, Carers Australia, sub. 32). Others said it ‘undermines the objectives of the DDA’ (New South Wales Council for Intellectual Disability, sub. 117, p. 8). The National Ethnic Disability Alliance said the unjustifiable hardship clause does not encourage discriminators to think more innovatively about what they can do to accommodate people with disabilities, or how they can address systemic discrimination problems (sub. 114). Some of these comments would be addressed through the duty to make reasonable adjustments.

Other inquiry participants pointed out that the federal racial and sex discrimination Acts do not have equivalent unjustifiable hardship clauses (Disability Council of New South Wales, trans. p. 1097). The *Age Discrimination Act 2004* also lacks such a clause.

However, the DDA differs subtly from these Acts. Though they may also imply some obligation to make reasonable adjustments, any such adjustments can be readily identified and addressed, and for the most part are unlikely to cause great hardship. The sorts of adjustment sometimes needed to accommodate people with disabilities in work, education or other situations would not be required for a person of a different race or sex or age only.

Internationally, other disability discrimination Acts contain provisions similar to the DDA’s unjustifiable hardship provisions, and for similar reasons. The equivalent defence in the Americans with Disabilities Act 1990 (ADA) is ‘undue hardship’ (s.101(10)), which is defined as ‘an action requiring significant difficulty or expense’. In the Canadian Employment Equity Act 1995, ‘efforts to accommodate’ individuals with disabilities ‘are required up to the point where the person or organization attempting to provide accommodation would suffer undue hardship’ (LDAC 2003, pp. 1–2). The UK DDA similarly puts a limit on the duty of employers to make reasonable adjustments requiring that regard be had to costs, the effectiveness of the adjustment and the employer’s financial resources, among other things (s. 6(4)).

Some inquiry participants who disapproved of the unjustifiable hardship defence in principle, nevertheless acknowledged the variable and occasionally high costs of making adjustments for people with disabilities. They agreed that ‘the exemption may need to remain in certain ‘justifiable circumstances’, such as where the costs of adjustment are too great for the person or business on whom they fall (New South Wales Council for Intellectual Disability, sub. 117, p. 8). Others said that an unjustifiable hardship defence is necessary and appropriate (Robin and Sheila King, sub. 56; HREOC, sub. 143; Australian Taxi Industry Association, sub. DR311;

Public Interest Advocacy Centre, sub. 102; Anti-Discrimination Commission Queensland, sub. 119, sub. DR335; Larry Laikind, sub. 70).

On balance, an unjustifiable hardship defence is important to facilitate the efficient and equitable application of the DDA. It helps to promote adjustments for people with disabilities that will produce benefits for the community as a whole, while limiting adjustments that impose unjustifiable costs or other hardships on individual providers or others in the community.

FINDING 8.2

An unjustifiable hardship defence in the Disability Discrimination Act 1992 is appropriate. It helps to promote adjustments for people with disabilities that produce benefits for the community as a whole, while limiting requirements that would impose excessive costs on persons or organisations.

Scope of unjustifiable hardship

The defence of unjustifiable hardship is limited to particular areas in the DDA. As noted by HREOC, ‘unjustifiable hardship defences in substantive provisions do not cover all situations where such a defence might be relevant’ (sub. 143, p. 20). The areas in which it does not currently apply are:

- in education, after enrolment
- in employment, between hiring and dismissal
- administration of Commonwealth laws and programs
- sports
- land.

Limits in the coverage of unjustifiable hardship have caused problems and created uncertainty for organisations dealing with people with disabilities, particularly in the education sector.

Education

Under section 22(4) of the DDA, it is not ‘unlawful to refuse or fail to accept a person’s application for admission as a student’ if the student would require services or facilities, ‘the provision of which would impose unjustifiable hardship on the education authority’. However, the DDA is silent on post-enrolment situations, which has been interpreted to mean that the unjustifiable hardship defence applies only to initial enrolment and not to other, post-enrolment situations

that might require an adjustment (see, for example, *Kinsela v QUT* (1997) HREOCA 5).

Inquiry participants from the education sector regarded this gap as a major flaw in the DDA. HREOC said the gap should be regarded as ‘an oversight’ or ‘drafting error’ (trans., p. 1147).

Inquiry participants from the education sector said the extension of the unjustifiable hardship defence to post-enrolment situations is desirable because students’ educational needs can change significantly over time. The Association of Independent Schools of South Australia said:

Some Independent schools have found themselves in the dilemma of offering a place and then over time finding via ongoing review that they do not have the sufficient resources to meet the needs of the individual student as they develop and mature or their condition deteriorates. (sub. 135, p. 14)

In such circumstances, the current arrangements might create incentives for educators to avoid or discourage the enrolment of students with disabilities, in case those students might need adjustments that would impose an unjustifiable hardship later in their education. The Association of Independent Schools of the Northern Territory said ‘schools should be encouraged to “have a go” rather than claim unjustifiable hardship’ as their first option (Alice Springs visit notes).

The availability of the unjustifiable hardship defence in post-enrolment situations might help to reduce this undesirable incentive. Where students’ circumstances change, schools would be encouraged to find the best educational solution for the student—including the possibility of transferring the student to a more appropriate educational setting—without fear of contravening the DDA.

Employment

Although it is unlawful to discriminate in all aspects of employment (including job interviews, job offers, wage offers, training, promotion, transfers and termination), the unjustifiable hardship defence is available only with respect to job offers and employment termination (s.15(4)).

The absence of the defence for situations within employment, such as a person’s rights to training and opportunities for promotion (s.15(2)(b)), creates the perverse incentive to discriminate at the recruitment stage. If an employer expects the costs of adjustment for a prospective employee to increase over time, for example in response to a subsequent promotion, they might not want to take them on in the first place.

The Commission is not aware of any reason for treating situations within employment any differently to the hiring and dismissal stages. It appears that the absence of this defence is not well known among employers, and hence it might not be having much effect. But its uncertain application does not help. If it were amended, it would help create greater certainty about the way the DDA applies to employment, and remove an obstacle to lessening discrimination in the workplace.

Administration of Commonwealth laws and programs

The unjustifiable hardship defence is not available in relation to the administration of Commonwealth laws and programs. Virtually all Australian Government departments and agencies can be characterised as administering Commonwealth laws and programs. Other organisations, including State, Territory and local governments and private sector businesses, are also often involved in some way in administering Commonwealth laws and programs.

The confusion over what is or is not a Commonwealth program, and hence whether this defence is denied to government service providers, concerned the New South Wales Government which said:

Specifically, it is not clear whether unjustifiable hardship applies to social housing, as the exemption applies to public premises but not to the administration of Commonwealth programs. Social housing programs occur under the umbrella of the Commonwealth State Housing Agreement. Consequently, some advocate that 100 per cent of public housing should be accessible. This is not achievable in public housing stock without significant efficiency and cost impacts. (sub. 220, p. 2)

Although the unjustifiable hardship defence is unavailable to Australian Government departments and agencies with respect to administration of laws and programs, it is available to them as employers and potentially as providers of goods and services.

The omission of an unjustifiable hardship defence in the administration of Commonwealth laws and programs is often cited to be a special case. First, it is sometimes assumed that the revenue raising powers of the Australian Government give it unlimited ability to fund all adjustments, regardless of their cost. However, the Australian Government manages resources on behalf of the whole community and not for itself. It must decide where the community's resources should best be deployed. Resources spent on adjustments that benefit only some individuals will mean that fewer resources are available for Australian Government programs that may benefit others, including other people with disabilities. The efficiency and equity implications of these choices need to be considered in a balanced manner and in relation to the whole community.

Second, it is often said that the Australian Government should set an example for the whole community in its conduct towards people with disabilities. But the Australian Government can demonstrate this commitment in a variety of ways, most directly through its laws and programs, and broad policies such as the Commonwealth Disability Strategy (see appendix E). Denying the possibility of an unjustifiable hardship defence under the DDA may not be the most effective or efficient vehicle for demonstrating the Australian Government's commitment to administering its laws and programs in a non-discriminatory way, particularly if it might mean that fewer resources are available to implement Australian Government programs that benefit people with disabilities, carers and other people in the community.

In addition to these arguments of principle, HREOC noted some practical reasons for allowing an unjustifiable hardship defence in the administration of Commonwealth laws and programs. First, the Australian Government might face a high burden of proof to show there is unjustifiable hardship in any particular case. Second, competing public purposes would be considered equally on their merits, rather than some public purposes receiving a blanket exemption from the unjustifiable hardship provisions of the DDA, but not other purposes (HREOC, sub. 143).

Disability standards and unjustifiable hardship

As well as featuring in the DDA, the unjustifiable hardship defence can be included in disability standards. Unjustifiable hardship appears in the disability standards for accessible public transport (the only standards yet introduced; see chapter 14), and the draft disability standards for education (see below and appendix B) and access to premises (see appendix C).

As explained in chapter 14, disability standards can both clarify and alter the way in which the DDA applies. The standards introduced or proposed to date illustrate how the unjustifiable hardship defence has variously been clarified (transport), amended (education) or annulled altogether (access to premises with respect to new buildings).

Public transport

The disability standards for accessible public transport include an extensive list of criteria that may be taken into account, where relevant, in determining unjustifiable hardship. Among other things the criteria include the benefits reasonably likely to accrue to people with disabilities, other passengers and other persons concerned,

and a host of other operational and financial considerations (Disability Standards for Accessible Transport 2002, s.33.7(3)–(4)).

HREOC explained that these detailed criteria were necessary to clarify the application of unjustifiable hardship in public transport cases, because ‘there have not been any court decisions under the DDA specifically regarding the application of unjustifiable hardship to transport issues’ (sub. 143, p. 65). HREOC added that the unjustifiable hardship defence was necessary as a trade-off to enable a shorter timetable for the standards’ implementation and to avoid ‘adopting a lowest common denominator set of obligations and/or providing for extensive detailed exceptions’ (sub. 219, p. 27). It thus enabled a shorter timetable and higher requirements to be set elsewhere in the standards (see chapter 14 and appendix C).

Draft disability standards for education

The current draft of the disability standards for education proposes to alter the application of unjustifiable hardship in two significant ways. First, it would extend unjustifiable hardship to post-enrolment situations. Second, it would augment the concept of unjustifiable hardship with the additional concepts of ‘reasonable adjustment’ and ‘unreasonable adjustment’, which are similar but ‘not identical’ (see appendix B).

The Productivity Commission supports the idea of extending the unjustifiable hardship defence to post-enrolment situations. However, for reasons of transparency, consistency and clarity, the Commission considers that amending the DDA is preferable to attempting to address such an anomaly in the disability standards alone (see chapter 14).

The introduction of the concepts of reasonable and unreasonable adjustment in the standards raises other issues. The Commission supports the standards’ use of the term ‘reasonable adjustment’. It is for the most part consistent with the approach outlined earlier in this chapter, though it is unhelpful in creating a divergence between unreasonable adjustment and unjustifiable hardship. Defining reasonable adjustment as all adjustments that do not cause unjustifiable hardship would resolve this issue.

If the DDA were amended to extend unjustifiable hardship to post-enrolment situations, an appropriate role for the disability standards might be to clarify the criteria for determining unjustifiable hardship in education, in much the same way as the disability standards for accessible public transport have done for that area.

Access to premises

If implemented, the draft access to premises standards would deny the owners of new buildings access to the unjustifiable hardship defence. Marrickville Council argued that this was appropriate because ‘the developer of a new development fully enters into a development site knowing that there are these regulations to adhere to, and there should be no excuse for not keeping to those’ (trans., p. 2414). This point was also made by HREOC (trans., p. 2877).

The Commission disagrees: the views of Marrickville Council and HREOC might be appropriate if the adjustments needed are always inexpensive and easy to adapt to the circumstances. However, to require the same level of adjustments in all circumstances, irrespective of the costs or the likely benefits, is not good policy. The draft Regulation Impact Statement (RIS) for the access to premises standards has revealed that many adjustments can be made at little cost, but that some have the potential to increase the costs of some types of new buildings by approximately 60 per cent. As noted in chapter 6, these standards have the potential to restrict competition and distort resource allocation.

The draft standards would permit owners of existing buildings to claim unjustifiable hardship when undertaking major renovations, and administrative protocols have been proposed for addressing accessibility issues, including interpretation of unjustifiable hardship. In many cases, it is easier to build accessibility in at the outset, than it is to amend existing premises. And, as noted, the costs are often quite moderate. It is therefore likely that unjustifiable hardship might be difficult to prove in the case of many new buildings. However, the defence should be available.

Conclusions on the scope of unjustifiable hardship

The Productivity Commission considers that there are good reasons to extend the unjustifiable hardship test to all areas of the DDA. As a duty to make adjustments might be implied from existing provisions, an across the board unjustifiable hardship defence is required as the Act stands now to provide the necessary balance. It would seem that the Australian Government intended it to apply it universally in the first place. According to HREOC:

The second reading speech introducing the Disability Discrimination Bill indicated an intention to apply the concept of unjustifiable hardship as a general limitation on the legislation, although the drafting of substantive provisions did not fully reflect this. (sub. 143, p. 28)

If the Commission’s proposal for a duty to make reasonable adjustments were adopted, an accompanying unjustifiable hardship defence would become even more important as an across the board safeguard to balance rights and obligations.

FINDING 8.3

The unjustifiable hardship defence does not cover all areas of the Disability Discrimination Act 1992. Major areas not covered include education post-enrolment, employment between hiring and firing, and administration of Commonwealth laws and programs. If the draft disability standards for access to premises were adopted, the unjustifiable hardship defence would be denied to developers or owners of new buildings.

RECOMMENDATION 8.2

The Disability Discrimination Act 1992 should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

Determining unjustifiable hardship

The DDA does not define unjustifiable hardship. Instead, all relevant circumstances including the four criteria listed earlier are to be taken into account in determining what constitutes an unjustifiable hardship (s.11). Unjustifiable hardship has consequently been interpreted on a case-by-case basis by HREOC and the courts.

The case law approach

Inquiry participants had mixed views on the workability of the current case-by-case approach to determining unjustifiable hardship under the DDA.

Some inquiry participants said case law provides insufficient guidance on the meaning of ‘unjustifiable hardship’ in employment, education and other areas (see for example, Disability Action Inc., sub. 43; Mental Health Coordinating Council, sub. 84; National Ethnic Disability Alliance, sub. 114; New South Wales Council for Intellectual Disability, sub. 117; Association of Independent Schools of South Australia, sub. 135). One issue with the case law approach is that it can take time for useful precedents to be established. Disability Action Inc. for example, stated that:

... the costs and risks associated with Federal Court action means that there is not adequate case law on many aspects of the DDA such as ‘unjustifiable hardship’ to give clarity to the DDA. (sub. 43, p. 4).

On the other hand, the Public Interest Advocacy Centre said there have been few problems in determining unjustifiable hardship in practice:

... a significant body of jurisprudence has developed in relation to the principle of ‘unjustifiable hardship’ and the methodology whereby courts and HREOC evaluate the evidence required to apply section 11. In particular, the case law gives guidance to complainants and respondents on the type of evidence required, the format of the evidence and the weighting process involved in determining if ‘unjustifiable hardship’ arises. Courts are experienced at interpreting the weighing provisions and evaluating the type of expert evidence raised in these cases. Neither HREOC nor the Federal Court have had undue difficulty in applying section 11, proving it to be far from unworkable. (sub. 102, pp. 3–4)

ACROD said it preferred the courts to decide how unjustifiable hardship should be interpreted, because ‘case-based reasoning is much safer than codified and inflexible rules of compliance and reprimand’ (sub. 45, p. 2). HREOC expressed a similar view on the importance of flexibility (sub. 143, p. 22), but pointed out that unjustifiable hardship has ‘been interpreted and fallen where we would have expected’ in the courts (trans., p. 1138). Blind Citizens Australia said unjustifiable hardship ‘does not require clarification’ (trans., p. 1677).

The Productivity Commission considers that delays in waiting for case law to develop for certain applications of the DDA may mean that some clarification is required of how unjustifiable hardship might apply in the interim. Indeed, as mentioned previously one reason the transport disability standards address unjustifiable hardship in detail is because there had not been sufficient case law on that particular application of the DDA.

FINDING 8.4

There is a lack of guidance as to how unjustifiable hardship might apply to particular areas of the Disability Discrimination Act 1992. This could be addressed through disability standards or guidelines.

Criteria for determining unjustifiable hardship

Although case law might be helpful in developing a workable approach to applying unjustifiable hardship, the question remains of whether the criteria are adequate in the first place. The benefits and detriments and financial circumstances criteria (ss.11(a) and 11(c) respectively) have attracted the most attention.

Jack Frisch raised a number of concerns with the way unjustifiable hardship can be interpreted, arguing that its ambiguity has undermined the effectiveness of the DDA (sub. 196, pp. 28–33). His concerns relate to: the incidence of the costs; the measurement of benefits; whether the detriments and benefits to persons other than

the complainant and respondent are to be considered and what weights they should be given; and how the financial circumstances of the respondent are to be defined. Among other things, he recommended that the DDA needs to be explicit in defining unjustifiable hardship as a cost-benefit exercise and that the ultimate incidence of costs needs to be considered.

The Productivity Commission generally agrees with Frisch's views on the importance of these matters. Ideally, unjustifiable hardship should be considered within a social welfare framework that looks at all costs and benefits, and includes all persons who are likely to accrue a benefit, bear a cost or suffer a detriment. Quantifying all of the costs and benefits will not always be possible, inevitably requiring the courts to exercise their discretion in making a qualitative assessment.

HREOC and the courts appear to have adopted a broad approach to defining detriments and benefits. For example, financial and non-financial issues have been emphasised in education cases, especially regarding the effects on other students. In the case of *Finney v Hills Grammar School*:

... the decisions make clear that consideration of unjustifiable hardship issues in education is by no means restricted to financial issues and in particular that any issues of educational benefits or detriments have to be considered. (HREOC, sub. 143, p. 62)

The High Court has emphasised that the safety considerations of other students and teachers should be considered in determining unjustifiable hardship:

The nature of the detriment likely to be suffered by any persons concerned, if the student was admitted, would comprehend consideration of threats to the safety and welfare of other pupils, teachers and aides. Any negative impact that may be caused by the presence of a student with a disability in a mainstream class is a proper matter to be considered when making a decision on whether that individual student can be admitted. Thus, the Act provides for a balance to be struck between the rights of the disabled child and those of other pupils and, for that matter, teaching staff. (*Purvis v State of NSW (Department of Education and Training)* (2003) HCA 62, para 94)

The courts and HREOC have also taken a broad approach to what is meant by 'any persons concerned'. For example, *Maguire versus SOCOG* (2001) HREOC 93-123, considered the benefits of an accessible website to the complainant and other visually impaired people. Further, in its Frequently Asked Questions on employment, HREOC has indicated that consideration should also be given to the benefits or detriments to 'other employees or potential employees, customers or clients or other persons who would reasonably be affected' (HREOC 2003f, p. 17). The Productivity Commission considers that these are appropriate considerations as they permit an overall assessment to be made of the net social benefit of the adjustment concerned.

Frisch's point about cost incidence brings in the importance of examining financial circumstances. A cost-benefit analysis might conclude that an adjustment has net social benefits, but if the organisation concerned operates in a competitive industry, its ability to pass on the costs will be limited. If an adjustment with the same net benefit were made by an organisation operating in a less competitive sector of the economy, a completely different conclusion might be reached, because that organisation might be able to pass on the costs. In an increasingly competitive and open economy, Frisch argued that an increasing number of firms might be able to claim unjustifiable hardship because they cannot pass on the costs and do not have any economic surplus to pay for them (sub. 120).

These arguments indicate that a large degree of flexibility is needed in determining unjustifiable hardship in different circumstances. Financial and non-financial factors, such as tradeoffs between the rights of different groups and safety considerations, will be relevant on a case-by-case basis. There is also a need to take a broad view of who is affected by the adjustment. In all cases, potential costs and benefits should be examined from both a communitywide and an individual or business perspective. As many costs and benefits may be intangible, the assessment will need to examine both quantitative and qualitative factors.

Nevertheless, there may be a case for giving the courts better guidance on the nature of those costs and benefits and how to identify the persons or groups affected. In particular, it should be made clear that in all cases, the first step is to make a communitywide cost-benefit assessment to determine whether the different 'facility or service' required by the person with a disability should be provided. This would require some consideration of the benefits and detriments to the community as a whole, not just those to the person or persons that are immediately affected. If there is no social net benefit, then the adjustment should not be made (for example, if the adjustment will seriously inconvenience more people than it assists).

If the proposed adjustment would produce a net community benefit, then the financial and other circumstances of the individual or business who is being asked to make the particular adjustment (or provide the 'different accommodations') should be examined. These two questions should not be regarded as alternatives, but rather, as a two-step test.

Assessing unjustifiable hardship is likely to involve looking at different factors in each case, depending on the area of activity and the circumstances in which the adjustment is being requested. For example, a claim of unjustifiable hardship from a small school will involve very different considerations to a claim from a large employer. Trying to incorporate all of these in the DDA could prove cumbersome and would be better relegated to standards or guidelines.

Unjustifiable hardship is best determined through broad criteria that can be applied flexibly to individual cases.

In section 8.3 the Productivity Commission examines the issue of who should pay for adjustments. It has been presumed until now that the organisation that is required to make the adjustment, pays for the adjustment. But this might not be the most equitable or efficient arrangement. Furthermore, if the organisation concerned can prove that it cannot afford the adjustment, the community might have to forgo otherwise worthwhile opportunities.

The Commission considers that an additional clause to the list of ‘relevant circumstances’ may help to recognise the role of the broader community in funding adjustments. The UK DDA provides an example. In defining the reasonableness of steps an employer might take to meet the duty to make reasonable adjustments, that Act requires that, among other things, regard should be had to ‘the availability to the employer of financial or other assistance with respect to taking the step’ (s.(6)(4)(e)). The advantage of such a clause is that it recognises the mutual obligations of the various parties concerned. It puts an onus on the organisation providing the adjustment to become aware of potential sources of funding, and it puts pressure on government and others to provide such assistance. The clause allows for the assistance to come from any source, not necessarily from government. This could include non-government organisations and entities affiliated with the organisation concerned. The Productivity Commission considers that a similar clause should be drafted to suit the circumstances of Australia’s DDA.

There is one more amendment that should be made to unjustifiable hardship provisions. This concerns subsection 11(d), treatment of action plans. In chapter 14 the Commission notes the unusual way that service providers are defined for the purpose of making an action plan under Part 3. ‘Service providers’ are defined as government departments, educational institutions and persons who ‘provide goods or services; or makes facilities available whether for profit or not’ (s.59). It is unclear whether other organisations can register plans or whether plans can cover other areas of activity such as employment. In considering unjustifiable hardship, an action plan must be taken into account (s.11(d)), but only ‘in the case of the provision of services, or the making available of facilities’. This would seem to imply that some organisations and persons might not be able to have their action plans considered (suppliers of ‘goods’ for example) in assessing unjustifiable hardship.

Further, both these interpretations of the term ‘service providers’ could be confused with the DDA’s coverage of organisations that provide ‘goods, services and facilities’ (s.24). Although all of these descriptions could be interpreted broadly to cover virtually all persons and organisations, they create inconsistencies and confusion. The Commission is not aware of action plans not being considered in assessing unjustifiable hardship because they were prepared by an organisation or person that did not fit the description in subsection 11(d). However, this vague and seemingly restrictive approach does not help interpretation of the Act. The DDA should make it clear that any person covered by the Act can register their action plan, and can expect to have it considered in assessing unjustifiable hardship.

RECOMMENDATION 8.3

The criteria for determining unjustifiable hardship in the Disability Discrimination Act 1992 (s.11) should be expanded to:

- *require consideration of the costs and benefits to all persons and an assessment of the net benefit to the community*
- *include as a relevant circumstance, the availability of financial and other assistance*
- *clarify that any respondent to a complaint (not just ‘service providers’) can expect to have their action plan considered.*

Inherent requirements

The ‘inherent requirements’ provision of the DDA applies to employment only. The term appears repeatedly in the Part 2 provisions concerning ‘Discrimination in work’. A similar concept applies to sports, whereby discrimination is lawful if a person ‘is not reasonably capable of performing the actions reasonably required in relation to the sporting activity’ (s.28(1)(a)) (see chapter 4).

Inherent requirements form the basis of an important exemption or safeguard in the DDA. They mean that discrimination in employment on the ground of disability is not unlawful if a person is ‘unable to carry out the inherent requirements of the particular employment’ (s.15(4)(a)), even after the employer has provided different facilities or services (that do not cause unjustifiable hardship).

The inherent requirements provisions of the DDA are similar to a provision of the *Workplace Relations Act 1996* which does not make it unlawful for employers to dismiss an employee due to a disability (or other attributes) if that disability means the employee cannot meet the inherent requirements of the position (s.170CK(2)).

Defining inherent requirements

The DDA does not define the term ‘inherent requirements’. Based on its context, the term appears to refer to the activities that are essential to the satisfactory completion of the tasks required to do a job. It can also extend to the manner in which the tasks are completed.

Various court decisions have highlighted aspects of ‘inherent requirements’ in different employment contexts (box 8.3). HREOC (2003f) summarised the relevant factors for determining inherent requirements in employment, as identified in *Woodhouse v Wood Coffill Funeral P/L* (1998) HREOCA 12:

- the work required in practice for the particular position
- duties that might be required in an emergency or at periods of high workload
- the results to be achieved in the position (as opposed to the means for achieving the results)
- the circumstances in which the work must be performed
- applicable awards and competency standards and mandatory requirements arising from other laws (such as occupational health and safety laws).

Considerations of speed, precision, workplace harmony and safety can thus form part of the inherent requirements of a job.

HREOC raised the additional point that ‘requirements contained in another law’—such as those arising from the Workplace Relations Act or occupational health and safety Acts—and qualification requirements ‘may well be recognised as inherent requirements or at least recognised as reasonable requirements for indirect discrimination purposes’ (sub. 143, p. 34).

HREOC added that ‘the terms of applicable awards and agreements will be relevant to, but not necessarily decisive of, the inherent requirements of a job’ (sub. 219, p. 33). The *Human Rights and Equal Opportunity Commission Act 1986* specifies procedures for complaints of discrimination that arise under an industrial award (see chapter 9).

Some inquiry participants said the courts’ interpretations of inherent requirements have been clear and appropriate. The Darwin Community Legal Service said it is ‘reasonably comfortable with the interpretation the courts have given of inherent requirements’ (trans., p. 17). It noted that a fairly narrow interpretation has been made to date, because:

Box 8.3 Defining inherent requirements

X v The Commonwealth HCA (1999) 63

A soldier, discharged in 1993 after testing positive for HIV, lodged a DDA complaint with HREOC. HREOC upheld the complaint because it considered that the ability to 'bleed safely' in a combat situation was an 'incident of employment' rather than an inherent requirement of a soldier's job. On appeal, the Full Court of the Federal Court rejected HREOC's determination. The court interpreted 'inherent requirements' to include the health and safety of fellow employees and the physical environment in which the employee may occasionally find himself (the battlefield). X's appeal of the Federal Court's decision was dismissed in the High Court.

Cosma v Qantas Airways Ltd. FCAFC (2002) 425

The defendant was injured in the course of his job as a cargo handler for Qantas. Following a lengthy period of alternative duties and vocational training, the employee was retrenched because no alternative positions were available. The defendant took action in the Federal Court under s.15 of the DDA but was unsuccessful. The Full Court subsequently rejected his appeal of that decision.

In its ruling, the Full Court of the Federal Court made a number of points in relation to the definition of 'inherent requirements'.

- When assessing a person's capacity to fulfil the inherent requirements of a position, only the requirements of pre-injury employment are to be considered, not those of alternative duties.
- 'A practical method of determining whether or not a requirement is an inherent requirement ... is to ask whether the position would be essentially the same if that requirement were dispensed with'.
- The DDA should not be interpreted as requiring that an employer modify a job's inherent requirements in order to accommodate an employee with a disability. Rather, workplace adjustments are designed to allow a worker to meet those requirements.

... to allow the requirements to extend to whatever an employer declares to be necessary or convenient or efficient for its operation would be basically to take any of the teeth out of the Act. (trans., p. 17)

Other participants said that inherent requirements should be made clearer and easier to understand for the general public and employers. Distinguishing between the inherent and the non-essential requirements of a position can be difficult and requires a close examination of the duties involved in a job. The ability to perform certain duties in an emergency may be an inherent requirement for airline cabin personnel, for example, but not for the ticket sales staff who work for the same company.

The definition of inherent requirements can be elusive in many cases. The Attorney-General's Department said each job must be considered carefully and individually:

The reference to 'inherent' requirements invites attention to what are the characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral ... the requirements that are to be considered are the requirements of the particular employment, not the requirements of employment of some identified type or some different employment modified to meet the needs of a disabled employee or applicant for work. (sub. 115, p. 8)

This approach requires a detailed knowledge of the nature and duties of each position in a business. Margaret Kilcullen said it is difficult for people seeking employment to identify the inherent requirements of a particular job:

... part of the problem with the concept of inherent requirements is that it ... imposes a hardship upon employees because it's not in fact standard practice for them to know what the inherent requirements of a job are before the interview. (Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 40)

This problem of limited knowledge (or 'knowledge asymmetry') in applying for employment arises for all job applicants and not just those with disabilities. Duty statements typically mention which selection criteria are 'essential' and which are 'desirable', but such distinctions will not necessarily correlate with what the courts might deem to be inherent requirements. It is possible, also, that a court might find that the position has inherent requirements that are not in the duty statement.

Margaret Kilcullen added that, like the job applicant, the prospective employer may not always have a clear and definite knowledge of the inherent requirements of a new or unfilled position, depending on the business and the circumstances (Janet Hope in conjunction with Margaret Kilcullen, sub. 165, p. 40).

Uncertainties could also arise from the trend towards 'credentialism' in the Australian and international labour markets, whereby employers ask for formal qualifications that are not required to do the job, or that are at a higher level than needed, as a screening method in recruitment (see, for example, Buchel et. al. 2003; Eraut 2001; Buon 1998).

Clarifying inherent requirements

There are several options for improving guidance on the meaning of inherent requirements in the DDA. One option is to define the term in the Act. The Intellectual Disability Services Council said it would be 'advantageous' to define inherent requirements because 'every effort needs to be made to clarify the provisions' (sub. 162, p. 4). However, unless the definition were long and detailed,

this approach might not provide practical guidance on what is, and is not, an inherent requirement in employment. A practical, simple, single definition that covers all eventualities may prove difficult to develop.

A more practical approach could be to define the factors to be taken into account in determining whether a requirement for a job is an ‘inherent requirement’. A list of criteria would be more helpful than a single fixed definition for identifying inherent requirements in practice. These criteria could be based on those already identified by the courts and HREOC as being relevant (see above and box 8.3). There are three ways to implement such a list of criteria.

First, the DDA could list the criteria to be taken into account in identifying inherent requirements, as it does for some other important concepts (such as unjustifiable hardship) (section 8.2). Criteria listed in the DDA (as opposed to disability standards, guidelines or elsewhere) would be more accessible and provide greater legal certainty. Examples of inherent requirements in different types of employment could be included to illustrate the criteria, much like the examples provided in the explanatory memorandum for the Age Discrimination Bill 2003.

Second, the criteria could be included in disability standards for employment, or for aspects of employment such as recruitment practices. However, there have been problems in developing disability standards for employment, and the standards appear unlikely to proceed soon (see chapter 14). Further, the protracted negotiations during previous attempts to draft disability standards for employment illustrate the potential difficulties of attempting to draft disability standards for inherent requirements.

Third, the criteria could appear in explanatory material from HREOC, such as advisory notes or guidelines, based on case law and other material. HREOC already publishes such information in a number of formats, such as its ‘frequently asked questions’ on employment (HREOC 2003f). Jobwatch (sub. 215) and Janet Hope in conjunction with Margaret Kilcullen (sub. 165) recommended inherent requirements as a suitable subject for guidelines. The Office of the Director of Equal Opportunity in Public Employment suggested such guidelines could ‘draw heavily on resources arising from successful conciliation cases’ (sub. 172, p. 5).

The Productivity Commission considers that the most practical and effective approach would be to address, in guidelines, the factors that might be taken into account when identifying inherent requirements. This would enable a reasonably detailed approach to be taken in providing background material that could be applied on a case by case basis. It would also be flexible to allow for changing circumstances. Elsewhere the Productivity Commission recommends that guidelines on employment be developed for the DDA and updated as needed (see chapter 14).

In relation to inherent requirements, these guidelines could draw on the ‘frequently asked questions’ that HREOC has published (HREOC 2003f), conciliation agreements (anonymously) and case law.

The Commission concludes that the inherent requirements provisions in the DDA are important from the perspectives of employers and employees (and prospective employees). From the employers’ perspective, inherent requirements provide an important safeguard that underpins the merit principle in employment decisions. For employees, inherent requirements mean that employers cannot discriminate against them by using failure to meet non-essential requirements as a reason. Guidelines would help employers and employees to identify the inherent requirements for particular jobs.

There is, however, one legislative amendment that should be made to address an apparent anomaly in the way inherent requirements apply to some employment situations and not others. Currently, like the unjustifiable hardship defence, the inherent requirements defence is not available between the hiring and dismissal stages of employment. It does not apply, for example, in relation to promotions. No good explanation has arisen for why this is so, nor to the Commission’s knowledge is it a major issue with employers. The current lack of this defence would appear to have the unusual result, for example, that failure to meet the inherent requirements of a more senior position could not be used by an employer to refuse to promote a person. Although not a seemingly urgent issue, this matter should be addressed.

FINDING 8.6

The inherent requirements defence does not currently apply to within-employment situations. This might discourage employers from employing people with disabilities because it limits their ability to train, transfer and promote whom they choose.

RECOMMENDATION 8.4

The defence of inherent requirements should be available to employers in all employment situations.

8.3 Who should pay?

The DDA, like most other disability discrimination legislation, places the responsibility for funding adjustments solely on organisations covered by the Act. No corresponding obligation exists on people with disabilities, on governments,³ or on consumers generally. This implies that, should an organisation successfully

³ Except in their role as employer, provider of goods and services, educator, etc.

argue that an adjustment would cause them an unjustifiable hardship (as it is currently defined), no alternative source of funding need be considered under the Act. In these circumstances, the proposed adjustment might not go ahead, even if it would be to society's overall benefit.

The question of who should pay for adjustments can be analysed from both a theoretical and a pragmatic standpoint. Both approaches are now adopted in turn.

Theoretical approach

Stein (2003) provides a formal framework within which to compare the costs and benefits of workplace adjustments, and to decide which adjustments should be: funded by employers; funded by taxpayers; or not be undertaken. Stein identifies a range of possible adjustments, ranging from wholly efficient to wholly inefficient, depending on the ratio of quantifiable costs to benefits (box 8.4). From Stein's analysis, a clear delineation of adjustment funding responsibilities emerges.

In essence, Stein's funding rule is that employers should pay for any adjustments that allow them to maximise profit. This rule applies even in cases where disability discrimination legislation is required to show employers that they would benefit from employing and/or accommodating a person with a disability (see chapter 7).

More controversially, Stein argues that employers should be made to pay for adjustments that, while benefiting them in absolute terms, do not benefit them as much as the alternative of employing a person without a disability who needs no adjustments (example 2a in box 8.4). Stein argues that such adjustments therefore 'extract a differential cost from employers' (2003, p. 143).

Finally, when employers stand to gain no net benefit—or risk incurring a loss—from employing/accommodating a person with a disability, two possibilities arise.

- If hiring and/or accommodating produces a net social benefit, then employment should go ahead, with adjustments to be funded by government. To impose this cost on the employer would be unreasonable.
- If employment of a person with a disability would result in a net social loss, then employment should be discouraged and replaced with social security benefits (Stein 2003, pp. 176–77).

Implications and limits of Stein's approach

Stein's approach helps clarify some of the efficiency and equity considerations that might guide the apportioning of disability adjustment costs. It might also inform the

application of the DDA's unjustifiable hardship defence (and the Commission's proposed duty to make reasonable adjustments).

Box 8.4 Stein's taxonomy of employer accommodations

Hiring and/or accommodating a person with a disability generates costs and benefits for the employee, the employer and society in general. Some of these costs and benefits are quantifiable. Based on a comparison of all assessable costs and benefits, Stein distinguishes five types of accommodation, grouped into three broad categories.

1. Wholly efficient (Pareto optimal) accommodations

- (a) *Voluntarily made accommodations*: these are undertaken voluntarily by the employer, without the need for government compulsion or intervention. Even after allowing for adjustment costs, the employee with a disability is the most profitable person to employ. In this scenario, the employer, the employee and society reap maximum benefits from the adjustment.
- (b) *Quasi-voluntary accommodations*: these would be made voluntarily by the employer, but for the existence of market failures such as information asymmetry. Disability discrimination legislation remedies these failures, for example, by coercing information exchanges between employers and employees. This leads to the most profitable person for the job—the employee with a disability—being hired, even if adjustments are necessary. The employer, the employee and society again enjoy maximum benefits.

2. Socially efficient (Kaldor-Hicks welfare enhancing) accommodations

- (a) *Semi-efficient (ADA) accommodations*: these would not be made voluntarily in the absence of disability discrimination legislation. While both the employee and the employer benefit from the decision to hire and/or accommodate, the benefit accruing to the employer (after possible adjustments) is less than that which would have been generated by the employment of a person without a disability.
- (b) *Social benefit gain accommodations*: these result in zero profit or even a loss for the employer, yet yield a net social benefit. For this type of accommodation to be efficient, the value of the overall benefit generated should at least equal the cost to the employer of employing the person with a disability (including adjustments). Stein states that 'this is an area where the state has the potential to compensate losing employers and should do so out of self-interest' (p. 174).

3. Wholly inefficient accommodations

In this scenario, employing and/or accommodating a person with a disability would create a net cost not just for the employer, but for society also. It would be more efficient not to make the adjustments and exclude that person from the workplace, in exchange for welfare benefits.

Source: Stein 2003.

- Where disability discrimination legislation only serves to clarify the benefits for employers of hiring and/or accommodating people with disabilities

(quasi-voluntary accommodations, example 1b in box 8.4), employers should pay for adjustments because it is in their interest and efficient to do so. Thus, where the only obstacle to the greater employment of people with disabilities is the lack of knowledge by employers and other organisations—for example, about cost-effective adjustments or the availability of government subsidies—then government funding of adjustments is unwarranted.

- At the other extreme, there are those adjustments that are not beneficial from the perspective of employers or the community and should not be required. This is consistent with the Commission's recommended approach to making the unjustifiable hardship defence encompass a community-wide approach to estimating the costs and benefits.
- In between these two is a grey area where social benefits exceed social costs, but there is insufficient benefit from the employer's perspective to make the adjustments voluntarily. Under the Commission's revised unjustifiable hardship defence, these adjustments would pass the first hurdle of providing a net social benefit. Using Stein's approach, some of these adjustments would be funded by the employer and some by the community.

Stein's classification system provides only limited guidance in this socially but not privately optimal world. First, his distinction between semi efficient and social benefit accommodations is essentially arbitrary. Both involve an opportunity cost to the employer (that being that profit would be maximised by not employing the person with the disability who needs accommodations). Further, it is not as clear as Stein suggests that semi efficient accommodations should be funded entirely by employers and social benefit accommodations should be funded entirely by government.

Second, the ways in which costs are distributed among firms can affect competition and resource allocation (see chapter 6). Restrictions on competition could arise if firms with different characteristics have a differing ability to successfully claim unjustifiable hardship) because, for example, of size or their inability to pass on the costs of adjustments to their customers. In the Australian context, these issues assume an extra dimension because disability discrimination legislation can be enforced either through complaints or through disability standards.

A third limit to the Stein approach is that it focuses exclusively on employment issues. Yet disability discrimination legislation mandates adjustments in many other areas. When adjustments are made in, for example, goods and services, or transport, they can benefit people other than the person with a disability and the organisation making the adjustment, such as parents with prams and elderly persons who may benefit from more accessible transport.

In summary, the possible competition effects and wider costs and benefits of adjustments raise issues of efficiency and equity (fairness) in funding, which cannot easily be resolved by reference to Stein's approach. It nevertheless focuses attention on the general group of adjustments which both governments and organisations should be funding, and paves the way for a more pragmatic approach to policy options.

Pragmatic approach

There are two ways of answering the question of who should bear the costs of social policies and community objectives (such as the elimination of discrimination against certain groups) that are more pragmatic than Stein's.

The first possible argument relies on the proposition that if the community, through the government, decides that a particular social objective is worth pursuing, then the community should pay for it through taxes. Under this 'community pays' approach, governments should use taxpayer funds to compensate organisations for any costs imposed on them by the community's objectives contained in disability discrimination legislation.

The second argument treats social objectives as just another 'cost of doing business'—similar, for example, to the costs of providing employees with a safe workplace or ensuring a product meets safety standards. Any costs imposed on the organisation by its obligation to be non-discriminatory (including the costs of adjustments) would thus be regarded as a social cost of production that should appropriately rest with the organisation (and its customers and suppliers if the organisation can pass on some of the costs). If the cost of removing discrimination can be spread sufficiently broadly across an industry—for example, through disability standards—then its incidence is little different to an industry-based tax.

Neither of these two approaches precludes some sharing of costs between government and other groups within the community, including individual organisations. Even where government can be expected to bear most of the costs imposed by legislation, some measure of financial involvement by producers and consumers would be justified. Conversely, under a 'social cost of production' approach, there would be reasons for government to bear part of the cost burden.

The factors influencing the distribution of costs between government and individual groups within the community are examined below, in relation to disability standards and complaints-based enforcement of the DDA.

Funding implications of disability standards

The pattern of costs and benefits associated with disability standards and, therefore, the implications for equity and efficiency in funding, differ somewhat from those associated with complaints-based enforcement. While disability standards rely, to an extent, on individual complaints for their enforcement, they impose widespread compliance requirements that are usually clear, precise and well publicised. Moreover, they can be linked to independent monitoring and compliance regimes—for example, through such bodies as Local and State Government planning authorities. As a result, organisations that do not comply with disability standards are at greater risk of litigation than those that do not comply with the general provisions of the DDA.

This greater risk suggests that organisations are more likely to carry out the adjustments imposed by the disability standards.⁴ The costs of these adjustments are thus more likely to be faced by all organisations in the industry, rather than by a few organisations subject to complaints. A ‘social cost of production’ approach to funding the costs of disability discrimination policies could apply in this circumstance, whereby all organisations in an industry would face the costs of making their product accessible. Moreover, costs faced by an entire industry will be passed on by organisations to their customers (except, arguably, overseas customers). This will result in an efficient distribution of the cost burden, because consumers will receive price signals reflecting the benefits that they derive from consuming accessible goods and services. This point can be illustrated by reference to the transport disability standards, but it applies equally to all standards that impose relatively uniform costs across an industry (box 8.5).

The distribution of costs and benefits under standards might lead to the conclusion that it is sufficient to let the burden of compliance fall solely on a particular industry and its customers. However, a case for some government funding might remain in three sets of circumstances.

First, governments may want to speed up the implementation of the standards, or ensure that organisations meet more than the minimum targets set in standards. This might be desirable to bring forward the benefits of implementing the standards for people with disabilities or for the government.

⁴ Disability standards in some areas, such as employment, would be unlikely to have the same widespread effect—for example, a person with a disability would still need to apply for a job before the employer could comply with the standards’ requirements concerning hiring practices.

Box 8.5 Incidence of costs and benefits under the transport disability standards

By imposing accessibility requirements on all public transport providers, the transport disability standards have the potential to affect four distinct groups: providers, customers with disabilities (and their carers), other customers and governments.

In the Regulation Impact Statement prepared for the transport disability standards, consultants Booz Allen & Hamilton estimated that the costs of implementing the standards would be faced by producers in the first instance. Although some increase in overall patronage was predicted to follow the implementation of the standards, it was not expected to offset costs. Benefits were forecast to accrue to both customers with disabilities (in the form of reduced travel costs) and those without disabilities (in the form of greater accessibility for elderly people and people with prams or luggage). Booz Allen & Hamilton also predicted that some benefits from the standards would accrue to government—for example, in the form of reduced expenditure on aged and health care, and on the Disability Support Pension.

Assuming that the costs of implementing the transport standards are faced equally by all organisations in the industry, these costs will be passed on, in part, to all the customers of that industry, including customers with disabilities. This arrangement is arguably equitable, given that most customers are expected to benefit from an accessible transport system. It is also mostly efficient, because the division of the cost burden between producers and consumers will be determined by alternative opportunities for resource use by each group.

Source: Attorney-General's Department 1999.

Second, governments may want to ensure the implementation of disability standards does not cause the levels or quality of service to drop in ways that would be socially undesirable. If, for example, exemptions and unjustifiable hardship provisions under the standards meant that specific services could not reasonably be expected to be provided by organisations (for example, accessible school buses in rural areas), governments might consider stepping in to fund these adjustments.

Third, governments might contribute where 'externalities' arise—that is, where benefits or costs accrue to sectors of the economy other than where disability standards are implemented. For example, the greater ability of people with disabilities to travel independently due to the transport disability standards might widen employment opportunities for them and their carers. Governments might also consider subsidising some segments of the transport industry to avoid undesirable outcomes. For example, fare increases generated by the disability standards could result in decreased public transport usage and increased road congestion. Such external benefits would not usually be considered in the decisions of public

transport providers regarding how much they charge for their services. This could lead to public transport provision that does not maximise benefits to society.

Funding implications of complaints-based compliance

The costs and benefits produced by the complaints mechanism, although they arise in all areas covered by the DDA, are best illustrated in terms of the adjustments that the DDA imposes on employers. Under that compliance enforcement mechanism, employers make workplace adjustments either voluntarily or when forced to do so in response to a complaint. This means that not all employers make adjustments, even when they employ people with disabilities who might benefit from them.

Depending on an organisation's degree of market power, the organisation may or may not be able to pass on part of the costs of adjustments to its customers and suppliers. In an increasingly competitive economy, few organisations would be able to pass on the costs. This would make it difficult to rely on a social cost of production approach to justify making organisations pay for adjustments.

The unpredictable or arbitrary imposition of adjustment costs under a complaints-based system raises important equity issues. In a given market, firms, employees, consumers and suppliers selected at random will be required to fund workplace adjustments. The inequitable distribution of the costs of adjustment is likely to detract from the DDA's objectives. Employers, for example, may seek undetectable ways of discriminating against employees with disabilities if they feel unfairly penalised by the provisions of the DDA. And employees and customers without disabilities might object to subsidising (in effect) the costs of adjustments through lower wages and higher prices respectively. This could encourage resentment.

As well as equity concerns, efficiency might be affected if the arbitrary distribution of the adjustment burden under a complaints-based system leads to restrictions on competition. Resource allocation throughout the economy would be distorted if the production costs of some firms within an industry reflected the social cost of production, while those of their competitors did not.

Given these possible drawbacks, and given that the duty to make adjustments stems from the community's desire to remove barriers to people with disabilities, a 'community pays' approach would be more appropriate in the case of complaints-based compliance. It may also be more appropriate in areas such as employment where the costs of adjustment are inherently arbitrary, depending on where people with disabilities apply for jobs. This approach would avoid distortions and is already in use in many other areas of government social policy. Governments

offer some compensation to organisations when, for example, their employees are called for jury duty or are members of the army reserves. HREOC's proposal for a national paid maternity leave scheme recognised that government funding is justified if government imposes wider social objectives on organisations that will increase their costs (HREOC 2002b, 2002i). Another example is in the education sector, where governments fund schools for at least part of the accommodation costs required by students with disabilities in non-government schools (see chapter 15 and appendix B).

In the area of employment, some government funding of disability aids and equipment used for employees with disabilities is already available (see chapter 15). Although it might be expected that organisations absorb most of the cost of equipping staff as a normal cost of doing business, this should not necessarily be the case when additional costs arise from wider social objectives.

The adoption of a 'community pays' approach to the funding of adjustments does not mean that the organisations covered by the DDA should not incur any of these costs. While it might be desirable for government to fund most of the 'lumpy' adjustments costs that the legislation imposes arbitrarily, these organisations should continue to incur some of the costs of removing discrimination, for two main reasons.

- Many organisations are willing to pay at least part of the costs, so government need only fund the incremental costs necessary to induce socially desirable adjustments. The difficulty is in deciding what proportion each should pay to achieve the desired result and may need to involve some experimentation (see chapter 15 for a discussion of funding issues).
- Paying for some of the costs of adjustments limits incentives for organisations to ask the government to pay for unnecessary adjustments. It also creates incentives for these organisations to develop low cost ways of meeting their duties under the legislation.

In conclusion, the two possible approaches to apportioning costs created by the DDA are not equally suited to the different methods of enforcing the Act. The 'social cost of production' approach is equitable and efficient in situations in which disability standards apply. This approach provides employers, producers and consumers with appropriate incentives and price signals. However, where complaints remain the main enforcement mechanism, the difficulty of applying uniform duties on all organisations (for example, in employment) means this approach would have undesirable equity and efficiency effects. A 'community pays' approach is justified in such cases, which implies a greater funding role for government.

Nonetheless, both approaches lead to the conclusion that the costs imposed by the DDA should be shared between governments and organisations directly affected.

People with disabilities might also be involved in funding adjustments. In practice, they already pay for many of the costs associated with their disability. While they should not have to fund adjustments mandated by the DDA, occasions may arise where they might wish to contribute to an upgrade in the specifications of those adjustments (for example, a better quality screen reader). This would be most likely to occur in areas such as education or employment.

FINDING 8.7

It is generally appropriate for the costs borne under the Disability Discrimination Act 1992 to be shared between the organisations required to make adjustments and governments.

As noted earlier, the Productivity Commission has recommended that the unjustifiable hardship defence be amended to include a new criterion that would require consideration of financial and other assistance available to organisations for making adjustments. This will help broaden the responsibility for funding adjustments to governments and other groups.

The Productivity Commission considers that it is appropriate for government to play a major role in funding adjustments in the workplace and elsewhere. This would serve to increase efficiency, equity and the opportunities for people with disabilities to participate as equals in society (see chapter 15)

8.4 Conclusion

This chapter has argued that substantive equality is a sound basis for disability discrimination legislation, and that an explicit duty to make reasonable adjustments be included in the DDA as a means to this end. This would remove the confusion over what is currently implied by the Act and is consistent with the principles of the Australian Government at the time the DDA was introduced.

The Productivity Commission recommends such a duty be included, provided it is always subject to the unjustifiable hardship defence, including in disability standards. ‘Reasonable adjustments’ should be defined to exclude adjustments that would cause unjustifiable hardship. This safeguard is necessary to ensure that adjustments are more likely to produce net benefits for the community, and do not impose undue financial hardships on the organisations required to make them.

The Commission is also recommending that the unjustifiable hardship defence be clarified to always require an assessment of the net benefits of making adjustments. This would require a quantitative and qualitative assessment of the community-wide impacts. Where possible costs and benefits should be quantified, but the broad framework envisaged would also allow consideration of trade-offs in the rights of the different groups concerned.

Imposing an obligation on organisations covered by the DDA to make adjustments has important efficiency and equity implications. There are good arguments for organisations and governments to share the costs. It is difficult to make hard and fast rules in this area. However, it appears that the Australian Government could play a more substantial role. The Commission is recommending a new criterion be added to the unjustifiable hardship test that would require the courts to consider the extent to which respondents had attempted to access available financial and other assistance. This would strengthen the bonds of mutual obligation between the organisations that must make the adjustments and the rest of the community.