
9 Equality before the law

The second object of the *Disability Discrimination Act 1992* (DDA) is to ensure equality before the law for people with disabilities. This chapter examines the concept of equality before the law, its treatment under the DDA and the effectiveness of the DDA in four areas in which inquiry participants raised particular issues:

- ensuring quality accommodation for people with disabilities, particularly those living in institutions
- providing appropriate safeguards for decision making by (and for) people with cognitive disabilities
- removing barriers to fair and equal treatment in the justice system and in civic participation for people with disabilities
- challenging laws that deliberately or inadvertently discriminate against people with disabilities.

Many of these areas fall primarily within the Constitutional responsibility of the States. This has significant implications for the effectiveness of the DDA in ensuring equality before the law for people with disabilities. This chapter examines ways of strengthening the DDA and other policy responses to ensure equality before the law.

9.1 The Disability Discrimination Act and equality before the law

The DDA contains few, if any, substantive provisions that relate directly to the object of equality before the law. As the Human Rights and Equal Opportunity Commission (HREOC) stated ‘... the reach of the substantive provisions of the DDA is limited compared to this object’ (sub. 143, p. 39).

Early drafts of the Disability Discrimination Bill contained specific provisions on equality before the law, but these were dropped before the Bill was presented to Parliament (section 9.5).

This section examines the following aspects of the DDA that have relevance to equality before the law:

- the ‘equality before the law’ object
- relevant HREOC functions.

Later sections cover other aspects of the DDA.

The object

The second object of the DDA is:

... to ensure, as far as practicable, that persons with disabilities have the same rights to equality before the law as the rest of the community ... (s.3(b))

There has been little elaboration of this object. The explanatory memorandum to the DDA states in regard to all the objects of the DDA:

[The objects clause] ... is also designed to ensure that people with disabilities have, as far as possible, the same rights as other citizens. (Explanatory memorandum, p. 7)

Inquiry participants did not raise many concerns about this object.

Equality before the law is a fundamental human right. Australia is a signatory to the UN International Covenant on Civil and Political Rights, which states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. (article 26)

However, practical limits need to be taken into account in pursuing equality before the law for people with disabilities.

- Some people with disabilities are unable to make reasonable decisions about their personal circumstances or their financial and legal affairs (section 9.3).
- The DDA includes exemptions where the rights of people with disabilities are constrained, such as public health measures relating to infectious diseases, *Migration Act 1958* decisions, and combat and peacekeeping services (see chapter 12).

The UN Declaration on the Rights of Mentally Retarded Persons and the UN Declaration on the Rights of Disabled Persons recognise situations in which some people with disabilities are unable to exercise their rights in a meaningful way, or in which it is necessary to restrict or deny some rights.

Functions of the Human Rights and Equal Opportunity Commission

Section 67 of the DDA confers functions on HREOC that contribute to achieving equality before the law. First, HREOC can undertake research and educational programs for the purpose of promoting the objects of the Act (s.67(1)(h)). HREOC has undertaken several pieces of influential research in various areas of equality before the law, including on the sterilization of girls and young women with intellectual disability (HREOC 2003d).

Second, HREOC can report to the Minister on actions that the Australian Government should take on matters relating to discrimination on the ground of disability (s.67(1)(j)). HREOC does not appear to have used this function to date.

Third, HREOC is empowered to examine Commonwealth enactments (and, when requested by the Minister, proposed enactments) (that is, Australian Government Acts of Parliament) to determine whether they are inconsistent with the objects of the DDA, and to report to the Minister (s.67(1)(i)). HREOC has exercised this function on occasion. In 1996-97, HREOC commented on regulations restricting Medicare benefits for psychiatric services (box 9.1).

Box 9.1 **HREOC investigation of changes to Medicare benefits for psychiatric services**

Regulations introduced in 1996 meant the Medicare rebate for psychiatric consultations was halved after a patient's 50th visit in any one year. The Regulations were intended to address overservicing, but there were concerns about their effect on people with high support needs. HREOC investigated whether the Regulations were inconsistent with or contrary to the objects of the DDA.

HREOC considered the original restrictions on Medicare benefits for certain psychiatric services had a discriminatory impact on people with a psychiatric disability. However, the Regulations had been modified following further consultations, and HREOC concluded that they were no longer inconsistent with the objects of the DDA. The restrictions that remained were comparable to those that applied to Medicare benefits for other areas of medical treatment, rather than singling out psychiatric treatment and psychiatric patients. HREOC's involvement appears to have assisted in achieving these improvements.

Source: HREOC 2003d, p. 26.

However, HREOC noted that 'use of this function to date has been limited':

... principally because issues of discrimination identified to HREOC as priorities for action whether through complaints or through other means have generally concerned discrimination in practice rather than discrimination embedded in laws. There is some

scope however for HREOC to give increased attention to this function as and if it is identified as a priority including through this inquiry. (sub. 143, pp. 35–6)

Several inquiry participants raised concerns about laws with potentially discriminatory effects (although many of these were State or Territory rather than federal laws) (section 9.5). Other participants raised concerns about consistency between the DDA and other laws (Australian Airports Association, sub. 213; Association of Independent Schools of South Australia, sub. 135) (see chapter 12). The Productivity Commission considers that this function could play an important role in bringing concerns about federal laws to the attention of the Attorney General.

FINDING 9.1

There appears to be potential for the Human Rights and Equal Opportunity Commission to make greater use of its power to examine Commonwealth legislation and report to the Minister on its consistency with the Disability Discrimination Act 1992.

Fourth, where thought to be appropriate and with the leave of the court, HREOC can intervene in court proceedings that involve issues of discrimination on the ground of disability (s.67(1)(l)). HREOC stated that it has had little opportunity to use this power:

So far, opportunities to appear as *amicus* or intervene in court proceedings under the DDA have been limited. In several cases where the Commissioner had indicated an interest in joining the proceedings the matter has settled before going to hearing. (HREOC 2003d, p. 15)

The Australian Human Rights Commission Legislation Bill 2003 (currently before Parliament) would require the renamed Human Rights Commission to obtain the leave of the Minister to intervene in court proceedings under the DDA or the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act) (or, if the president of the new commission is a Federal Court judge, to notify the Attorney General).

In the explanatory memorandum for the Bill, the Australian Government argued:

Requiring the new Commission to seek the Attorney General's approval for such an intervention before the new Commission exercises its function to seek leave to intervene will ensure that the intervention function is only exercised after the broader interests of the community have been taken into account. (Explanatory Memorandum, p. 9)

A number of inquiry participants expressed concern that this proposal would undermine the new Human Rights Commission's independence (particularly in

situations where the Australian Government is a party to the matter). The Australian Human Rights Commission Legislation Bill 2003 is outside the terms of reference for this inquiry (see chapter 1). However, the Productivity Commission notes the concerns of inquiry participants and observes that independence is an important characteristic of organisations such as HREOC.

In a related issue, the Anti-Discrimination Board of New South Wales (sub. 101), the New South Wales Office of Employment and Diversity (sub. 172) and Women with Disabilities Australia (sub. DR318) suggested expanding HREOC's intervention powers to cover proceedings involving industrial relations issues, based on the New South Wales model.

Under the HREOC Act, complaints about discriminatory acts done under an award can be made to HREOC. If the president of HREOC considers that a discriminatory act has occurred, then the complaint must be referred to the Australian Industrial Relations Commission (AIRC) (s.46PW).

The AIRC is required to take account of the DDA (along with the *Racial Discrimination Act 1975* and the *Sex Discrimination Act 1984*) in performing its functions (*Workplace Relations Act 1996*, s.93). It is also required to ensure that a decision or determination affecting an award does not contain provisions that discriminate on the ground of 'physical or mental disability' (among other grounds), and must not certify an agreement if it thinks that a provision of the agreement discriminates against an employee on the ground of 'physical or mental disability' (*Workplace Relations Act 1996*, ss.143(1C)(f) and 170LU(5)). The DDA does provide a partial exemption for capacity-based wages in awards and agreements in some circumstances (s.47(1)(c)) (see chapter 12).

The Productivity Commission considers that current arrangements dealing with the interaction between HREOC and the AIRC appear to provide adequate protection in industrial relations matters for people with disabilities. Although discrimination in employment is an issue (see chapter 5), it does not appear to derive from discriminatory acts done in accordance with awards. If any such discriminatory acts do arise, dealing with them is properly the role of the AIRC, which has statutory responsibilities to take account of the DDA.

FINDING 9.2

Current provisions in the Human Rights and Equal Opportunity Act 1986 (Part IIC) dealing with discriminatory acts done in accordance with Awards are appropriate.

9.2 Accommodation

Under the Commonwealth State and Territory Disability Agreement (CSTDA), accommodation services for people with disabilities are the responsibility of the States and Territories (see chapter 15). Historically, many people with disabilities were institutionalised, particularly people with intellectual disabilities and some forms of mental illness. Since the 1970s, emphasis has been placed on integrating people with disabilities into the community—an approach commonly called de-institutionalisation. This section examines issues raised by inquiry participants relating to those people with disabilities who remain in institutions, the effects of de-institutionalisation, and the potential role for disability standards for accommodation.

People with disabilities in institutions

According to the ABS Survey of Disability, Ageing and Carers, 184 000 people with disabilities lived in ‘cared accommodation’ in 1998 (ABS 1999b, p. 21).¹

People with disabilities living in institutional accommodation can face constraints on their choice, liberty and privacy, and are vulnerable to abuse or neglect (Stephanie Mortimer, sub. 13). The Office of the Public Advocate, Victoria stated:

Many people with disabilities live in accommodation specifically provided for them by government or community-based agencies. Any disability specific support services are sometimes also often provided by the same agencies. This means that these people with disabilities are wholly reliant on the service provider to provide for them and lack real choices about how, when or even if such services are provided. In such situations many are vulnerable to being exploited, abused or neglected. (sub. 91, p. 3)

In addition, several inquiry participants raised concerns about the inappropriate placement of young people with disabilities in aged care nursing homes (Queensland Parents for People with a Disability, sub. DR325; UnitingCare Australia and UnitingCare NSW/ACT, sub. DR334; Hume Regional Forums; HREOC, sub. 143) (see chapter 15).

As discussed in chapter 15, the Productivity Commission considers that there is very limited scope to use the DDA complaints process to challenge government decisions about access to disability services or the quality of those services, although it should apply to the administration of those services.

¹ ‘Cared accommodation’ includes hospitals, homes for the aged (such as nursing homes and aged care hostels), cared components of retirement villages, and other ‘homes’ such as children’s homes (ABS 1999b, p. 65).

However, there appear to be weaknesses in applying the DDA even to the administration of institutional accommodation. HREOC (sub. 143, p. 37) noted that ‘the DDA has had limited impact to date on issues in institutional living’ for several reasons. First, people living in institutions or their advocates are often reluctant to make complaints because they are concerned about the consequences. The accessibility of the DDA complaints process, including issues of victimisation, is discussed in chapter 13.

Second, HREOC stated that there are more effective mechanisms than the DDA to deal with complaints about institutional accommodation. Alternative mechanisms include internal complaints mechanisms for disability services under the CSTDA. The National Disability Services Standards have been adopted by all jurisdictions as the basis of quality assurance for disability services, and the CSTDA requires each jurisdiction to ensure these standards are ‘upheld and monitored’ (see chapter 15). However, many aspects of the CSTDA are ‘aspirational’ rather than mandatory, and do not have associated compliance mechanisms (see chapter 15). Complaints can also be made to specialist State and Territory bodies such as ombudsmen and public advocates (section 9.3). Serious allegations of abuse are more appropriately made to the police.

Inquiry participants questioned the usefulness of these alternative complaint mechanisms. Action for Community Living stated:

Often these internal and other mechanisms are time consuming and it seems to be an undermining assumption that such people should be grateful for the services they receive and that people in ‘institutional care’ do not have the need nor right to any legal rights as such. (sub. DR330, p. 3)

The Productivity Commission considers that people with disabilities living in institutional settings appear to face particular barriers to achieving equality before the law. The quality of institutional accommodation for people with disabilities currently falls under the CSTDA, and arguably lacks sufficiently enforceable standards. It could be possible to improve the position of people with disabilities in institutional accommodation through the development of mandatory accommodation disability standards covering institutional accommodation. The possible development of accommodation disability standards is discussed below.

FINDING 9.3

People with disabilities living in institutional settings face particular barriers to achieving equality before the law. There is limited scope to apply the Disability Discrimination Act 1992 in this area.

De-institutionalisation

Growing acceptance of the social model of disability (see chapter 2) has led to a strong emphasis on the de-institutionalisation of people with disabilities, both internationally and across all States and Territories in Australia. The Equal Opportunity Commission Victoria stated:

De-institutionalisation policies, which began in the early 1970s, coincided with and reflected a growing focus on individual human rights and dignity. The effects of these policies, which aim to enable people with disabilities to participate fully within the community, have become apparent in the last ten years. (sub. 129, p. 9)

The Australian Housing and Urban Research Institute (AHURI) noted ‘a strategic emphasis on de-institutionalisation and the restructuring of housing assistance’ over the past 15 years (AHURI 2001a). In particular, it noted the introduction of the Commonwealth State Disability Agreement (CSDA) (later replaced by the CSTDA), which set out the rights of people with disabilities to live within the community rather than in segregated settings. The CSDA stated:

Accommodation support should not lock programs into one or two models. It should not be confined to group homes. It should be as flexible as the wide range of living options in the community generally and the ways that could be used to support individuals in those living options, for example, share houses or flats, co-tenancy or live-in arrangements or married living arrangements, or drop-in support models (Department of Community Services 1987, p. 1, *in* Hardwick et al 1987, p. 32)

Inquiry participants argued that the process of de-institutionalisation has raised several ‘equality before the law’ issues. Some inquiry participants argued that policies of closing institutions for people with disabilities are discriminatory because they deny choice to residents and families (Community and Institutional Parents’ Action on Intellectual Disability, sub. 21; Kincumber Lodge Resident Advocacy Group, sub. 22; Robert Atkins, sub. 26; UnitingCare Australia and UnitingCare NSW/ACT, sub. DR334).

Many participants argued that de-institutionalisation has not been adequately supported by access to disability services. Chenoweth (2000) summarised many of these concerns, arguing that access to services and supports is essential for the wellbeing of those who have been moved into the community, and that the failure to provide sufficient resources could place people with disabilities in a more invidious position than they had in their previous institutional lives.

Inquiry participants’ comments show little progress in this area since the 1993 Burdekin Report into de-institutionalisation of mental health care. That report found that savings from de-institutionalisation had not been directed into community-

based care and that such services were seriously underfunded (Burdekin 1993). However, HREOC noted that the scope of the DDA is limited in this area:

Individuals (people with disabilities or parents) or organisations who consider that government policies regarding disability accommodation involve a discriminatory lack of choice are free to lodge complaints under the DDA. ... However, ... there would be a number of legal issues to address, including those of identifying appropriate comparators and assessing the applicability of the special measures defence for measures reasonably intended to address special needs. (sub. 219, p. 42)

The Productivity Commission recognises that de-institutionalisation can further the rights of people with disabilities. However, a policy of de-institutionalisation must recognise peoples' desire for choice and self-determination. De-institutionalisation also must be supported by access to disability services that allow people with disabilities to live in the community safely and with dignity. However, as noted above, the Commission considers that scope to use the DDA complaints process to challenge government decisions about access to disability services or the quality of those services is very limited (see chapter 15).

FINDING 9.4

The process of de-institutionalisation needs to be supported by access to disability services. However, there are major limitations on the use of the Disability Discrimination Act 1992 to challenge government decisions about provision of disability services.

Tenancy rights

Other inquiry participants argued that many people with disabilities in de-institutionalised accommodation lacked tenancy rights (Tony and Heather Tregale, sub. 30; Office of the Public Advocate, Victoria, sub. 91; Action for Community Living, sub. DR330). This can arise for several reasons.

First, many people with disabilities live in low cost private accommodation such as boarding houses and caravan parks, where there is very little tenancy law. They are regarded as licensees, rather than tenants, and have limited security of tenure. However, this is not a disability-specific issue. All residents of such accommodation share this problem.

Second, many people with disabilities in supported accommodation outside institutions are also not covered by residential tenancy laws. The Victorian *Residential Tenancies Act 1997*, for example, excludes 'health or residential services' from its coverage. In 2001, an independent working group in Victoria recommended extending tenancy rights to people in supported accommodation.

However, a 2003 Victorian Government review of disability legislation identified tensions in implementing these recommendations, including: the need to balance tenancy rights for people with disabilities with the need to provide support; concerns about the safety of other residents and staff; and concerns about the ability of some tenants to make informed decisions. For example, the right to notice before ending a tenancy might conflict with the need to move a disruptive individual. Although ‘mainstream’ tenancy law provides mechanisms for breaking a lease, these mechanisms were not designed with supported accommodation in mind. The review committee is currently reconsidering these issues.

The Productivity Commission agrees with the Victorian Government review that the extension of ‘mainstream’ tenancy rights to people with disabilities in supported accommodation could introduce tensions between the rights of tenants and the responsibilities of the service provider towards that tenant, staff and other residents. However, it might be possible to improve the position of people with disabilities in supported accommodation through the development of accommodation disability standards that clarified how such tensions should be resolved.

Accommodation disability standards

The DDA provides for the development of disability standards for accommodation (s.31(1)(c)). However, there has been little progress on the development of such standards. Although a number of disability peak bodies lobbied the DDA Standards Project in 2000 to begin work on accommodation standards, the Attorney-General’s working group argued that priority should be given to work on other standards.

The DDA does not specify what areas of accommodation the disability standards were intended to cover. They could be limited to private rental accommodation or could address accommodation services specifically provided to people with disabilities, including those living in institutions and supported accommodation.

Disability standards for private rental accommodation?

As noted above, many people with disabilities live in low cost rental accommodation. Disability standards could provide greater clarity about the rights of people with disabilities in these forms of accommodation. However, the development of standards would raise several issues.

First, access to private rental accommodation is already addressed by the DDA provisions on access to premises, and goods, services and facilities. There are also draft disability standards on access to premises. Although inquiry participants such as Blind Citizens Australia (sub. DR269) noted the difficulty of proving

discrimination in rental decisions, it is not clear how accommodation standards would overcome these problems.

Second, people with disabilities are not the only residents in low cost accommodation. If regulation is required, it might be more appropriate for it to cover all residents. Otherwise, minimum standards for people with disabilities that do not apply to other residents might discourage landlords from renting to people with disabilities.

Third, tenancy rights are the responsibility of State and Territory governments. Accommodation standards would thus have implications for existing State and Territory arrangements. Victoria, South Australia and Queensland already have boarding house regulation. New South Wales has both licensed and unlicensed boarding houses, and has commissioned a review into the regulation of boarding houses licensed to provide accommodation for people with disabilities (The Allen Consulting Group 2003b, p. 1). However, national disability standards might provide uniformity in this area.

Fourth, although minimum standards covering areas of low cost housing might be desirable, their effect on affordability would need to be considered. There is already concern that the supply of low cost accommodation is rapidly shrinking, because of 'gentrification' in inner city areas, a decline in profitability and an increasingly complex client group (Department of the Premier and Cabinet, South Australia 2002). The Victorian Government stated:

... in the area of accommodation and housing, strict Disability Standards in the area of private rental may have the unintended adverse effect of reducing access to affordable housing and is not supported. (sub. DR367, p. 3)

The Victorian Government noted that the Building Commission and the Australian Building Codes Board are about to commence research on the need for accessible forms of housing and options to stimulate appropriate supply. Research is planned to commence on 1 July 2004 and a draft report is planned to be available for public comment in mid 2005 (Victorian Government, sub. DR367, p. 25). The results of this research could provide the basis for the development of housing standards that could be applied throughout Australia (rather than specifically to private accommodation for people with disabilities).

The Productivity Commission considers that disability discrimination issues in private rental accommodation are largely addressed by the general provisions of the DDA. Issues about the supply and quality of low cost accommodation are better addressed by more general approaches such as the forthcoming Building Commission and Australian Building Codes Board research.

Disability standards for institutional and supported accommodation?

The Productivity Commission has noted above the limited application of the DDA complaints processes for institutional and supported accommodation. There appears to be potential for accommodation disability standards to overcome some of these limitations and provide greater equality before the law for people with disabilities living in these forms of accommodation.

As noted above, several inquiry participants supported improved tenancy rights for people with disabilities in supported accommodation. However, there was mixed support for accommodation standards for institutional accommodation, with one inquiry participant arguing that ‘the standard should be that people with disabilities should not have to live in institutions’ (Association for Community Living, sub. DR330, p. 3).

The Office of the Public Advocate, Victoria argued that disability standards would have to address a variety of settings:

If an accommodation standard were to be developed, then care should be taken to ensure that minimum requirements are sufficient to meet the needs of all people with disabilities who might require such a standard in a variety of settings. Any accommodation standard needs to address both physical access and the quality of accommodation provided. (sub. DR310, p. 2)

But the Office also noted that it would be difficult for standards to address problems of supply or access to services:

A lack of affordable, accessible, long term, secure accommodation of ALL types for people with disabilities in the open market as well as appropriate levels of support means that some people are forced into supported and/ institutional accommodation that may be physically accessible but at the same time such settings are not homes. (Office of the Public Advocate, Victoria, sub. DR310, p. 3)

The Disability Council of NSW argued that accommodation disability standards were unworkable:

Council believes that an accommodation standard, as presently conceived, is unworkable given the broad range of issues it might attempt to address ... (sub. DR291, p. 2)

The Productivity Commission notes the mixed support for disability standards in this area. This inquiry does not have enough information to recommend that standards covering institutional and supported accommodation be developed, or to determine what such standards should include. Separate consultative processes are necessary to set priorities for developing standards and to reach consensus on their content (see chapter 14).

9.3 Decision making by and for people with cognitive disabilities

Some people have a ‘cognitive disability’, which results in the person being unable to make reasonable decisions about their person or circumstances, or their financial and legal affairs. Included in this group are people with some forms of intellectual disability, acquired brain injury and acute mental illness.

There are practical limitations to achieving equality before the law for people with cognitive disabilities. For example, it is generally accepted that some restrictions on the rights of involuntary patients are justified; that some people with mental illness should not be permitted to own firearms; and that there are limits on the ability of some people with cognitive disabilities to make legally binding contracts.

In some circumstances, people with cognitive disabilities might not be in a position to understand or enforce their rights, although family, carers and advocacy organisations can sometimes act on their behalf (for example, in disability discrimination complaints—see chapter 13). However, given the risk that other people might make decisions that are not in the best interest of a person with a cognitive disability, legal rules have been developed to govern decision making by and for people with cognitive disabilities. Many of these limitations also give rise to issues in access to justice (section 9.4).

The States and Territories have primary responsibility for arrangements governing decision making by and for people with cognitive disabilities. Each State and Territory has institutional and procedural arrangements in place to cover:

- the rights of involuntary patients (including financial rights, privacy of correspondence, and restraint and seclusion practices)
- the admission, review of detention, and appeals against detention of involuntary patients
- consent for certain treatments
- the appointment of guardians and the provision of advocacy services
- financial administration, particularly choice of trust funds.

The role of the Office of the Public Advocate in Victoria in decision making by and for people with cognitive disabilities is summarised in box 9.2. All jurisdictions have similar arrangements. The Australian Guardianship and Administration Committee provides a national forum for all relevant State and Territory agencies associated with guardianship and administration. It aims to develop consistency and

uniformity; provide a collaborative focus; encourage research and dialogue; and advise governments on relevant issues (AGAC nd).

Box 9.2 Office of the Public Advocate, Victoria

The Office of the Public Advocate, Victoria is an independent statutory office, answerable to the Victorian Parliament. It represents the interests of Victorian people with disabilities. Its aim is to promote the rights and dignity of people with disabilities, and to strengthen their position in society. It can investigate and speak out about situations in which people are exploited, neglected or abused.

It works with the Guardianship List of the Victorian Civil and Administrative Tribunal, to ensure the rights and opportunities of people with disabilities are protected. Its services include:

- **advice**—information and assistance about the rights and services relevant to people with disabilities, including: complaints about services; care and treatment; information about guardianship, refusal of medical treatment, powers of attorney and treatment for patients who cannot consent
- **advocacy**—individual advocacy for people with disabilities; strategic advocacy to address systemic issues arising from individual advocacy work
- **guardians**—guardianship for people with disabilities when orders are made by the Victorian Civil and Administrative Tribunal.

The Guardianship List of the Victorian Civil and Administrative Tribunal protects persons aged 18 years or over who are unable, as a result of a disability, to make reasonable decisions about their person or circumstances, or their financial and legal affairs.

Sources: Office of the Public Advocate, Victoria 2001; VCAT 2003.

Despite these protections, a Victorian Auditor General's report on services for people with an intellectual disability noted that legislation relating to disability in Victoria has limitations in protecting and safeguarding the rights of people with a disability who cannot make informed decisions or provide legally effective consent (DHSV 2003, p. 55). The Victorian Government is currently reviewing its disability legislation (the *Intellectually Disabled Persons' Services Act 1986* and the *Disability Services Act 1991*). The discussion paper for this review raised several issues associated with decision making and consent for people with cognitive disabilities, in the context of developing a future legislative framework for disability (DHSV 2003).

The National Disability Advisory Council expressed concern about achieving equality before the law for people with cognitive disabilities:

The general belief is that equality before the law for people with a cognitive disability is not achieved. In the body of the [draft] report an observation is made that there is no evidence to suggest that arrangements for protecting the rights of people with cognitive disabilities are *‘inappropriate’*. Nevertheless, it is difficult to suggest that they are appropriate given the lack of research in this area. (sub. DR358, p. 3)

In all jurisdictions, legislative rules must balance competing claims about the best interests of a person with a disability. Many inquiry participants raised examples of conflict between legal requirements and the desires of family or carers. Particular concern was expressed about the administration of the financial affairs of people with cognitive disabilities, especially the lack of avenues for families or carers to challenge the decisions of trustees, and lack of choice of trustee (Dare to Do Australia, sub. DR308; ASEHA Queensland Inc., sub. 222; Stephanie Mortimer, trans., p. 2695; the Gippsland Carers Association, sub. 203; E Hutson, sub. 193).

HREOC considered that State and Territory rules governing decision making by people with cognitive disabilities are not subject to the DDA:

Rules in other laws (including mental health and guardianship laws) governing decision making by or on behalf of people with impairments to decision making capacity are not addressed by the DDA. (sub. 143, p. 36)

However, HREOC clarified that the presumption that certain people are not competent to make decisions for themselves can be unlawful under the DDA:

Constraints on ability to make decisions in other contexts, for example if it is simply assumed that a person with an intellectual disability lacks the capacity to enter into a transaction such as renting a flat or hiring a video—are capable of challenge through the DDA, although only a small number of complaints has been made in this area to date. (sub. 143, p. 36)

HREOC has undertaken limited research in the area of decision making by and for people with cognitive disabilities, but stated that it has been constrained by a lack of resources (HREOC 2003d).

The Productivity Commission considers that there are practical limitations to achieving equality before the law for people with cognitive disabilities, and that fair and transparent arrangements for governing decision making by and for people with cognitive disabilities are essential. This is largely an area of State and Territory government responsibility, and is outside the scope of this inquiry. However, the Commission notes that comments from inquiry participants suggest that there is some room for improvement.

The DDA has a limited role in this area, but there is a role for HREOC in researching issues of national importance and providing opportunities for the States and Territories to compare approaches and learn from each other. This could be

facilitated by consultation with the Australian Guardianship and Administration Council.

FINDING 9.5

There are practical limitations to achieving equality before the law for people with cognitive disabilities. However, there are major limitations on the use of the Disability Discrimination Act 1992 in this area.

9.4 Justice and civic participation

Equality before the law for people with disabilities extends to the right to fair and equal treatment in the justice system, and the right to participate in civic activities, particularly voting and jury duty.

Physical access

People with disabilities often face physical barriers to the justice system and civic participation, such as inaccessible premises and lack of information in accessible formats. The DDA provisions that cover access to premises and goods, services and facilities include access to courts and polling places, and the provision of information. The effectiveness of the DDA in eliminating discrimination in these broad areas of activity is discussed in chapter 5. The following section focuses on particular issues relating to equality before the law.

The justice system

Evidence suggests that people with disabilities face particular barriers to achieving equal treatment in the criminal and civil justice systems.

The criminal justice system

The Office of the Public Advocate, Victoria, noted that people with disabilities receive less favourable treatment in the justice system:

The evidence strongly suggests that people with disabilities either as victims, witnesses or perpetrators of crime receive less favourable treatment because of their disability. (sub. 91, pp. 3–4)

The Office of the Public Advocate, Victoria, provided evidence that people with intellectual disabilities are overrepresented as victims of various forms of abuse,

particularly sexual abuse, and that victims of crime and/or witnesses with cognitive incapacities are generally viewed as unlikely to be reliable witnesses (sub. 91).

Some commentators have argued that this problem is compounded by the lack of recognition of many crimes against people with disabilities. According to Hauritz et al. (1997, p. 199), the use of euphemistic language disguises the nature of criminal acts by some care providers, professionals and even parents. Hauritz et al. argue that terms such as ‘psychological abuse’, ‘threat’, ‘physical abuse’, ‘punishment procedure’ and ‘aversive treatment’ are used to describe what would be regarded as assaults in other contexts, and that the terms ‘abuse’ or ‘professional misconduct’ can be used to describe rape or sexual assault.

There is little concrete data on the number of offenders and prisoners with disabilities (particularly cognitive disabilities), but evidence suggests that people with cognitive disabilities are overrepresented as offenders and prisoners (box 9.3).

The UN International Covenant on Civil and Political Rights, to which Australia is a signatory, sets out minimum guarantees for the determination of criminal charges, which include the rights:

- to be informed promptly and in detail in a language which he [or she] understands of the nature and cause of the charge against him [or her]
- to have the free assistance of an interpreter if he [or she] cannot understand or speak the language used in court. (UN International Covenant on Civil and Political Rights, article 14, s.3)

Several inquiry participants argued that people with disabilities (particularly people with cognitive disabilities) are often denied these rights, and that those charged with offences are thus more likely than people without a disability to be found guilty and to receive more severe sentences. Villamanta Legal Service noted:

... research has shown that many people appearing before the courts and incarcerated in Australia’s prisons would be diagnosed as having a cognitive impairment or borderline disability, low literacy levels, limited functional adaptability and are socially isolated. (trans., p. 1870)

The Disability Services Commission, Western Australia, stated:

... people with disabilities are likely to receive more severe sentences and are less likely to receive parole or conditional release ... (sub. 44, p. 3)

Box 9.3 People with cognitive disabilities in the criminal justice system

A literature review by the Office of the Public Advocate, Victoria, found that available evidence strongly suggests that people with cognitive disabilities face many barriers in dealing with the criminal justice system.

As offenders

Offenders with intellectual disabilities are most likely to commit crimes that reflect impulsive or unpremeditated behaviour (NSW Law Reform Commission 1996b).

People with intellectual disabilities are more likely to admit to offences, even if innocent, due to a desire either to please an authority figure or to conceal the fact that they do not understand the questions (NCOSS 2003; Petersilia 1997).

If apprehended, people with intellectual disabilities are more likely to be ignorant of, or unwilling to exercise their rights and more likely to confess or plead guilty (Glaser and Deane 1999). They are also more likely to be refused bail (NSW Law Reform Commission 1996b).

In corrective services

Prisoners with an intellectual disability in Australia are estimated to make up 12–13 per cent of the prison population in New South Wales (Hayes 2002), compared with a rate of 1–3 per cent in the community (Intellectual Disability Rights Service and the New South Wales Council for Intellectual Disability 2001).

Prisoners with a mental illness are estimated to make up 30 per cent of the prison population (NCOSS 2003).

People with intellectual disabilities are more likely to receive a longer sentence, be denied parole and be victimised in the prison system (than people without such a disability) (Glaser and Deane 1999). They may also receive more custodial sentences because of a lack of alternative placements in the community (NCOSS 2003; Glaser and Deane 1999; NSW Law Reform Commission 1996b).

Inability to follow prison rules can extend the sentences of people with a cognitive disability (Glaser and Deane 1999). Further, a lack of appropriate accommodation or other necessary supports means that parole is often delayed and occasionally denied (Victorian Adult Parole Board, pers. comm. nd).

Borderline and undiagnosed offenders with cognitive disabilities do not receive support services and are more likely to re-offend (The Framework Report, NSW 2001). Offenders with an intellectual disability are 78 per cent more likely than mainstream prisoners to return to prison. During 1990–1998, 68 per cent of inmates identified as having an intellectual disability were re-imprisoned within two years, compared with 38 per cent of the total prison population (Intellectual Disability Rights Service and the NSW Council for Intellectual Disability 2001).

Source: Office of the Public Advocate, Victoria, pers. com., 12 August 2003.

The Office of the Public Advocate, Victoria, stated:

... people with cognitive disabilities are more likely to be over represented in the criminal justice system as offenders ... they are less likely to have adequate legal representation and to have their disability-specific needs addressed in prison. (sub. 91, p. 4)

Some commentators have argued that policies of de-institutionalisation in practice have become policies of ‘re-institutionalisation’ in prisons, because there appears to be a correlation between de-institutionalisation and the rising number of offenders and prisoners with cognitive disability (Armstrong 2002). As discussed in chapter 2, many disability issues involve difficult balances. De-institutionalisation and protections against involuntary commitment to an institution protect the rights of people with disabilities but they can also reduce access to mental health services and make people more vulnerable to being caught up in the criminal justice system.

Further, some inquiry participants argued that many people with disabilities in prisons do not have access to appropriate services and face punishments for behaviours that are related to their disability (Office of the Public Advocate, Victoria, sub. 91).

The Productivity Commission considers that even the limited evidence canvassed here on the experience of people with disabilities in the criminal justice system is of great concern. As argued by ACROD, ‘there is no evidence to suggest that the overrepresentation of people with disabilities in the prison population reflects a greater tendency towards criminality than among other parts of the community’. ACROD cited evidence gathered by the NSW Law Reform Commission that ‘strongly indicates the influence of indirect discrimination, especially among those with intellectual disabilities’ (sub. 45, p. 3).

FINDING 9.6

Available evidence suggests that people with disabilities, particularly people with cognitive disabilities, are overrepresented in the criminal justice system (as victims of crime, alleged offenders and in corrective services).

The civil justice system

Civil law regulates conduct between private individuals. It includes both federal law (in areas such as family law and migration) and State and Territory law (in areas such as property law and commercial contracts). Civil law includes anti-discrimination law, where it is up to individuals to take civil action to enforce their rights. As in the criminal justice system, people with disabilities can face barriers in the civil justice system (in both courts and tribunals).

Little comprehensive data were available to the Productivity Commission in relation to people with disabilities in the civil justice system, other than in relation to the DDA. The Mental Health Legal Centre argued that people with psychiatric disabilities face discrimination in the Family Court and in child protection services (sub. 108). The Office of the Public Advocate, Victoria, also raised concerns about unequal treatment of parents with disabilities by child protection services (sub. 91).

The Productivity Commission considers that people with disabilities in the civil justice system are likely to face difficulties similar to those that they face in the criminal justice system, as witnesses, plaintiffs (applicants) and respondents (defendants).

Conclusion on access to justice

All citizens are entitled to fair treatment in the justice system. It is particularly important to protect the rights of those who are most vulnerable. The administration of many aspects of the justice system, particularly criminal justice, is the responsibility of State and Territory governments, and lie outside the scope of this inquiry's terms of reference. However, the Productivity Commission considers that there is a role for the Australian Government in ensuring basic human rights, evidenced by Australia's adoption of the UN Covenant on Civil and Political Rights.

The Australian Government has demonstrated its willingness to provide leadership on disability issues through the DDA—for example, through the development of disability standards that bind State and Territory governments in areas such as public transport and access to premises. It should also provide leadership in an area as important as access to justice.

The Attorney General should commission an inquiry into access to justice by people with disabilities, with a particular focus on practical strategies for protecting their rights in the criminal and civil justice systems. Such an inquiry would require both legal and disability-rights expertise. It could build on the discussion paper recently released by the Office of the Public Advocate, Victoria (2004) *Disability and the Courts*. The discussion paper seeks to stimulate debate on ways of making the court system more responsive to the needs of people with a disability or mental illness, including the introduction of specialist 'therapeutic courts' with expertise on disability issues.

As argued by the Villamanta Legal Service, an inquiry into equality before the law for people with an intellectual disability would improve justice for all (trans., p. 1870).

Many inquiry participants supported an inquiry into access to criminal and civil justice, including the National Disability Advisory Council (sub. DR358), People with Disabilities Australia (sub. DR359), Action for Community Living (sub. DR330) and the Office of the Public Advocate in Victoria (sub. DR310). The ACT Government (sub. DR366) suggested that such an inquiry should extend beyond procedural aspects to examine:

- support for witnesses and victims with disabilities
- the range of sentencing options for people with disabilities
- access to information on the legal system for people with intellectual disabilities
- physical, social and economic impediments to participation in the justice system
- capacity, resources and expertise of Legal Aid to represent people with disabilities.

Subject to appropriate resourcing, HREOC could be requested under s.67(j) of the DDA to conduct such an inquiry. Alternatively, the inquiry could be conducted by the Australian Law Reform Commission (ALRC) or some other qualified body. This inquiry could draw on work such as the *Report into People with an Intellectual Disability and the Criminal Justice System* by the NSW Law Reform Commission (1996b), the *Access to Justice* report by the Access to Justice Advisory Committee (1994) and the *Report of the National Inquiry into the Human Rights of People with Mental Illness* by HREOC (1993c). In addition, the Law and Justice Foundation of New South Wales (2004) is currently examining the ability of disadvantaged people, including people with mental illness, to participate in the legal system.

This inquiry would address many issues that are particularly relevant to the States and Territories. State and Territory cooperation could be facilitated by involving the States and Territories in appointing associate Commissioners to the inquiry. The Productivity Commission considers that the Attorney General should discuss the alternative forms the inquiry could take at a meeting of the Standing Committee of Attorneys-General.

RECOMMENDATION 9.1

The Attorney General, in consultation with State and Territory governments, should commission an inquiry into access to justice for people with disabilities, with a focus on practical strategies for protecting their rights in the criminal and civil justice systems.

Civic participation

People with disabilities can face many barriers to participation, including participation in the civic life of the community (see appendix D). Contributing to civic life helps develop social capital (see chapter 6) and is an important means of demonstrating that people with disabilities accept social responsibilities as well as rights. The Disability Council of New South Wales argued:

... people with disabilities are denied the rights of citizenship, the right to equal participation and the support to ensure these rights are upheld. ... While they are, ostensibly, equally entitled, they are effectively disempowered by the failure to recognise differential access and forms of participation as valid. (sub. 64, p. 13)

Inquiry participants identified two areas of civic participation that have particular relevance to equality before the law: voting and jury duty.

Voting

Voting is regarded as a civic duty and right of citizenship. Every Australian citizen (18 years or over) is required by law to vote. If an enrolled citizen fails to vote and cannot provide a valid reason for not voting, penalties can be imposed. HREOC (2003d, p. 27) noted that 'equal electoral access clearly has great significance for equality of citizenship'.

However, some people with disabilities argued that they have been actively discouraged from voting or required to vote from their car, or have had to submit postal votes (Blind Citizens Australia, sub. 72; Peter Young, sub. 199; Paraplegic and Quadriplegic Association of Queensland, sub. 138; Disability Council of New South Wales, sub. 64; Joe Harrison, sub. 55). Others complained about a lack of information (about the election, how to vote and ballot papers) in accessible forms (National Disability Advisory Council, sub. DR358; People with Disabilities Australia, sub. DR359; Blind Citizens Australia, sub. DR269).

One inquiry participant gave an example of apparent discrimination in access to voting, and described how Australian Government and New South Wales Government electoral officers adopted different approaches (box 9.4).

Box 9.4 Accessible voting

Betty Moore (sub. 42, p. 2) noted:

At the recent State election, we were faced with inappropriate venue problems which had been documented at the regional office and Sydney headquarters for the previous two State elections. The Sydney officer still had on his file all the previous correspondence but failed to act.

The new regional officer again rented a first floor conference room for the pre-poll voting venue. This building does not have a passenger lift nor any method of communication between the ground and first floor. It also has 14 steps up to the front door. It took a concerted effort of political lobbying to the Labor Party Member of the Legislative Council and the letting agent for the building to prevent use of this venue.

The Sydney officer in charge would not change the Saturday polling venue—he stated it was classified ‘assisted disabled access’. This, despite file documentation and new information of two other available fully accessible buildings in the central business district. He did not inspect the venue or provide the electoral staff to do the ‘assisting’.

Hats off to the Federal Electoral Commission, whose new regional officer saw fit to physically inspect the traditional voting venues in this area, and made the decisions to change to accessible voting venues.

Dr Cath Gunn of the Communication Project Group found that confidentiality of the electoral ballot is also a concern for people with disabilities (trans., p. 902). Many voters needed assistance to complete their ballot paper because they were visually impaired, lacked manual dexterity or had an intellectual or communication impairment. This created the potential for undue influence to be exerted on their voting decisions.

Dr Gunn (pers. Comm., 29 August 2003) surveyed 639 people who received the Disability Support Pension or other allowance (some of whom received help from a care giver and some of whom did not) about their voting experiences. Although statistical analysis of the data is still underway, many responses indicated problems, particularly for people who needed assistance to fill in a ballot paper. One survey respondent summarised many issues:

... round here we do what they (carers) want. I’m dependent on them for everything so you don’t argue. I’d like to choose for myself—but the only way that could happen was for you to have to use an official person and not someone who knew you. They’ll never do that. It’s too expensive so I’ll never get to vote will I? Disenfranchised that’s me—and a lot of others. (Gunn 2003, pers. comm., 29 August 2003)

Other issues raised in Dr Gunn’s research are provided in box 9.5.

Box 9.5 Voting by people with disabilities

Access difficulties, including getting to a polling place, discouraged some people from enrolling or voting, for example:

Going to vote is awkward. We used to do it in a church hall but they changed it to the school and there are two steps into their hall. My Dad had to take the ramp over, not just for me but a couple of other people as well. They should think of that sort of thing but they don't—just let him do it instead.

Many people were 'advised' how to vote by someone else, for example:

I voted the way my parents said, because my sister would have told them if I hadn't done it that way.

Only two respondents were aware that they could ask for independent assistance, and others thought it should be compulsory (not optional), for example:

First I've heard of it and who's going to ask someone else for help when the help they're supposed to be getting is already standing there? I'd really like it if they made it so you had to have one of the staff to do it ... it would be more private. ... They make those laws so you can ask for help but they don't think it through—think how impossible it would really be—don't they realise that you can't ask sometimes even when you want to because—well you just can't.

Many did not even see the ballot paper after it was filled in on their behalf, for example:

I didn't even get to see the papers to start with and he didn't show me when he finished. (Did you ask him?) Sure I asked him and all he said was 'Don't you trust me?' so of course I had to say yes and then he said, 'Well you don't need to see them do you?' but I reckon he didn't do what I wanted because we don't think the same.

Source: Gunn 2003, pers. comm., 29 August 2003.

HREOC stated that despite individual complaints about electoral access and a public inquiry on electoral processes in 1999-2000, results have been limited (sub. 219). HREOC stated:

A number of complaints have been conciliated with agreement to improve electoral access in particular locations. In an effort to secure broader progress, a public inquiry into an individual complaint regarding a range of barriers to accessibility in local government elections was conducted in 1999. This led to agreement in 2000 by the Australian Electoral Council—of which all electoral commissions are members—to establish a committee ... to develop a standard definition for access, and set benchmarks for its achievement over a period of years. Formal progress through this committee process has not been as effective as anticipated. (HREOC 2003d, p. 27)

Several inquiry participants raised the potential for electronic voting to improve access for many people with disabilities. A Joint Standing Committee on Electoral Matters Report (2003, p. 263) pointed out that computerised voting can 'extend the secret ballot to those with visual impairment who otherwise require assisted voting to cast their vote'.

The ACT Government noted that computerised voting was used in the 2001 ACT election and is to be expanded for the 2004 ACT election (sub. DR366, p. 4). Blind Citizens Australia applauded the ACT trial and noted that:

The [ACT] Electoral Commission analysis of the trial concluded that the system could be continued with only a minimal impact on the cost of elections; in fact, the Commission suggested that cost offsets could result in a reduction in the cost of an election. (sub. DR269, p. 8)

Electronic voting is not currently an option in federal elections (or in many other jurisdictions). In 1999, HREOC declined a disability discrimination complaint on the grounds that the *Commonwealth Electoral Act 1918* did not give the Electoral Commission any discretion to permit the electronic voting that the complainant was seeking to protect his privacy. The extent to which compliance with laws with discriminatory effects can be challenged under the DDA is subject to some debate (section 9.5 and see chapter 12).

HREOC recommended consideration of legislative requirements for accessible voting:

The United States has more specific legislative requirements in place requiring accessible polling places to be used unless the responsible officer certifies no such place is available in the district. It may be appropriate to consider such a provision for inclusion in Electoral Acts to give greater specificity to the general application of the DDA in this area. (sub. 219, p. 40)

Voting is an essential element of Australian citizenship. The Productivity Commission considers, given the lack of progress following HREOC's inquiry in 1999-2000 and the Joint Standing Committee report in 2001, that it is desirable to take direct action to ensure voting processes are accessible to all citizens eligible to vote. Accessibility involves physical access, provision of information in accessible formats and an appropriate means of allowing people who require assistance to vote to do so confidentially. People with disabilities should have access to the same facilities and opportunities to vote 'on the day' as people without disabilities, in order to have equal access to up to date information.

The Productivity Commission considers, given the significance of voting as part of citizenship, that it is inappropriate to rely on individual complaints to improve access. The HREOC inquiry and Joint Senate Committee report should have placed authorities on notice that access needed to be improved. The Australian Government should amend the *Commonwealth Electoral Act 1918* to require accessible federal voting procedures (physically and in provision of information and independent assistance), and encourage State and Territory governments to amend their electoral Acts, if required.

Given the range of disabilities for which access is required, the access requirements in the electoral Acts should be expressed in general terms. There could then be scope to develop disability standards to clarify the general legislative access requirements. These standards would establish a national access benchmark. While there might be some doubt about the current ability to introduce standards in this area, the Productivity Commission is recommending that the DDA be amended to allow the Attorney General to introduce standards in any area covered by the Act (see chapter 14). Standards would also encourage the States and Territories to improve access, as they could apply to both federal and State and Territory voting arrangements.

FINDING 9.7

Physical access and provision of accessible information and independent assistance at polling places are not uniform. Given the importance of voting, it is inappropriate to rely on individual complaints to improve access.

RECOMMENDATION 9.2

The Commonwealth Electoral Act 1918 should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.

Jury duty

Like voting, jury duty is regarded as a civic duty and is compulsory for large sections of the population. However, a person is usually ineligible for jury duty if (among other reasons) they are unable to read or understand English, or if they cannot discharge the duties of a juror because of sickness, infirmity or disability.

The DDA has been used by people with disabilities to address issues of jurors' physical access to courts. HREOC provided the following example:

Two people with physical disabilities complained they had been discriminated against in 1994 by lack of provision of access for people who use wheelchairs to serve as jurors in certain courts in Sydney and at Coffs Harbour. [HREOC] found there had been a refusal to provide the service of assisting an eligible person to perform jury duty when Ms Druett was directed against her wishes to apply for exemption from duty. Damages of \$5000 were awarded accordingly. (HREOC 2003d, p. 38)

Jurisdictions are also taking steps to improve access. However, the emphasis to date appears to have been on physical access. The Office of the NSW Sheriff provides advice on people with disabilities and jury duty. It states that 'the Sheriff's Office will take all reasonable steps to help you to participate in jury duty', but focuses on

issues such as wheelchair access and accessible parking (Office of the Sheriff, New South Wales, 2003, p. 1).

Some inquiry participants argued that people with certain types of disability are being discouraged from participating in jury service. Blind Citizens Australia stated:

We are also aware that frequently blind and vision impaired people are discouraged from participating in jury service. Blind Citizens Australia believes that juries should be sourced from the widest possible pool. (sub. 72, p. 10)

This raises the difficult issue of what is required for a person with a disability to ‘discharge the duties of a juror’. As discussed in chapter 2, some disability issues involve difficult tradeoffs. In this instance, there is a potential trade off between the rights of people with disabilities to participate in jury service and society’s desire to ensure the fairest possible system of justice. It could be argued that juries should be more representative of the general population, including people with disabilities. However, some people with disabilities might not be able to assess all the evidence or communicate with other jurors. Does a defendant have a right to expect that all members of the jury can assess evidence in its original form? If so, what degree of disability should make a potential juror ineligible?

In April 2002, the NSW Law Reform Commission began a review into jurors with disabilities. The ongoing review is examining whether there is a need to exclude people from juries on the basis of serious hearing or vision impairment or if these people are being unnecessarily barred from jury duty. It is also examining ways of supporting those who do want to carry out their civic duty in this way. The review is considering the NSW *Anti-discrimination Act 1977*, the DDA and the need to maintain confidence in the administration of justice in NSW. A discussion paper was released in April 2004, and a final report is due in late 2004 (NSW Law Reform Commission 2004).

The NSW Law Reform Commission review has implications for access to jury duty for people with disabilities throughout Australia.

9.5 Laws with discriminatory effects

A significant issue relating to the DDA and equality before the law is the potential to use the DDA to challenge actions taken under laws that might have a discriminatory effect. (The DDA makes it unlawful to undertake various ‘acts’; it does not operate to make legislation invalid.) A related issue—the interaction of State and Territory laws and DDA disability standards—is discussed in chapter 14.

Several inquiry participants raised examples of laws with potentially discriminatory effects.

- The Mental Health Council of Australia argued that the Victorian Wrongs and Limitation of Actions Act (Insurance Reform) Bill 2003 (now an Act) discriminates against people with psychiatric disability, because the threshold for compensation for ‘psychiatric impairment’ is set at 10 per cent, while the threshold for ‘general damages’ (which covers physical impairment) is 5 per cent (sub. 150, p. 11).
- The Mental Health Council of Australia criticised the disproportionate effect of Centrelink ‘breaching rules’ on people with mental illness (sub. 150).
- Other inquiry participants criticised the exclusion of supported accommodation from *Residential Tenancies Act 1997* protection (section 9.2).

As noted in section 9.1, the original Disability Discrimination Bill included provisions that would have allowed people to use the DDA to challenge legislation that was discriminatory, similar to provisions in the *Racial Discrimination Act 1975* (box 9.6). These provisions were dropped as a result of concerns about their possible effect on special legal regimes in relation to people with disabilities, including guardianship and mental health legislation (HREOC, sub. 143). It is not clear what these concerns were, or why the exemption mechanism in the DDA for ‘prescribed laws’ could not have been used to exempt these laws from the operation of the DDA (see chapter 12).

Box 9.6 Equality before the law under the Racial Discrimination Act

Section 10 Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:

- (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
- (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

Source: Racial Discrimination Act 1975, s.10.

However, even in the absence of substantive provisions relating to equality before the law, it might be possible to use the DDA to challenge actions taken under other legislation. The DDA expressly exempts ‘anything done by a person in direct compliance with a prescribed law’ (s.47), implying that compliance with a law that is *not* prescribed is no defence to an action under the DDA.

The Sex Discrimination Act (which does not have specific provisions dealing with equality before the law)² has been used to challenge actions taken under Victorian State law (box 9.7).

² The Act mentions equality before the law in its preamble, but does not have a specific object covering equality before the law. It does not have specific provisions allowing actions taken under laws with discriminatory effects to be challenged.

Box 9.7 McBain v Victoria

In July 2000, the Federal Court decision in *McBain v Victoria* (2000) 99 FCR 116 rendered the *Infertility Treatment Act 1995* (Victoria) inoperative to the extent that it restricted assisted reproductive technology to married or heterosexual *de facto* couples.

The case arose following a request by a single woman for invitro fertilisation (IVF) services. The request was made to a medical practitioner specialising in reproductive technology. The practitioner considered that the woman was suitable for the treatment, but was precluded from providing the treatment under the Victorian Act. The practitioner applied to the Federal Court for a declaration that section 8 of the Victorian Act was inoperative due to inconsistency with section 22 of the Commonwealth Sex Discrimination Act, which outlaws discrimination on the basis of marital status. The State of Victoria and the Minister did not concede inconsistency, but they did not offer any arguments supporting the validity of the Victorian legislation. The Infertility Treatment Authority adopted a passive role. The only active supporters of the Victorian legislation were the Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church, which were granted leave to intervene as *amicus curiae* (friends of the court).

The Attorney General granted the bishops a *fiat* (special leave) to apply to the High Court. This application was dismissed by the High Court.

Sources: Re McBain; Ex parte Australian Catholic Bishops Conference; Re McBain; Ex parte Attor (2002) HCA 16 (18 April 2002)

However, several inquiry participants stated that HREOC would not accept complaints about actions taken under other laws. Blind Citizens Australia stated:

[Section 47] appears to enable a complainant to lodge a complaint against an action or decision made in direct compliance with a law as long as it is not a prescribed law and the action or decision was not made within three years of the commencement of the section. The three-year exclusion period has long expired. It has nonetheless been impossible for Blind Citizens Australia to date to lodge a complaint where compliance with a not prescribed law has been in issue. HREOC has maintained that it is not possible to make a law the subject of a complaint and that it is not possible to use section 29 in this context because it is not the administration of the law which is at issue. (sub. 72, p. 6)

In comments on this issue, HREOC distinguished two situations (sub. 219).

- Where another law creates a power to act and gives no discretion but to act in the manner complained of, HREOC believes the DDA does not apply. That is, the DDA does not apply to discrimination in the *content* of laws.
- Where another law gives a person discretion to act, and the person uses that discretion to act in a discriminatory manner, HREOC believes the DDA does

apply. That is, HREOC considers that the DDA does apply to discretionary actions under other laws.

HREOC's reasoning for this distinction is not clear. Section 47 of the DDA explicitly states:

During the period beginning at the commencement of this section and ending three years after the day this section commences, this Part does not render unlawful anything done by a person in direct compliance with another law.

It therefore appears that, three years after this section commenced, part 2 of the DDA was capable of rendering direct compliance with another law unlawful (unless another, more specific exemption applied). The DDA makes no reference to the degree of discretion of the decision maker.

The Commission recognises, however, that there might be practical difficulties in bringing a complaint about discriminatory acts under other laws, because of the need to fit the subject of the complaint within one of the areas of activity covered by the DDA. The DDA specifically covers the administration of Commonwealth laws and programs, but it does not specifically cover the administration of State and Territory laws. It might be necessary to fit complaints about discriminatory acts under a State or Territory law under another area of activity, such as the provision of a service.

FINDING 9.8

There is uncertainty about the application of the Disability Discrimination Act 1992 to actions done in compliance with laws that have not been prescribed under section 47 of the Act.

Clarifying the ability to challenge other laws

The Productivity Commission considers, given the uncertainty surrounding this issue, that the scope of the DDA to challenge actions taken under other laws should be clarified. It is also necessary to clarify the interaction among relevant provisions of the DDA, particularly the 'special measures' (s.45) and 'prescribed laws' (s.47) provisions.

Which law should have precedence?

The Victorian Government favoured giving compliance with other laws priority over the DDA (as is the case under the Victorian *Equal Opportunity Act 1995*):

The Victorian *Equal Opportunity Act 1995* has a general exemption from discrimination where the conduct is necessary to comply with, or is authorised by, an enactment, such as another piece of legislation, regulations or Orders ... there is no requirement for the other law to be expressly ‘prescribed’. (sub. DR367, p. 6)

On the other hand, the ACT Government (sub. DR366) and the South Australian Government (sub. DR356) supported giving DDA priority, subject to the ability to exempt specific laws through the prescription process. The South Australian Government stated:

The South Australian Government supports this recommendation. However, it makes the exemption provision and the process of adding State Acts to the exemption list much more important than at present. Amendments to the DDA for state governments should be simple to administer. (sub. DR356, p. 4)

The Productivity Commission considers that actions taken under another law should be able to be challenged (unless another, more specific exemption applies). Governments should be held accountable to the principles they espouse and the duties they impose on the rest of the community. Where governments want to ensure actions taken under laws are free from challenge, they should be exempted under section 47, as the DDA allows.

On one reading of the DDA, it is already possible to challenge laws with discriminatory effects, although this is not clear. As noted, HREOC has been declining complaints where the alleged discrimination has resulted from the application of laws that give no discretion to the decision maker.

The Productivity Commission considers that the ability to use the DDA to complain about discriminatory acts under other laws should be clarified by the introduction of explicit provisions on equality before the law. These could be based on those in the Racial Discrimination Act (box 9.6). This would help overcome the difficulty of having to fit complaints about the administration of State and Territory laws within a specific subject area of the DDA, by allowing the discriminatory provision of the law itself to be the subject of a complaint. In some circumstances this might allow a complaint to be made about the discriminatory effect of a law before a specific discriminatory action is taken (in the same way that proposed direct discrimination is currently covered by the DDA, and that the Commission recommends proposed indirect discrimination be covered).

The Department of Employment and Workplace Relations was concerned that such provisions would create a new right to challenge legislation itself, rather than discriminatory actions:

Amending the DDA to insert a specific ‘equality before the law’ provision modelled on section 10 of the [Racial Discrimination Act], as suggested by the Productivity

Commission, would fundamentally alter the scope of the DDA. It would open up the potential for aggrieved persons to challenge Commonwealth legislation which is said to have a discriminatory impact or effect upon people with disabilities, independently of any actions taken under such laws. This would be an extremely far-reaching new power and not one to be recommended lightly. (sub. DR299, p. 20)

The Productivity Commission notes that the equality before the law provisions in the *Racial Discrimination Act 1975* do not invalidate challenged laws. Rather, where legislation grants a discriminatory ‘right’ to a particular group, the Race Discrimination Act provisions have the effect of extending that ‘right’ to members of the disadvantaged group. That is, the law still applies, but in a non-discriminatory manner. It is also necessary for an aggrieved person to their specific circumstances—the DDA does not allow complaints to be made on a purely in-principle basis.

RECOMMENDATION 9.3

The Disability Discrimination Act 1992 should apply to actions done in compliance with laws that have not been prescribed under section 47 of the Act.

Special measures and prescribed laws

The ‘special measures’ provision of the DDA exempts actions (acts) that are ‘reasonably intended’ to benefit people with disabilities (s.45). This requires a distinction to be drawn between laws with discriminatory effects (laws that disadvantage people with disabilities relative to people without disabilities) and laws that establish levels of funding or eligibility criteria for disability services. The DDA should allow aggrieved persons to complain about laws with discriminatory effects, but existing limitations on complaints about the establishment, funding or eligibility criteria for disability services should remain (see chapters 12 and 15).

Acts done in compliance with ‘prescribed laws’ are exempted from the application of the DDA (s.47). Prescribed laws are listed in the Disability Discrimination Regulations 1996. The prescribing mechanism operates transparently, clarifying governments’ tradeoffs between potential discrimination and other objectives of government (see chapter 12). If the scope to use the DDA to challenge other laws with discriminatory effects were clarified, it might be necessary to provide a transitional period to review existing prescribed laws and allow governments to prescribe other laws they wish to exempt from challenge. It might also be necessary to ensure exemptions are regularly reviewed so that the reasons for exemption remain valid (see chapter 12).

9.6 Effect of the DDA on equality before the law

As noted throughout this chapter, there are practical limits to achieving equality before the law for people with disabilities, particularly people with cognitive disabilities.

State and Territory governments have primary responsibility in many important areas, and many of their existing arrangements appear to be appropriate. However, there appears to be scope to protect the rights of people with disabilities in institutional and supported accommodation, and improve access to justice by people with disabilities.

There appears to be only a limited role for DDA complaints in many areas that are important to achieving equality before the law. One area where the complaints mechanism could be useful is in challenging potentially discriminatory acts done in compliance with non-prescribed laws. Lack of clarity in this area has prevented such complaints from being heard. Equality before the law could be enhanced by making it clear that acts under non-prescribed laws are not exempt from challenge.

The DDA gives HREOC some important functions in this area. HREOC could make greater use of its powers to report to the Minister on government actions that could promote the rights of people with disabilities, and to examine Commonwealth legislation for consistency with the DDA. In addition, HREOC research in the area of equality before the law could provide a useful national focus and assist regulatory benchmarking by the States and Territories, in conjunction with the AGAC.

Finally, one of the most important symbols of equality before the law is the right to vote. The Australian Government should amend the Commonwealth Electoral Act to ensure voting processes are accessible to people with disabilities, and encourage State and Territory Governments to follow suit. Subject to the extension of the standard making power, the Attorney General, in consultation with the States and Territories and people with disabilities, could consider developing disability standards for voting, to clarify how the access requirements of electoral Acts are to be implemented.