
11 Definitions

This chapter examines definitions for some of the key concepts of the *Disability Discrimination Act 1992* (DDA)—including disability, direct discrimination, indirect discrimination and harassment. These define who is covered by the DDA (section 11.1) and which actions are unlawful under the DDA (sections 11.2, 11.3 and 11.4). Recommendations are made to improve some definitions and clarify others. Areas of activity that are explicitly excluded from the DDA are discussed in chapter 12.

11.1 Definition of disability

The definition of disability in the DDA is deliberately broad. It does not require any assessment of the severity, type or permanency of a disability, or of when or how it was acquired. The disability may not even be current—it can be in the past, the future or imputed (see chapter 4).

Inquiry participants said the main benefit of this definition is that it ‘avoids unproductive disputes over whether a person with a disability fitted a particular impairment category’, as can happen under other anti-discrimination Acts (Val Pawagi, sub. 1, p. 2). LeeAnn Bassler said this breadth is:

... a real strength of the DDA. It stands in stark contrast to overseas experience, such as in America where people with disabilities—clearly with disabilities—are found to be not people with disabilities for the purposes of the [US Americans with Disabilities Act]. (trans. p. 2720)

HREOC noted that significant legal resources can be ‘taken up with issues of the identification of who is, and is not, a person with a disability’ in the United States and the United Kingdom (sub. 143, pp. 5-6). Under the UK’s Disability Discrimination Act for example, 16 per cent of applicants in decided cases (from 1995 to 2002) lost because the tribunal ‘ruled that they had not met the statutory definition of disability. This was the single most common reason for a claim to fail’ (Levertton 2002). This is now being addressed (among issues) through an amendment to the Act (DRC 2004, p. 16).

By contrast, consideration of complaints made under Australia’s DDA has tended to focus on whether a discriminatory act has occurred, rather than on the nature of the

complainant's disability. HREOC said that in this regard, the Australian DDA is much more 'inclusive' in practice than its equivalent in the UK (sub. 219, p. 4). Nevertheless, some participants raised concerns about possible gaps or confusion regarding the DDA's definition of disability. These are discussed in turn below, followed by the Productivity Commission's conclusions on this issue.

Social versus medical definitions of disability

The DDA, taken as a whole, 'reflects a social or environmental model of disability ... rather than accepting a medical or deficit model' (HREOC, sub. 219, p. 4). The social model appropriately describes discrimination in terms of physical and attitudinal barriers to participation and is essential to the underlying rationale of the DDA (see chapter 2).

Within this 'social model' framework, the DDA's technical definition of disability is based on a medical approach that includes a mix of impairments, diseases and disorders (AIHW, sub. DR272, p. 2). Similar medically-based definitions of 'disability' (or 'impairment') are evident in State and Territory and in international anti-discrimination legislation (see chapter 4). The AIHW said this integrated approach is appropriate and that:

... the DDA definitions of disability and discrimination, and the DDA objects, fit very well within the [International Classification of Functioning, Disability and Health] framework, which is based on an integration of the medical and social models of disability (or, as [the World Health Organization] puts it, represents a biopsychosocial model of disability). (AIHW, sub. DR272, p. 2)

However, some inquiry participants argued that the DDA's definition of disability should reflect the social model more closely, because the current definition 'allows many social myths and value judgements to be imported to the legal system ... [and] used to legitimate abuses' (Joe Harrison, sub. 55, p. 5; Disability Council of NSW, sub. 64, p. 4, sub. DR291, p. 11). Participants suggested alternative definitions for disability, such as a 'disadvantage or restriction caused by a contemporary social organisation ... [and] barriers in society' (Disability Council of NSW, sub. 78, pp. 7–8), or removing the word 'disability' from the DDA entirely, on the ground that truly inclusive environments and technologies would mean that people are 'no longer disabled' (Independent Living Centre of NSW, sub. 92, pp. 1-2).

Other inquiry participants did not favour adopting a more overtly 'social model' definition of disability for practical reasons. The National Ethnic Disability Alliance said of the two models, that 'from a pragmatic and legislative point of view the current definition of the DDA' is more useful and 'does not exclude anybody with a

disability’ (sub. 114, p. 13). Alexa McLaughlin (trans., p. 657) said the social model has merit in some contexts, but was ‘very concerned’ about applying it to the definition of disability in the DDA.

In response to these comments, HREOC (sub. 219, p. 4) said that a definition of disability based more directly on the social model was considered in the initial drafting of the DDA, but was ‘rejected because it risked leaving some instances of disability discrimination outside the coverage of the legislation’.

Taking the definition of disability more fully into the social model might also increase confusion between ‘disability’ and other sources of social disadvantage. Some inquiry participants, for example, recommended extending ‘disability’ to include social disadvantages due to past experiences as an Indigenous person (ATSIC, sub. 59, p. 4) or to homelessness (Women’s Health Victoria, sub. 68, p. 2; Mental Health Legal Centre, sub. 108, p. 3). This approach appears to confuse ‘disability’ with ‘disadvantage’. HREOC noted that if psychiatric disorders resulted from these or other social disadvantages, the DDA would cover any incidences of discrimination on the ground of that disorder (sub. 219, p. 6).

Medical conditions

Many inquiry participants considered that the DDA’s definition of disability is broad enough to cover all medical conditions and that this is appropriate. The Anti-Discrimination Board of New South Wales said ‘the broad definition of disability in the DDA should be retained’ (sub. 101, p. 19), as did the Equal Opportunity Commission Victoria (sub. 129, p. 26).

However, other participants were concerned that the DDA was not sufficiently clear about its inclusion of individual medical conditions including depression, chronic fatigue syndrome, addictions, multiple chemical sensitivities (MCS) and dyslexia. Some of these concerns appeared to arise because the DDA does not list individual disabilities or impairments. For example, the Communication Project Group said ‘we probably need a recognition of communication problems’ (trans., p. 899) and the Mental Health Council of Australia and beyondblue said there is ‘a strong need to expand the language’ to cover depression, behavioural and emotional disorders more explicitly ‘because people do not understand the disability’ of mental illness (trans., p. 635). Villamanta Legal Service said that disability ‘should include addiction’ (trans., p. 1874).

Other participants were concerned the medical conditions of interest to them might not be covered by the DDA, sometimes because the very existence of the condition has been disputed by parts of the medical profession. For example, the Myalgic

Encephalopathy and Chronic Fatigue Syndrome Association of Australia (sub. 211, p. 3) was concerned that chronic fatigue syndrome may not be included in the DDA, because the condition is not always easily diagnosed. People with MCS and related illnesses raised the same concerns about their conditions (Dorothy Bowes, trans., pp. 1988-9; Agnes Misztal, sub. 160, p. 1).

In response to some of these submissions, HREOC noted that the DDA's definition of disability already includes some of these conditions and more:

The existing DDA definition already covers depression, addiction and obesity, as is noted in explanatory material and complaint reports available on HREOC's website and (in the case of addiction) in Federal Court case law. (sub. 219, p. 6)

On the other hand, in the context of insurance, the Investment and Financial Services Association (IFSA) (sub. DR349, p. 4) was concerned about the potential for conflicting medical evidence for people who have medical symptoms but no diagnosis. It said that, in such cases, the underwriting decision 'would normally be deferred until a diagnosis has been made'. Due to the DDA's exemption for insurance decisions based on reasonable actuarial or statistical data or other relevant factors (s.46), this response would remain possible (see chapter 12).

The DDA expressly includes the presence of 'organisms capable of causing disease or illness', as well as disabilities that 'may exist in the future'. However, some doubt may remain among some people regarding conditions that are not easily diagnosed or recognised, such as chronic fatigue syndrome, MCS or other new conditions that have identifiable medical symptoms but not necessarily a medically recognised underlying organism, disease or illness. It would be worthwhile to clarify that such medical conditions are disabilities for the purposes of the DDA.

Genetic conditions

The current definition of disability in the DDA is broad enough to include genetic disorders and conditions. However, some participants were concerned that their inclusion is not sufficiently explicit (Anti-Discrimination Board of New South Wales, sub. 101; New South Wales Office of Employment and Diversity, sub. 172). IFSA (sub. DR349, p. 4) was again concerned about 'problems of evidence' and definition of genetic conditions for insurance and underwriting purposes. But as with other disabilities covered by the DDA, insurance providers may lawfully discriminate against people with genetic conditions if reasonable actuarial data or other relevant factors apply (see chapter 12).

In its review of legal protection for genetic information, the Australian Law Reform Commission (ALRC 2003) found the DDA includes 'genetic conditions that are

manifested by current symptoms’ or that may cause a disability ‘in the future’, but it was concerned the definition of disability ‘may not be wide enough’ to include ‘genetic status where a person is presently asymptomatic’ (ALRC 2003, p. 306). It recommended amending both the objects (s.3) and the definition of disability (s.4) in the DDA (and equivalent clauses in the *Human Rights and Equal Opportunity Act 1986* (HREOC Act)) ‘to clarify that the Act applies to ... discrimination on the ground of genetic status’. The ALRC also recommended harmonisation of State and Territory anti-discrimination laws to reflect these changes (ALRC 2003, pp. 56–7).

In support of these recommendations, the ALRC referred to the UNESCO *Universal Declaration on the Human Genome and Human Rights 1997*, which aims for no ‘discrimination based on genetic characteristics’ (article 6)¹ and the Council of Europe’s *Convention on Human Rights and Biomedicine*, which prohibits ‘any form of discrimination against a person on grounds of his or her genetic heritage’ (article 11).² In the UK, the Disability Rights Commission recommended extending the definition of disability in the Disability Discrimination Act 1995 (UK) to include ‘genetic pre-disposition’ to an impairment (DRC 2003, p. 41).³

HREOC (sub. 143, p. 5) said it supported the ALRC’s ‘proposals to confirm that the DDA covers genetic discrimination (although in HREOC’s view this is already the case)’, but preferred clarification through explanatory material rather than an amendment to the DDA. The Productivity Commission agrees with HREOC that clarification is needed. For the purposes of the DDA, the relevant genetic condition, predisposition or status should be clearly linked to a disability as otherwise defined in the DDA (such as a genetic predisposition to a particular disease), so as to avoid confusion with genetic status issues that may be more relevant to racial or other discrimination. Similar wording to that recommended for the UK Act by the Disability Rights Commission would help to make this clear.

Behaviour as a manifestation of a disability

In *Purvis v State of NSW (Department of Education and Training)* ((2003) HCA 62) the High Court of Australia ruled that ‘disturbed behaviour’ that is a consequence of a disability is part of the disability for the purposes of the DDA (box 11.1). That is,

¹ This Convention is not a legally binding instrument (ALRC 2003, p. 292).

² This Convention is legally binding on the 15 Council of Europe member countries which have signed it (ALRC 2003, p. 293). It applies in the context of sex, race and disability discrimination.

³ By contrast, the Disability Rights Taskforce recommended the opposite in 2001, on the ground that the UK Act ‘only covers people who actually have an impairment’ and not those who may have one in the future (Disability Rights Task Force 2001, p. 21).

direct discrimination on the ground of a behaviour that is a consequence of a disability is discrimination on the ground of the disability.

Box 11.1 Behaviour as a disability in the Purvis case

Daniel Hoggan, the foster child of Mr and Mrs Purvis, was enrolled in a mainstream Year 7 class at Grafton High School in 1997. Daniel had multiple, complex disabilities due to a severe brain injury in infancy. During 1997, he was disciplined and suspended on several occasions for verbal and physical abuse of teachers, teachers' aides and other students. The school recommended Daniel be moved to a special education unit.

The New South Wales Department of Education rejected an appeal from Mr and Mrs Purvis against this move. The Purvises made a disability discrimination complaint to HREOC, which found in their favour, and the case then proceeded through the courts.

- HREOC found the Department of Education had discriminated against Daniel on the ground of his behaviour and therefore on the ground of his disability.
- The Federal Court disagreed with HREOC. It said 'the behaviour of the complainant is not *ipso facto* a manifestation of a disability within the meaning of the Act'.
- The Full Court of the Federal Court agreed with the first Federal Court decision. It said Daniel's 'conduct was a consequence of the disability rather than any part of the disability within the meaning of section 4 of the Act'. That is, Daniel's behaviour was separate to his disability, even though it was caused by the disability.
- The High Court said Daniel's conduct was part of his disability for the purposes of the DDA because it was 'disturbed behaviour' under part (g) of the definition. It said the Federal Court had erred in distinguishing between a condition and its behavioural manifestations. However, for other reasons, the majority of the High Court found that the Department of Education had not discriminated against Daniel.

Sources: State of NSW (Department of Education) v HREOC (2001) FCA 1199; Purvis v State of NSW (Department of Education and Training) (2002) FCAFC 106; Purvis v State of NSW (Department of Education and Training) (2002) FCAFC 503; Purvis v State of NSW (Department of Education and Training) (2003) HCA 62.

Until this High Court decision, there was some doubt about this question, with various legal decisions pointing in different directions (box 11.1 and HREOC 2003b, pp. 67–70). Contrary to the views of some participants, the High Court decision on this point in the Purvis case represented a clarification, not an extension, of the DDA's existing provisions. Following the High Court decision, it may be of value to remove any remaining confusion surrounding this issue by ensuring that it is clear that the DDA's definition of disability includes behaviour that is a manifestation of a disability (as per part (g) of the definition in the Act). This does not imply that the definition of disability requires alteration or extension as a result of the High Court's decision, but only that it requires clarification.

Concerns among some inquiry participants about the implications of recognising ‘behaviour’ in the definition of disability appear to be misplaced. A broad definition of disability does not mean that all actions by people with disabilities are automatically protected by the DDA—the High Court decision in the Purvis case makes this clear (section 11.2). The DDA includes a number of defences that allow disability discrimination in certain circumstances. Direct discrimination, for example, may be lawful if providing different accommodations and services would cause an unjustifiable hardship (see chapter 8). Indirect discrimination is lawful if the rules or conditions that have a disproportionate effect on the person with a disability are otherwise reasonable in the circumstances (section 11.2).

Conclusions on the definition of disability

The Productivity Commission considers that the DDA, in its entirety, promotes a social rather than a medical response to disability discrimination. Despite its medical connotations, the current broad definition of disability operates in a manner that is consistent with a broad ‘social model’ framework. Attention is then focused on the discrimination (that is, on the physical and attitudinal barriers), and not on the attributes of the person that constitute their ‘disability’.

Whichever language or philosophical basis is used to describe the relevant attribute of people with disabilities (such as disability, impairment, condition or symptom), the DDA must include a definition of disability so it can operate in a practical manner. This definition of disability should not inadvertently exclude people with disabilities who face what would otherwise be genuine cases of disability discrimination, merely because their circumstances are not included, or because its wording is ambiguous.

Further, the definition of disability should not require repeated updates as medical knowledge advances or as new medical conditions emerge. To assist with this, the definition of disability should be amended to ensure there is no doubt that it includes the presence of genetic predispositions to disabilities, and conditions that have medically recognised symptoms but have not necessarily been diagnosed.

The status of behaviour that is a consequence or manifestation of a disability should also be clarified. This matter has been addressed by the High Court in the Purvis case (box 11.1). Nevertheless, the Productivity Commission agrees with HREOC and other inquiry participants that it would be beneficial to the general public to clarify this important point, in the interests of ensuring that ‘disability’ in the DDA is as clear and unambiguous as possible. This could be done in an explanatory note attached to the DDA. As noted above, this is a clarification, and not an extension, of the meaning of ‘disability’ in the DDA.

FINDING 11.1

The Disability Discrimination Act 1992 is based on a ‘social model’ of disability discrimination, but it uses a medically-based definition of disability. This integrated approach is appropriate. However, the current definition of disability in the Act (s.4) is unclear in certain areas.

RECOMMENDATION 11.1

The definition of disability in the Disability Discrimination Act 1992 (s.4) should be amended to ensure that it is clear that it includes:

- *medically recognised symptoms where the underlying cause is unknown*
- *genetic predisposition to a disability that is otherwise covered by the Act.*

A note should be added to the Act to explain that behaviour that is a symptom or manifestation of a disability is part of the disability for the purposes of the Act.

11.2 Definition of discrimination

The DDA features two types of discrimination: direct and indirect discrimination. Inquiry participants raised several concerns about direct and indirect discrimination, which are discussed in turn below:

- the need for two separate definitions of discrimination
- the comparator test in the definition of direct discrimination
- the implications of providing ‘different accommodation or services’ in cases of direct discrimination
- the proportionality test in the definition of indirect discrimination
- the reasonableness test in the definition of indirect discrimination
- proposed (or future) acts of indirect discrimination.

Distinguishing direct from indirect discrimination

In the DDA, direct discrimination arises when a person with a disability is treated less favourably than others, in ‘circumstances that are the same or are not materially different’ (s.5(1)). In making this comparison, the fact that a person requires ‘different accommodation or services’ does not render their circumstances ‘materially different’. By contrast, indirect discrimination arises when a person with a disability is particularly disadvantaged by being treated the same as people

without the disability, due to a uniform rule or requirement that the person with the disability cannot meet and that is not reasonable in the circumstances (see below and chapter 4).

One inquiry participant said this is an ‘academic’ or legal distinction only, and suggested merging the two (Anita Smith, trans., p. 297, sub. 127, p. 2). An example of a merged definition can be found in the Human Rights Code 1996 in British Columbia, Canada, which tests all cases of discrimination against the same set of criteria.⁴ However, this single test still requires proof that an action is discriminatory ‘either directly or indirectly’, and does not appear to operate as a single test in practice (Equal Opportunity Commission Victoria, sub. 129, p. 28).

All Australian anti-discrimination Acts distinguish direct from indirect discrimination (although their actual wording varies), in acknowledgement of the different forms that discrimination can take. The Productivity Commission considers that the DDA’s distinction between direct and indirect discrimination is appropriate. A distinction is necessary to ensure the DDA can address unlawful discrimination that arises from different circumstances.

The ‘comparator’ test in direct discrimination

Two elements of the DDA’s ‘comparator’ test raised issues for this inquiry: identifying a suitable (real or hypothetical) person for comparison; and identifying the ‘circumstances that are the same or not materially different’ for the purposes of the comparison. Some inquiry participants suggested replacing the comparator with other tests of direct discrimination, while others suggested amending it. These issues and suggestions are discussed below.

Alternative approaches to the comparator

A small number of jurisdictions have sought to eliminate the comparator in their discrimination legislation. Instead of a comparator, they look at whether the person with a disability has been treated ‘unfavourably’ or in a manner that ‘disadvantages’ them, or has suffered a ‘detriment’ in an absolute sense (box 11.2).

Some participants said they preferred these alternatives. People with Disability Australia (trans., p. 1323) said the ‘detriment test’ recommended by the New South Wales Law Reform Commission for the *Anti-Discrimination Act 1977* (NSW) is more appropriate than the DDA’s comparator test and would have wider application

⁴ The Supreme Court of Canada established this test. The British Columbia Code does not define direct or indirect discrimination (Equal Opportunity Commission Victoria, sub. 129, p. 28).

(for example, where no comparison to a person without the disability is possible) (box 11.2).

Box 11.2 Alternatives to the comparator in other legislation

The Americans with Disabilities Act 1990 (US) defines discrimination in an absolute (unfavourable treatment) rather than relative sense (less favourable treatment). It defines discrimination in employment as (among other things):

... limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee. (s.102(1))

The ACT's *Discrimination Act 1991* defines discrimination as when a person:

(a) ... treats or proposes to treat the other person unfavourably because the other person has an attribute referred to in section 7. (s.8(1))

In its review of the *Anti-Discrimination Act 1997* (NSW), the New South Wales Law Reform Commission (1999, paras. 3.51–3.53) said that Act's comparator, which specifies 'less favourable treatment', causes 'conceptual difficulties as well as problems associated with proof for complainants ... artificiality and resulting complexity'. It recommended replacing the comparator with a 'detriment' test, with 'detriment' defined as 'adverse effects', 'somewhat akin to damage' or 'disadvantage'. This recommendation has not been implemented.

Sources: Americans with Disabilities Act 1990 (US); *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); NSW Law Reform Commission 1999.

Currently in Australia, the ACT Act is the only anti-discrimination Act that does not define direct discrimination (in this Act, called 'unfavourable treatment') in a comparative sense. The ACT Discrimination Commissioner claimed this 'lack of a comparator' allows for 'unique circumstances and for each individual's experience of discrimination to be explored on its own merits' (sub. 151, p. 6). However, the Commissioner acknowledged that:

... very often there's an implied comparator in that if a person is claiming to have been treated unfavourably, almost in the back of your mind you have some notion of what might have been fair treatment or favourable treatment. (trans., p. 713)

In *Prezzi and Discrimination Commissioner* ((1996) ACTAAT 132), the ACT Administrative Appeals Tribunal said that the lack of an explicit comparator meant that 'in some special cases', the ACT approach might lead to a different decision to that made under other anti-discrimination Acts, but, in most cases, the resulting decision would be the same. The Tribunal was concerned that the ACT approach 'involves some difficulty' in cases where all of the available courses of action might produce unfavourable outcomes, regardless of whether there was discriminatory treatment.

HREOC (sub. 143, p. 12) raised concerns about the implications of adopting the ACT approach for the scope of the special measures exemption in the DDA (s.45). It cited an ACT case in which a person complained about being denied the provision of a particular disability service. Because this service was used by people with a particular disability only, the ACT Tribunal had no comparator, such as how a person without the disability might be treated by the service. If the Tribunal had not exercised the special exemption clause in the ACT Act (which is similar to the special measures exemption (s.45) in the DDA, see chapter 12), it might have had to decide whether the person concerned was treated ‘unfavourably’ and, in effect, decide whether the person should receive the disability service in question, possibly in contravention of that service’s eligibility criteria. If this problem were to arise in relation to the DDA, the special measures exemption for disability services might be applied in a similar manner (see chapter 12).

The Productivity Commission is not convinced that these alternative approaches are significantly different in practice from the comparator approach in the DDA. Any notion of ‘unfavourable’, ‘less favourable’ or ‘detrimental’ treatment almost inevitably requires a notional or theoretical comparison of the treatment of the person with a disability, and the treatment that person would have received if they did not have the disability. South Australia’s *Equal Opportunity Act 1984*, for example, defines discrimination on the ground of impairment as ‘unfavourable’ treatment (s.66), but then goes on to define ‘unfavourable’ as treating someone:

... less favourably than in identical or similar circumstances the discriminator treats, or would treat, a person who does not have that attribute or is not affected by that circumstance. (s.6(3))

For all intents and purposes, these different approaches are applied in a similar manner and achieve similar outcomes to that of the DDA. A direct point of comparison provides an essential, practical benchmark, against which the action of the discriminator can be measured. The use of a comparator in the DDA is therefore appropriate. However, this is not to say that the current version of the comparator in the DDA cannot be improved upon (see below).

FINDING 11.2

The requirement to compare the treatment of a person with a disability and the treatment of a person without the disability to determine direct discrimination in the Disability Discrimination Act 1992 (s.5(1)) is appropriate.

Identifying the comparator

Potential problems in identifying an appropriate comparator and appropriate circumstances for comparison sets disability discrimination apart from sex or race

discrimination, for which many more comparators (and comparative circumstances) are usually available. In its review of Federal Court discrimination cases (from September 2000 to September 2002), HREOC concluded:

The issue of how an appropriate comparator is chosen in a particular case has been a complicated and vexed one since the inception of the DDA, and one that continues to be the subject of academic and judicial debate. (HREOC 2003b, p. 70)

Many inquiry participants said an appropriate comparator can be difficult to find (box. 11.3). These comments mainly related to alleged discrimination in access to disability services. Arguably, if a comparator cannot be found at all (for example, because people who do not have the disability do not use the service), then the situation is likely to involve problems such as ‘inadequate planning ... or a lack of adequate funding of support services’, (National Disability Advisory Council, sub. 225, p. 2), rather than disability discrimination. Further, the DDA does not apply to complaints about access to disability services due to the ‘special measures’ exemption (s.45). For various reasons, the Productivity Commission considers this exemption appropriate (see chapter 12).

Box 11.3 Inquiry participants’ views on the comparator

Disability Action Inc. (sub. 43, p. 2) and the National Council for Intellectual Disabilities (sub. 112, p. 12) said the comparator is problematic for people with intellectual or non-physical disabilities, and when dealing with cases of ‘quality of life’ or ‘special needs’ instead of physical access.

The National Disability Advisory Council (sub. 225, p. 2) said there are ‘many areas that comparison cannot be easily made and in remote areas may not exist’. It said the comparator in these cases should be ‘the quality of life of the average Australian, or the life expectations of the average Australian’.

People with Disability Australia (trans., p. 1322) criticised the comparator for producing ‘perverse results’ and for not addressing ‘the substantial issues of the Act’ or dealing with ‘active measures’ for people with disabilities.

Blind Citizens Australia (sub. 72, p. 2) recommended a review of the comparator in the DDA to clarify when and how it applies to disability services.

Queensland Parents for People with a Disability (sub. DR325, p. 3) said it found ‘this area of the law most confusing’. It questioned the comparator’s relevance to people living in institutional accommodation or nursing homes and suggested ‘the comparator could be the living setting of non-disabled young people’.

In HREOC decisions, the comparator was a real or hypothetical person who was in the same (or not materially different) circumstances, but who did not have ‘the

characteristics of the person with the disability’.⁵ The treatment of a person with HIV/AIDS, for example, was compared to the treatment of a person who was not infectious, because ‘infectiousness’ was one of ‘the characteristics of an HIV/AIDS sufferer’ (HREOC 2003b, p. 71). To do otherwise, it was argued, would have had ‘the result that the treatment could never be discriminatory within the meaning of the Act’ (Wilson in *Dopking v Commonwealth of Australia [HREOC 1994]*, in HREOC 2003b, p. 71).

Some of the problems with the comparator have arisen from practical difficulties in identifying circumstances that are ‘the same or not materially different’. Various HREOC and Court decisions have taken different approaches to interpreting circumstances ‘that are not materially different’ and the characteristics that should therefore be imputed to the real or hypothetical comparator (such as ‘infectiousness’ or ‘disruptive behaviour’).⁶

Most notably, in the Purvis case (box 11.1), the members of the High Court were split on this issue. The majority of the High Court said the circumstances for comparison included disruptive behaviour—that is, the comparator was a student without the disability who behaved in a similarly ‘violent’ manner, for reasons other than disability. The minority of the High Court dissented on this point, arguing that if disruptive behaviour was, in effect, part of Daniel’s disability (which all members of the High Court agreed it was), it could not also be imputed to the comparator.

In essence, the majority of the High Court distinguished between two types of behaviour that seemed outwardly identical and that had the same disturbing or harmful effect on others, but that had different causes: (1) ‘disturbed’ behaviour that was a manifestation or symptom of a disability; and (2) ‘wilful’ behaviour that was not related to a disability. The High Court’s majority finding of no direct discrimination rested largely on its view that the comparator was a (hypothetical) student exhibiting ‘wilful’ behaviour similar in outward appearance to Daniel’s ‘disturbed’ behaviour. This case demonstrates the practical importance of identifying the correct comparator and circumstances for comparison in determining direct discrimination.

The majority view of the High Court regarding the comparator in the Purvis case appears to imply that different treatment of a person with a disability on the ground of the behaviour caused by their disability cannot constitute direct discrimination

⁵ HREOC was empowered to make decisions prior to 2000; now it only conciliates (see chapter 4).

⁶ Cases that followed HREOC’s interpretation include *IW v City of Perth & Ors* (1997) 191 CLR 1 and *McKenzie v Dept of Urban Services & Canberra Hospital* (2001) FMCA 20. Cases that did not follow HREOC’s interpretation include *NSW v HREOC & Purvis* (2001) FCA 1199 and *Minns v State of NSW* (2002) FMCA 44.

under the DDA. If this approach were extended to other manifestations of disability (for example, to non-behavioural symptoms or limitations caused by a disability), the scope of the direct discrimination provisions could be significantly narrowed.

Several participants raised concerns about the High Court's majority interpretation of the comparator in the Purvis case, and about its implications for future cases of direct discrimination. Lee Ann Bassar and other participants were concerned that significant differences in the students' ability to control their behaviour had been overlooked in the circumstances of the comparison. Bassar explained that:

... a person without a disability who exhibits the kind of anti-social behaviour that goes on in Purvis is doing a deliberate act. They are acting up and acting out in response to authority or against authority. The person with a disability like the complainant in Purvis is acting in a way that they actually have no control over. ... the problem in Purvis is if you don't analyse why the young man is behaving [disruptively]—if you simply compare behaviours, you'd have to say it was fair enough to expel him from school. You can't come to any other conclusion. (trans. p. 2735)

Conversely, although it was not the majority decision, the implications of the High Court minority's view in the Purvis case was of concern to many other participants (such as non-government schools and employer associations). They argued, among other things, that they had health and safety obligations to their employees, students and others that must also be met (see chapter 12). These concerns do not rest solely on the issue of the comparator, but extend to the bigger question of the extent of obligations to make adjustments to accommodate people with disabilities.

The Productivity Commission considers that these concerns would be addressed in part by its recommendation to introduce a general obligation to make reasonable adjustments for people with disabilities, excluding adjustments that would cause unjustifiable hardship. This would apply to both pre and post enrolment situations in education, and to all other areas of activity covered by the DDA (see chapter 8).

In situations such as the Purvis case, the Commission's recommended duty to make reasonable adjustments should help to ensure that regardless of whether or not a test of comparison indicates unlawful direct discrimination, adjustments to improve participation must have been attempted (excluding adjustments that would cause unjustifiable hardship). This recommendation would mean, for example, that the school in the Purvis case would have been required to make reasonable adjustments to accommodate the student's disability. But if, despite their reasonable attempts to make adjustments, the student's inclusion caused an unjustifiable hardship to the school or to other students, the school would have been able to lawfully exclude him. If the approach taken by the majority of the High Court has the effect of narrowing the application of the direct discrimination provisions of the DDA (as described above), an explicit duty to make reasonable adjustments (excluding

adjustments that would cause unjustifiable hardship) will become all the more necessary (see chapter 8).

Improving the comparator

The Productivity Commission agrees with HREOC and other participants that in most cases of direct discrimination, identifying a suitable comparator and circumstances for comparison is not overly difficult. The Commission also notes that some of the past uncertainty surrounding the comparator may be due to deficiencies in the definition of ‘disability’ rather than the comparator *per se*—for example, the question of whether ‘disability’ includes behavioural symptoms (now answered in the affirmative by the High Court in the Purvis case (section 11.1)).

However, the High Court decision in the Purvis case raised other issues for the comparator—most notably, the question of which circumstances should be taken into account in making a (real or hypothetical) comparison between the treatment of a person with a disability and that of someone without the disability. Lee Ann Bassar (sub. DR266, p. 1) said the conflicting views on the comparator ‘highlights the need for further clarification’. People with Disability Australia (sub. DR359, p. 15) suggested amending the DDA to clarify that ‘the comparator shall have none of the characteristics or consequences of the other person’s disability, and shall require no services or accommodations’.

Alternatively, greater guidance could be given on what constitutes circumstances that are ‘not materially different’. HREOC noted that the DDA:

... does not provide any clear test of what circumstances are, or are not, materially different so as to justify different treatment. This phrase cannot be regarded as providing a defence for justifiable differences in treatment where the disability itself is regarded as making a material difference. (sub. 219, p. 7)

To address this, HREOC suggested deleting the word ‘materially’ in section 5(1) to simplify the task of identifying a suitable comparator (sub. 219, p. 8).

Guidance could be provided in the DDA or in attached guidelines or standards (as suggested by the New South Wales Office of Employment and Diversity, sub. 172, p. 4). These could take the form of criteria or examples drawn from case law since, as noted by the Department for Employment and Workplace Relations (sub. DR299), detailed and comprehensive guidelines would be ‘difficult to formulate’. Reference could also be made to the objects of the DDA.

FINDING 11.3

The definition of direct discrimination in the Disability Discrimination Act 1992 (s.5(1)) is unclear about what constitutes ‘circumstances that are the same or not materially different’ for comparison purposes.

RECOMMENDATION 11.2

The definition of direct discrimination in the Disability Discrimination Act 1992 (s.5(1)) should be supplemented with examples (either included in the Act or in guidelines) to clarify the ‘circumstances that are the same or not materially different’ for the purposes of making a comparison.

‘Different accommodation or services’ in direct discrimination

The DDA’s definition of direct discrimination has a second, equally significant, criterion: to ignore any ‘different accommodation or services’ that may be required by the person with a disability when making the comparison (s.5(2)). This ‘recognises that people with disabilities may require accommodation to enable them to participate on an equal footing with their non-disabled peers’ (Lee Ann Bassar, sub. DR266, p. 2). If this provision were absent, the fact that a person requires an adjustment might be enough to make their circumstances ‘materially different’. As found by HREOC Commissioner Wilson in the Dopking case:

It would fatally frustrate the purposes of the Act if matters which it expressly identifies as constituting unacceptable bases for different treatment ... could be seized upon as rendering the overall circumstances materially different, with the result that the treatment could never be discriminatory within the meaning of the Act. (Sir Ronald Wilson (HREOC unreported 1994) in HREOC 2003b, p. 71)

In a case relating to an employee with a vision impairment who required screen magnifying software, the Federal Court found that despite the employee’s need for different workplace equipment, her circumstances were not materially different from other employees:

The comparison in this case must be as between Mrs Humphries, with her needs to enable her to function as an ASO1, and other ASO1s who are not disabled, but who have reasonable needs for equipment which would enable them to carry out their duties. (*Commonwealth of Australia v Nerilie Ann Humphries & Ors* ((1998) FCA))

This approach has been followed in subsequent DDA cases before HREOC and the courts. The DDA clearly states—and the courts have upheld—that a person who requires different accommodation or services is ‘not materially different’ in their circumstances, for the purposes of determining direct discrimination.

Section 5(2) of the DDA has also been interpreted by HREOC and others to mean that if a person with a disability requires a different accommodation or service, then failure to provide it might constitute unlawful direct discrimination. This interpretation is contentious. The Productivity Commission agrees that such adjustments should be made for people with disabilities (with certain caveats), but considers that the obligation to make reasonable adjustments should be stated clearly in a separate provision of the DDA (see chapter 8). If this recommendation is implemented, section 5(2) will continue to operate in its current form.

11.3 Definition of indirect discrimination

Indirect discrimination occurs when a person must comply with a requirement (such as a general rule or policy) with which a substantially higher proportion of persons without the disability can comply; which is not reasonable in the circumstances; and with which the person with the disability cannot comply (see chapter 4). In summary, this definition requires a complainant to establish four separate elements.

1. The discriminator requires the aggrieved person to comply with a requirement or condition.
2. A substantially higher proportion of people without the disability can comply with this requirement or condition (the proportionality test).
3. The requirement or condition is not reasonable in the circumstances (the reasonableness test).
4. The aggrieved person cannot comply with the requirement or condition.

Inquiry participants said these requirements are too complex and confusing for potential complainants. The Equal Opportunity Commission Victoria said:

... many people do not understand what indirect discrimination is. Staff across the [Equal Opportunity] Commission state that actual and potential respondents and complainants find the concept confusing and the definition unwieldy and difficult. (sub. 129, p. 27)

HREOC said a simpler set of criteria for determining indirect discrimination would:

... assist people with rights and responsibilities under the legislation in understanding more readily what indirect discrimination involves. (sub. 143, p. 17)

Three specific issues were raised by participants about indirect discrimination:

- the proportionality test
- the reasonableness test
- proposed acts of indirect discrimination.

These issues are discussed in turn below.

The proportionality test

Many inquiry participants were critical of the proportionality test for indirect discrimination. The Anti-Discrimination Board of New South Wales (sub. 101, p. 20) said it places an extra evidentiary burden on people with disabilities and adds little or nothing to the test. The Equal Opportunity Commission Victoria said:

... the technical requirements of the definition may place too onerous a burden on complainants. ... a complainant must first prove that they have been required to comply with a requirement or condition with which they cannot comply but which a substantially higher proportion of people without the disability would be able to comply. (sub. 129, pp. 27-8)

In the Minns case, Raphael FM noted that the proportionality test can require ‘a complex, time consuming and undoubtedly expensive exercise in comparisons’ ((2002) FMCA 605 in HREOC 2003b, p. 85).

On the other hand, HREOC said the proportionality element of indirect discrimination has not presented problems in practice:

These issues of appropriate methods for comparison have not presented the same difficulties in applying the DDA as in applying sex discrimination law. There is no sophisticated mathematics required to determine, for example, that a requirement to enter a building or vehicle by stairs will disadvantage people who use a wheelchair compared to people who do not. (sub. 143, p. 19)

Nevertheless, HREOC recommended simplifying this element of the definition.

Anti-discrimination Acts in the Northern Territory, Tasmania and the ACT, and some other federal anti-discrimination Acts, do not include a proportionality test. Instead, they use a concept of ‘disadvantage’ that is similar to the ‘unfavourable’ and ‘less favourable’ tests found in definitions of direct discrimination (section 11.2). The ACT Act, for example, states that a person indirectly discriminates against another person if:

... the person imposes or proposes to impose a condition or requirement that has, or is likely to have, the effect of disadvantaging persons because they have an attribute referred to in section 7. (s.8(1)(b))

The federal *Sex Discrimination Act 1984* was amended in 1995 to simplify the test of indirect discrimination. In this Act, indirect discrimination occurs when a condition or requirement ‘has, or is likely to have, the effect of disadvantaging persons of the same sex as the aggrieved person’ (s.5(2)). The Anti-Discrimination Board of New South Wales (sub. 101, p. 21) recommended this section of the Sex

Discrimination Act as ‘an appropriate model’ on which to base a simpler indirect test for the DDA. Federal age discrimination legislation (s.15(1) of the *Age Discrimination Act 2004*) refers to ‘disadvantage’ instead of a proportionality test to define indirect discrimination in a similar manner.

In the draft report, the Productivity Commission suggested removing the proportionality test (s.6(a)). This suggestion was supported by the ACT Government (sub. DR366), People with Disability Australia (trans., p. 2464), Lee Ann Basser (trans., p. 2725), NSW Office of Employment Equity and Diversity (sub. DR354), DEWR (sub. DR299) and Blind Citizens Australia (sub. DR269).

Alternatively, the Australian Industry Group (sub. DR326) suggested replacing the proportionality test with the notion of ‘disadvantage’. This seems unnecessary because ‘disadvantage’ is implied by both the subsequent clauses—that the rule is ‘not reasonable having regard to the circumstances’ (s.6(b)), and the person ‘is not able to comply’ (s.6(c)).

The Productivity Commission considers that the current proportionality test in the DDA places a further burden of proof on the complainant for little apparent benefit. The criteria set out in clauses s.6(b) and (c) are sufficient to demonstrate indirect discrimination. The DDA’s definition of indirect discrimination should be simplified by removing the proportionality test in s.6(a).

FINDING 11.4

The proportionality test in the definition of indirect discrimination in the Disability Discrimination Act 1992 (s.6(a)) is unnecessarily complex and places an unwarranted burden of proof on complainants.

The reasonableness test

In addition to the proportionality test, the definition of indirect discrimination in the DDA requires that the rule or condition also be ‘not reasonable having regard to the circumstances of the case’ (s.6(b)). This feature is common to many other anti-discrimination Acts, including the *Discrimination Act 1991 (ACT)*, Sex Discrimination Act and Age Discrimination Act. As noted in chapter 8, it is also one of the provisions of the DDA that has been interpreted to imply an obligation to make reasonable adjustments or accommodations.

Unlike these other Acts, the DDA does not include a definition or criteria to help determine reasonableness in indirect discrimination. Instead, a set of criteria has developed through case law, based in part on the established legal concept of

‘reasonable’ (Blind Citizens Australia, trans., p. 1690). This was loosely described by Raphael FM in relation to the DDA:

The test of reasonableness is less demanding than one of necessity, but more demanding than a test of convenience ... which requires the court to weigh the nature and extent of the discretionary effect on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All of the circumstances must be taken into account. (Minns (2002) FMCA 60 in HREOC 2003b, p. 86)

HREOC has suggested non-exclusive criteria for assessing the ‘reasonableness’ of a requirement or condition in employment cases as including: the purpose of the rule; the importance of the rule; whether other means are available to achieve it; the nature and extent of the disadvantages it causes; and the effects of its removal on others (HREOC 2003f).

By contrast, the Sex Discrimination Act lists matters to be taken into account in determining ‘reasonableness’:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice. (s.7B(2))

The ACT’s Discrimination Act lists similar criteria for judging whether an otherwise discriminatory action is reasonable in the circumstances (s.8(1)).

The Productivity Commission considers the presence of the reasonableness test in the definition of indirect discrimination appropriate. It should be possible, for example, to include a reasonable requirement to have unimpaired eyesight in the job description for aeroplane pilots, or to prohibit students from harming other students, without causing unlawful indirect discrimination under the DDA.

However, section 6(b) could benefit from clarification of the criteria that should be considered in determining whether a rule or condition is reasonable, as appears in some other anti-discrimination Acts (see above). This suggestion was supported by some participants (Blind Citizens Australia, sub.DR269; Department of Employment and Workplace Relations, sub. DR299; Disability Council of NSW, sub. DR291), but the Australian Industry Group said ‘an overly prescriptive approach to clarifying the term could cause more problems than it solves’ (sub. DR326, p. 17). The South Australian Government argued that fixed criteria could be problematic because:

The concept of reasonableness permeates the law and is nowhere defined, because this is impossible. The criterion is meant to be flexible. Making lists of ancillary criteria

would only result in something important being omitted. Each case must continue to be looked at on its own merits. (sub. DR356, p. 7)

The Productivity Commission acknowledges these concerns, but considers greater guidance on ‘reasonableness’ would be desirable. This is particularly important in the light of the Commission’s recommendation to introduce a new provision into the DDA, requiring ‘reasonable adjustments’ to be made (see chapter 8), so as to distinguish the meaning and application of ‘reasonable’ in these two different contexts in the DDA. Non-exclusive, flexible guidance criteria for ‘reasonableness’ in indirect discrimination could be inserted into the DDA or described in guidelines or explanatory notes, using other anti-discrimination Acts, HREOC’s existing explanatory material and DDA case law as models.

FINDING 11.5

The definition of indirect discrimination in the Disability Discrimination Act 1992 (s.6(b)) does not provide sufficient guidance on how to determine whether a requirement or condition is ‘not reasonable having regard to the circumstances’.

Burden of proving ‘reasonableness’ in indirect discrimination

The DDA is silent on the issue of who must prove ‘reasonableness’ in indirect discrimination. In his second reading speech to Parliament, the then Minister said that ‘the overall legal burden of proof, in proving discrimination unlawful, will remain with the complainant’, except for proving the inherent requirements of a job or unjustifiable hardship to a person or business (Australia 1992a, p. 2751).

As noted by inquiry participants (and Raphael FM in HREOC 2003b, p. 86), this burden can be considerable. The Equal Opportunity Commission Victoria said the:

... burden of proving that the requirement or condition is not reasonable ... can be problematic for complainants, because the information necessary to make an assessment of what is reasonable, or to prove reasonableness, often lies with the respondent and is inaccessible to the complainant. (sub. 127, pp. 27–8)

Other anti-discrimination Acts, including the Sex Discrimination Act (s.7C), place the burden of proving the ‘reasonableness’ of their actions on the alleged discriminator. The Age Discrimination Act also places the burden of proving that a requirement is reasonable in the circumstances on the alleged discriminator. The explanatory memorandum for the Bill to this Act explained this is because:

... the person who is imposing or proposing to impose such a requirement is in the best position to explain or justify the reasons for it in the particular circumstances. For example, where an employer’s business context requires certain productivity standards for competitiveness or to meet external requirements, the employer understands the

reasons for requiring those standards and is therefore best placed to show that they are reasonable. An employee or prospective employee, on the other hand, is less likely to have access to all the information about the overall needs of and demands on the business in question. (para. 20)

The Australian Chamber of Commerce and Industry (sub. DR288), Australian Industry Group (sub. DR326) and IFSA (sub. DR349) did not support altering the onus of proof of ‘reasonableness’ in the DDA to match the requirements of other anti-discrimination Acts.

However, the Productivity Commission considers that the same issue of access to appropriate information that was identified in relation to the sex and age discrimination Acts is relevant to the DDA also. The current provisions place an additional burden on the complainant in proving that they have been indirectly discriminated against. In the interests of reducing the (already significant) burden of proof on the aggrieved person, the burden of proving that an indirectly discriminatory rule or condition is reasonable in the circumstances should be placed on the defendant (who is best placed to do so), as is required in other Australian anti-discrimination Acts.

FINDING 11.6

The burden of proving that a requirement or condition is ‘not reasonable having regard to the circumstances’ in the definition of indirect discrimination in the Disability Discrimination Act 1992 (s.6(b)) falls on the complainant. This is neither appropriate nor efficient.

Proposed acts of indirect discrimination

HREOC (sub. 143, p. 21) identified that ‘as the result of an apparent oversight in drafting, proposed acts of indirect discrimination are not expressly covered in the DDA’ in the same way as they are in the Sex Discrimination Act and other anti-discrimination Acts, or in the DDA’s definition of direct discrimination, which includes ‘proposed treatment’ of a person with a disability that is different from treatment of others (s.5(a)).

This means that a person with a disability must wait until a requirement or condition that indirectly discriminates against them is introduced before they can make a complaint, even if they can recognise beforehand that it will have a discriminatory effect. If a school or club, for example, proposed to introduce a dress regulation that would indirectly discriminate against a person with a disability, then the person could not make a complaint until after the regulation is introduced.

Some inquiry participants agreed that this anomaly should be addressed, although the Australian Chamber of Commerce and Industry disagreed, on the ground that it would add to ‘the regulatory burden on employers’ (sub. DR288, p. 9). In the Productivity Commission’s view, the current approach seems both inefficient and unnecessary, as it requires a proposed rule or regulation to be introduced and disadvantage someone (because they cannot comply with it due to their disability) before a complaint can be made. The anomaly that proposed actions are included in direct discrimination but not in indirect discrimination in the DDA should be addressed.

FINDING 11.7

The definition of indirect discrimination in the Disability Discrimination Act 1992 (s.6) does not include proposed acts of indirect discrimination. This is neither appropriate nor efficient. It is inconsistent with the definition of direct discrimination and with other anti-discrimination Acts.

RECOMMENDATION 11.3

The definition of indirect discrimination in the Disability Discrimination Act 1992 (s.6) should be amended to:

- *remove the proportionality test*
- *include criteria for determining whether a requirement or condition ‘is not reasonable having regard to the circumstances’*
- *require the respondent to prove that a requirement or condition is reasonable*
- *cover incidences of proposed indirect discrimination.*

11.4 Harassment and vilification

The DDA makes harassment of people with disabilities unlawful in some, but not all, of the areas in which it makes disability discrimination unlawful. Harassment of people with disabilities, their carers and their associates is unlawful in employment (by employers, commission agents and contractors only), education (by education staff but not other students) and the provision of goods and services (ss.35–40).

Harassment is not unlawful in the other areas of activity to which the DDA applies, including accommodation, clubs, sport and the administration of Commonwealth laws and programs. However, behaviour that amounts to harassment might constitute part of a disability discrimination complaint—for example, harassment of a customer, client or club member could be part of the ‘less favourable’ treatment in

a case of direct discrimination, or a school's policies (or lack of) to address harassment by other students could be part of a case of indirect discrimination.

Vilification is offensive, humiliating or intimidating behaviour in public, directed at a class of people rather than at a particular individual. Unlike some other anti-discrimination Acts, the DDA does not mention vilification. Vilification is to be distinguished from 'victimisation', which does appear in the DDA. Victimisation refers to unlawful interference in the complaints process or harassment of a person who has made a complaint under the DDA (see chapters 4 and 13).

Inquiry participants' comments on harassment

HREOC said it receives few harassment complaints under the DDA (sub. 143). The Attorney-General's Department noted 'there appear to have been no [legal] cases considering the term as it is used in the DDA', and did not identify any particular issues or problems associated with it (sub. 115, p. 10).

Many participants gave personal examples of significant harassment and problems with the processes intended to address harassment, particularly in employment and education (Denis Denning, sub. 109; Victor Camp, sub. 20; Ivor Fernandez, sub. DR332; Stephen Kilkeary, sub. DR309; Daryl McCarthy, sub. DR278). Janet Hope, for example, was concerned about 'student to student harassment' in universities and said that the DDA's failure to cover this was 'an anomaly' (sub. 165, p. 63). James Bond also spoke about harassment from other students:

The harassment that you put up with from other schoolchildren when you're in the school system ... if you're unable to read and write, the kids pick on you like anything. So you're not learning anything ... because children taunt those kids at morning tea and lunch and after school, and it's still going on severely. (James Bond, trans., p. 2901)

Some inquiry participants wanted the scope of the DDA's harassment provisions expanded to address these problems, particularly in education and employment. The Disability Rights Network of Community Legal Centres, for example, recommended extending the DDA's unlawful harassment provisions to:

- ... students harassing teacher/staff with disability on the basis of the disability
- ... no person in the workplace is to harass any other person in the workplace with a disability on the basis of the disability
- ... no person in relation to the provision of goods and facilities should harass another person with a disability on the basis of the disability. (sub. 74, pp. 3-4)

Inquiry participants' comments on vilification

Many inquiry participants expressed concern about vilification of people with disabilities in the media, particularly for 'those with cognitive impairments, addiction issues and psychiatric conditions' (UnitingCare Australia and UnitingCare NSW.ACT, sub. DR334, p. 15). Inquiry participants—including Pete Casey (sub. 3), Arafmi Hunter (sub. 36), SANE Australia (sub. 62), the Mental Illness Fellowship of Australia (sub. DR283), and the Media, Entertainment and Arts Alliance (trans., p. 2287)—pointed to the media's role in perpetuating stereotypes through continuing negative portrayals of people with mental illness. SANE Australia said that action to address:

... stigma and discrimination towards Australians with a psychiatric disability is held back by the limited nature of the DDA's terms, especially in relation to vilification and harassment. Offensive, stigmatising representation of this group in the media and advertising needs to be easier to prosecute as discriminatory. (sub. 62, p. 2)

Autism Aspergers Advocacy Australia (sub. DR267) spoke of a complaint made to a television station about alleged vilification of people with autism in a television program. It was unhappy with the response it received and noted that the station's code of practice did not cover disability vilification and neither did the DDA.

Options for addressing harassment and vilification in the DDA

Participants made many suggestions to address these gaps in the DDA including:

- making harassment against people with disabilities unlawful in all areas of activity in which the DDA makes disability discrimination unlawful
- making harassment unlawful in all facets of life in general, in a similar manner to the Queensland Anti-Discrimination Act (Anti-Discrimination Commission Queensland, sub. 119). This would make harassment unlawful in areas beyond the existing (albeit very extensive) areas of activity covered by the DDA
- adding 'more definition on what constitutes harassment and on an employer's duties in preventing harassment' (HREOC, sub. 143, p. 29)
- replacing or further defining harassment to include the 'concept of a hostile environment' (Blind Citizens Australia, sub. 72, p. 8)
- amending the definition of indirect discrimination 'to include discriminatory, vilifying language against a whole class of persons with a disability', such as people with mental illness (SANE Australia, sub. DR264, p. 2). This may require adding media and advertising to the areas of activity covered by the DDA

- making all vilification of people with disabilities unlawful, modelled on provisions in other anti-discrimination Acts (box 11.4).

Box 11.4 Examples of vilification provisions in other legislation

The *Racial Discrimination Act 1975 (Cth)* was amended by the *Racial Hatred Act 1995 (Cth)* to include:

- 18C (1) It is unlawful for a person to do an act, otherwise than in private, if:
- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
 - (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.
- (2) For the purposes of subsection (1), an act is taken not to be done in private if it:
- (a) causes words, sounds, images or writing to be communicated to the public; or
 - (b) is done in a public place; or
 - (c) is done in the sight or hearing of people who are in a public place.

The *Anti-Discrimination Act 1977 (NSW)* was amended in 1994 to include:

- 49ZXB (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected).
- 49ZXC (1) A person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected) by means which include:
- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
 - (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

The *Anti-Discrimination Act 1998 (Tasmania)* states:

19. A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of—
- (a) the race of the person or any member of the group; or
 - (b) any disability of the person or any member of the group; or
 - (c) the sexual orientation or lawful sexual activity
 - (d) the religious belief or affiliation or religious activity
20. (1) A person must not publish or display ... any sign, notice or advertising matter that promotes, expresses or depicts discrimination or prohibited conduct.

All three Acts feature exceptions for some or all of: fair reporting; artistic performances; academic or scientific debate; research; religious instruction; good faith; public interest.

Sources: *Racial Discrimination Act 1975 (Cth)*; *Racial Hatred Act 1995 (Cth)*; *Anti-Discrimination Act 1998 (NSW)*; *Anti-Discrimination Act 1998 (Tasmania)*.

Currently, most State and Territory anti-discrimination Acts make behaviour that amounts to vilification unlawful on some or all of the grounds of race, religion, sexuality or gender identity. In NSW, vilification of people with (or presumed to have) HIV/AIDS is unlawful and in Tasmania, vilification of all people with disabilities is unlawful (AGS 2004b; Smyth 2003).

Constitutional limitations

The Productivity Commission agrees with inquiry participants that it would be desirable to extend the harassment provisions and add vilification provisions to the DDA. However, the Australian Government Solicitor (AGS) noted that ‘a legislative provision that is not supported by a legislative power of the Commonwealth under the Constitution is invalid’ (AGS 2004b, p. 10). The AGS advised that there are constitutional limitations to the Commonwealth’s power to legislate in this area, due to the nature of the international treaties to which the DDA is linked. The AGS noted that the proposed UN convention on the rights and dignity of persons with disabilities (see chapter 4) would give the Australian Government greater constitutional authority in this area, but that this convention is ‘likely to be some years away’ from ratification (AGS 2004b, p. 18).

In the meantime, the AGS advised that the Government may have a ‘power to legislate generally’ against ‘conduct that attacks the honour or reputation of a person or group of persons on the basis of disability’, based on the International Covenant on Civil and Political Rights (Article 17) (2004b, pp. 1-10). Aside from the external affairs power, the AGS said the Australian Government’s constitutional authority to make disability vilification unlawful would be limited to vilification:

- that occurs in the ACT or Northern Territory
- of or by Australian Government employees
- by foreign corporations or national trading or financial corporations
- in the course of international or inter-state trade or commerce.

This means, for example, that it would be possible in the DDA to make vilification of people with disabilities unlawful by international and national corporations but not State-based businesses or individuals, and unlawful for national broadcasters and newspapers but not for smaller State-based or regional media. Such limitations and distinctions would be likely to render any vilification provisions in the DDA unwieldy and ineffective. The same constitutional issues would be likely to arise for any attempt to extend the harassment provisions beyond those already included in the DDA.

Role of State and Territory anti-discrimination legislation

As noted above, all State and Territory anti-discrimination Acts include harassment and vilification provisions against people or groups on at least some grounds (typically, race, religion and gender). Tasmania makes vilification of people with disabilities unlawful. In some States and Territories, ‘serious vilification’ (typically on the grounds of race and religion only) is also a criminal offence (AGS 2004b).

Given the constitutional limitations on the Australian Government’s power to legislate comprehensively with regard to vilification of people with disabilities, it may be preferable for the State and Territory jurisdictions to extend their anti-discrimination Acts to make vilification of people with disabilities unlawful, following, for example, the existing provision in the Tasmanian Act (box 11.4).

Self-regulation and other measures

The Association of Independent Schools of South Australia (sub. 135; sub. DR357) and other inquiry participants from the education sector pointed out that this issue in education is far from being ignored and that harassment and vilification of students with disabilities by other students is addressed in school and institution policies. HREOC noted that the draft disability standards for education ‘provide significantly more detailed compliance measures’ than provided by the DDA, including ‘the duty of schools to have effective policies and measures in place to prevent harassment’ (sub. 143, pp. 29, 63). HREOC was interested in feedback on extending this model to other areas of activity in the DDA, but none was received following the draft report.

In employment and other areas of activity, many businesses and organisations have policies to address harassment, bullying and related problems. UnitingCare Australia and UnitingCare NSW.ACT, for example, said all its agencies must:

... develop anti-harassment policies and practices ... agencies are quick to act where they perceive any harassment and ... encouraged to develop policies that strongly sanction harassment and vilification. (sub. DR334, p. 15)

As an alternative to amending the DDA, Gary Batch (sub. 189) and the Disability Council of NSW (sub. 64) suggested that vilification, stigma, harassment and discriminatory practices should be the subject of ‘a public awareness campaign’ (see chapter 10).

Conclusions on addressing harassment and vilification

The DDA does not make harassment of people with disabilities unlawful in all of the areas of activity in which discrimination is unlawful. However, in many cases, harassment could constitute direct or indirect discrimination under the DDA—for example, harassment by other students might be part of a disability discrimination complaint against a school. In most other cases, behaviour that constitutes harassment will be unlawful under State or Territory anti-discrimination legislation.

The DDA does not make the vilification of people with disabilities unlawful at all. There are constitutional reasons for this omission in the DDA. Until the proposed UN convention on the rights of people with disabilities is ratified by Australia, there appears to be more scope to make disability vilification unlawful in the State and Territory anti-discrimination Acts than there is in the DDA.

FINDING 11.8

There are constitutional limitations on the Australian Government's power to make vilification of people with disabilities unlawful. There is scope for the States and Territories to extend their anti-discrimination Acts in this area.