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# 12 Exemptions

The *Disability Discrimination Act 1992* (DDA) makes disability discrimination and harassment unlawful in a wide range of key public and commercial activities, including employment, education, the provision of goods and services, access to premises, accommodation, sports, clubs and the administration of Commonwealth laws and programs (see chapter 4). The DDA makes specific exemptions for a small number of areas of activity that would otherwise be included in the above list. This chapter examines the reasons for, and effects of, the more significant of these exemptions including:

- the partial exemption for insurance and superannuation
- the *Migration Act 1958* and its regulations
- various specific activities, such as combat duties, special measures intended to benefit people with disabilities and capacity-based wages
- prescribed laws
- health and safety related exemptions.

Other areas of activity are exempt from the DDA because it is silent on them (see chapter 4). These mainly relate to personal activities and are not discussed here. The DDA also allows the Human Rights and Equal Opportunity Commission (HREOC) to grant temporary exemptions to organisations for up to five years.

## 12.1 Partial exemption for insurance and superannuation

Insurance and superannuation are ‘goods or services’ for the purposes of section 24 of the DDA. In most circumstances, it is therefore unlawful to discriminate against people with disabilities in the provision of insurance and superannuation. However, the DDA also contains a specific exemption that states that it is not unlawful to discriminate on the ground of a person’s disability by refusing to offer, or by imposing special terms or conditions to, an annuity, life insurance policy, insurance policy against accident, other policy of insurance, or membership of a superannuation or provident fund or scheme (ss.46(1)(a)–(e) and (2)(a)–(e)) if:

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- the discrimination ‘is based on actuarial or statistical data on which it is reasonable’ to rely ‘and is reasonable having regard to the matter of the data and other relevant factors’ (ss.46(1)(f) and (2)(f)) or
  - ‘in a case where no such actuarial or statistical data is available and cannot reasonably be obtained—the discrimination is reasonable having regard to any other relevant factors’ (ss.46(1)(g) and (2)(g)).

Inquiry participants raised several concerns about this partial exemption including: access to insurance and superannuation; acceptable actuarial and statistical data; the nature of ‘any other relevant factors’; reliance on stereotypes; and access to the insurers’ underwriting data and information. These concerns are discussed below, following an examination of the reasons for having such an exemption in the DDA, and the way in which it currently operates. Some options for improving the exemption and some conclusions are then presented.

### **Rationale for a partial exemption for insurance and superannuation**

There are several reasons that may justify a partial exemption for insurance and superannuation. First, the insurance industry is based on assessing risks of future adverse events—to one’s house, employment, holiday, health, life or whatever other object or activity is being insured—and processing future claims resulting from such events. In at least some cases, the presence of a disability will increase an individual’s risk, and hence increase the probability that they will make a claim against their insurance policy.

The Investment and Financial Services Association (IFSA) explained that if insurers could not take disability status into account in underwriting formulae and decisions (that is, if there were not a partial exemption), insurance premiums for all insurance customers would need to increase. This would be necessary to cover people who have a higher risk of making a claim but who cannot be easily identified and/or be lawfully discriminated against in either policy conditions or price (IFSA sub. 242; sub. DR349).

Likewise, the Insurance Council of Australia (ICA) argued that because ‘risk-based premiums are fundamental to the insurance model’, insurers’ ability to ‘take account of relevant characteristics as variables for assessing risk’ would be reduced and premiums for all insurance customers would increase as a result (sub. 234).

Second, ICA explained that the current exemption can be justified in part by the presence of ‘asymmetric information’ (that is, unequal availability of information between buyer and seller) in the insurance market. Information asymmetry can be

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particularly significant if, for example, applicants do not reveal all aspects of their health status to the insurer. It can lead to:

- adverse selection, where one of the parties (the principal) is unable to observe (or take account of, as it may be) important characteristics of the other (the agent) or of the good involved in the transaction and
- moral hazard, where the principal is unable to monitor the actions of the agent following the decision to proceed with the transaction and where the agent has no incentive to act in the principal's interest. A pertinent example would be where a fully insured person might not then take appropriate risk reduction measures. (ICA, sub. 234, p. 3)<sup>1</sup>

These two factors together mean that even in the absence of an exemption, insurers would, in many cases, be able to lawfully discriminate against people with disabilities on the ground that making adjustments for them would cause the insurer an unjustifiable hardship (see chapter 8). Under the DDA, the defence of unjustifiable hardship would need to be proved individually in each case.

Under these circumstances, a third reason for exempting some insurance and superannuation decisions is that transaction costs would be higher without the exemption—for example, if each case of different treatment for an insurance applicant with a disability had to be proven to be lawful on the ground of unjustifiable hardship.

## **Insurance and superannuation guidelines and explanatory material**

Because the insurance and superannuation exemption applies in limited circumstances only, HREOC and others have produced documents to help explain it. These include:

- HREOC guidelines for providers of insurance and superannuation, which explain the DDA in relation to life, disability and accident insurance, and death and disability cover under superannuation arrangements (HREOC 1998b). These guidelines are used in the insurance industry on a voluntary basis. They are currently being revised by HREOC in consultation with the industry and others (HREOC 2004b)<sup>2</sup>
- HREOC's 'frequently asked questions' on insurance, which emphasise that insurance is not wholly exempt from the DDA (HREOC 2003n)

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<sup>1</sup> In insurance industry terminology, 'the principal' is the insurer, 'the agent' is the applicant or customer and 'the good involved in the transaction' is the insurance policy.

<sup>2</sup> HREOC will release a draft of the new guidelines for consultation later in 2004 (HREOC 2004b).

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- the Memorandum of Understanding between the Mental Health Sector Stakeholders and IFSA (2003), which sets out principles of good practice for the provision of insurance to people with mental health conditions.

The current version of the HREOC guidelines list the following examples of lawful discrimination under the DDA, where reasonable and relevant cause can be shown:

- deferring approval, given an inability to quantify the applicant's risk at the time (although not deferring it for an unspecified or unreasonable amount of time)
- reducing or limiting the amount of insurance cover
- restricting the terms of liability or using exclusion clauses for pre-existing conditions or conditions to which the person is susceptible
- imposing an additional premium
- denying cover, where the risk of making a claim can be shown to be unacceptable to the insurer or would cause an unjustifiable hardship.

Currently, it is not possible for disability standards (a form of subordinate regulation under the DDA) to be implemented for insurance and superannuation. Disability standards—and their possible desirability in insurance and superannuation—are discussed in chapter 14.

#### *Legal decisions on disability discrimination in insurance*

Another important vehicle for explaining the operation of the insurance and superannuation exemption is case law. Both aspects of the insurance exemption—actuarial and statistical data, and 'other relevant factors'—have been tested in the courts, most significantly in *Xiros v Fortis Life Assurance Ltd* ((2001) FMCA 15) with regard to reliance on actuarial and statistical data, and *Bassanelli v QBE* ((2004) FCA 396) with regard to reliance on 'other relevant factors' (box 12.1).

The *Xiros* case emphasised that statistical data must be current if they are to be considered 'reasonable' (for the purposes of s.46(1)(f)), particularly in the context of changing medical knowledge and actuarial evidence. The *Bassanelli* case was significant in clarifying the meaning and scope of discrimination that is 'reasonable having regard to any other relevant factors' (s.46(1)(g)) in underwriting decisions. In that case, Mansfield J emphasised that actuarial and statistical data should be relied upon where possible, that all relevant factors should be examined and that stereotypes should not be used (see below).

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## Box 12.1 Legal decisions about disability discrimination in insurance

***Xiros v Fortis Life Assurance Ltd.*** Xiros, who was HIV positive, alleged discrimination on the ground of disability because he was denied payment several times between 1997 and 1999 under his mortgage protection insurance, which included death, and permanent and temporary disability cover. Conciliation by HREOC was unsuccessful. Xiros took his case to the Federal Magistrates Court.

Fortis defended its denial of payments on 'actuarial and statistical' evidence (s.46(1)(f)). The Magistrate found Fortis had discriminated under section 5 of the DDA. He said substantial statistical data were available to suggest a reasonable basis for the HIV/AIDS exclusion in policies offered from 1991 until 1996, and for rejecting the existing claim in 1999. But the incidence of HIV/AIDS had since declined, so it was questionable whether an exclusion based on actuarial data could reasonably remain.

***Bassanelli v QBE Insurance.*** In 2002, QBE denied travel insurance to Bassanelli after she disclosed that she had metastatic breast cancer. Bassanelli subsequently obtained travel insurance (excluding cover for her pre-existing medical condition) from another company. Bassanelli had expected:

... the Insurer not [to] cover her for ... cancer, a pre-existing illness ... To exclude Denice from all policy items was considered by us to be disability discrimination. (sub. 175, p. 1)

Conciliation by HREOC was unsuccessful. Bassanelli took her case to the Federal Magistrates Court.

QBE argued its decision was based on the 'other relevant factors' component of the insurance exemption in the DDA (s.46(1)(g)), and said it would be 'uneconomic' to issue a non-standard policy excluding Bassanelli's medical condition. The Magistrate found QBE had discriminated by refusing any insurance policy because: QBE had issued similar policies in the past; it was unreasonable for QBE to refuse to provide any policy at all; and no unjustifiable hardship would have been involved in providing one.

QBE appealed the Magistrate's decision to the Federal Court, again arguing that its underwriting decision was 'reasonable having regard to any other relevant factors' (s.46(1)(g)). Mansfield J dismissed the appeal for several reasons. He said the insurer cannot rely on section 46(1)(g) without first seeking out relevant actuarial and statistical data (as required in section 46(1)(f)). Further, the insurer cannot pick and choose which material it considers in the context of 'any other relevant factors'. Instead, it must consider 'any matter which is rationally capable of bearing upon whether the discrimination is reasonable', and must not rely on stereotypes in doing so.

Sources: *Xiros v Fortis Life Assurance Ltd* (2001) FMCA 15; *Bassanelli v QBE Insurance* (2003) FMCA 412 ; *QBE Travel Insurance v Bassanelli* (2004) FCA 396 ; Michael and Denice Bassanelli, sub. 175.

## Access to insurance and superannuation for people with disabilities

Access to insurance and superannuation is a significant issue for people with disabilities. Denial of insurance can reduce opportunities to participate in areas such

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as employment, travel and home ownership, as highlighted by many inquiry participants, including the Disability Services Commission Western Australia (sub. 44), the Association for the Blind of WA (sub. 83), Michael and Denice Bassanelli (sub. 175), and Frank Fisher (sub. 200). Access to superannuation is important to ensure quality of life in retirement (see appendix D).

People with Disability Australia (sub. DR359) said access to insurance and superannuation was a priority area for its members. The National Disability Advisory Council (sub. DR358, p. 5) said ‘access to insurance and superannuation has been a significant issue for people with disabilities for many years’.

The National Association of People Living With HIV/AIDS (NAPWA) emphasised that insurance is not ‘a luxury product’ and that in some situations, insurance is not optional. NAPWA noted, for example, that ‘you can’t get a mortgage without mortgage insurance’ and ‘if you choose not to [buy] health insurance, you actually pay higher tax’ (trans., p. 2337).

Availability of insurance for people with disabilities was also raised as an issue for employers, with some participants indicating problems getting appropriate (and necessary) insurance for employees and volunteers who have disabilities. The Department of Family and Community Services (sub. DR362, p. 36) noted that ‘increasing uncertainty about insurance liabilities was discouraging employers to continue with work experience’ and work placement programs for people with disabilities. The Association of Competitive Employment raised similar concerns:

There are some significant problems, particularly in New South Wales at the moment, with insurance coverage, particularly for work experience for people with disabilities, ... it’s near impossible to get insurance that will cover work experience through our sector for people with a disability, and ... we don’t know how things would go if someone tested their insurance, but certainly loss of future earnings is something that’s not covered by insurance generally. (trans., p. 2629)

### *Evidence of disability discrimination in insurance and superannuation*

DDA complaints about insurance that HREOC has conciliated have included cases about infertility treatment, post natal depression, death and disability insurance, HIV status, vision impairment, cancer, mental disorders, Tourette’s syndrome and AIDS (HREOC 2003l, see appendix D).

There have been few DDA complaints about superannuation (see chapter 5 and appendix D). Now that superannuation is compulsory in Australia, people with disabilities cannot be denied membership entirely. Discrimination is still possible, however, in the terms and conditions on which superannuation is offered, or in relation to insurance offered as a component of superannuation. One complainant

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with a vision impairment, for example, was refused additional benefits cover on top of automatic entitlements. The complaint was settled through agreement that the company would provide additional benefits except for vision impairment or vision disorders (HREOC 2003d, p. 59).

In its report on protecting genetic information in Australia, the Australian Law Reform Commission (ALRC 2003) summarised the evidence presented to it on genetic discrimination, which can amount to disability discrimination, in insurance:

- A 2001 survey identified 48 cases of alleged discrimination on the ground of genetic information or disorders in life, income protection and trauma insurance (Barlow-Stewart and Keays 2001 pp. 254–6 quoted in ALRC 2003, p. 672).
- IFSA said life insurers had ‘received no complaints with respect to underwriting decisions involving genetic testing results (IFSA quoted in ALRC 2003, p. 673).
- Several cases of discrimination were alleged following genetic test results that indicated ‘genetic mutations’ that can cause disorders such as Charcot-Marie Tooth disease and Huntington’s disease (ALRC 2003, pp. 672–4).

The ALRC concluded that there is ‘considerable uncertainty about the nature and extent of discrimination in this area’. It noted that further research on this topic had commenced and was due for completion in late 2004 (ALRC 2003, p. 674).

NAPWA reported some improvement in access to insurance by HIV positive people, but it stated that a national survey had found continuing incidences of discrimination.

... 22 per cent had experienced less favourable treatment in relation to insurance [at some time] ... and 15 per cent in the last two years for insurance. So it is a current issue. We have to recognise it has decreased but it’s still significant. (trans., p. 2329)

A Breast Cancer Network of Australia (BCNA) survey of 750 women found about one quarter had had difficulties obtaining travel insurance due to their condition. Some had been refused insurance totally, others had their breast cancer excluded as a pre-existing condition, and others were charged higher premiums as well or instead of pre-existing condition exclusions. Survey respondents were concerned about ‘inconsistent and inadequate risk assessment methods’ across insurers and within companies (Timbs 2004; BCNA trans., pp. 1956–9).

## **Issues for the insurance and superannuation exemption**

Aside from the primary questions of access and discrimination (see above), inquiry participants raised four important issues about the insurance and superannuation exemption: identification of reasonable and relevant actuarial data; the scope of

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‘other relevant factors’; reliance on stereotypes; and access to the information on which insurers base their underwriting decisions. These issues are examined in turn.

*‘Actuarial and statistical data’ in the insurance and superannuation exemption*

HREOC guidelines for insurance and superannuation list a variety of Australian and international actuarial and statistical data sources that can be acceptable for the purposes of the DDA exemption, including (but not limited to) underwriting manuals, government statistical studies, medical journals, international population studies and insurance studies. The guidelines state that international data should be modified for Australian circumstances if necessary, and all data must be up to date or adjusted for changes in relevant medical or other technologies (for example, a medical condition that would have stopped someone from working in the past but may no longer do so). The guidelines also state that it is not reasonable to refuse insurance cover due to: the insurer’s lack of data; limited availability of data; the company’s ‘historical practice’; or inaccurate assumptions about the person. These guidelines are being reviewed by HREOC in consultation with industry (see above).

IFSA suggested the following actuarial data sources are reasonable bases for insurance decisions: underwriting manuals; established company actuarial practices for risks deemed too great to underwrite (based on the underwriting manuals); and published guidelines in cases where different life insurance companies offer the same person insurance on different terms (sub. 142, pp. 25–7).

IFSA (sub 142, p. 27) conceded that the insurance industry has been slow to change its actuarial practices and that it continues to rely on underwriting manuals, for which it sometimes has difficulties providing the supporting medical and clinical evidence. IFSA (sub. DR349, p. 3) was concerned about the costs involved in researching and compiling new data for risk ratings and underwriting manuals. It said that ‘underwriting is subject to cost–benefit analysis’ and that in some circumstances, or in relation to some conditions, there may be ‘no commercial justification for obtaining that information’ (sub. 242, p. 3). Nevertheless, IFSA gave several examples of actuarial research (including health risk assessments) undertaken to help assess insurance applications (sub. DR349, pp. 6–7).

Other inquiry participants said data availability and quality have improved:

... there was really poor quality actuarial evidence being used to justify some of their decisions, and that’s changing now. I mean, they have got access to better information about disease progression, life spans, life expectancy, all of those sorts of things. (NAPWA, trans., p. 1537)



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Significantly, although the costs of statistical and actuarial data are a commercial consideration for insurers, the DDA requires the insurer to obtain data ‘on which it is reasonable’ to rely and that ‘is reasonable having regard to the matter of the data and other relevant factors’ for their underwriting decisions, if they are to rely on the exemption (s.46(1)(f)). This will not necessarily be the same benchmark for obtaining data as ‘commercially justifiable’. In the absence of the exemption, insurers might be required to obtain data up to the point of ‘unjustifiable hardship’—which arguably, could be a higher cost benchmark again (see chapter 8).

*‘Other relevant factors’ in the insurance and superannuation exemption*

In cases where no reasonable actuarial or statistical data are available (and ‘cannot reasonably be obtained’), insurers may lawfully discriminate against a person with a disability if the ‘discrimination is reasonable having regard to any other relevant factors’ (ss.46(1)(f)(g) and (2)(f)(g)). For many inquiry participants, this was the most contentious element of the DDA’s insurance and superannuation exemption.

HREOC guidelines for insurance and superannuation state that ‘relevant factors include both those that may increase risk and those that may reduce it’. These can include (but are not limited to) medical opinion, other professional opinions, actuarial advice, information about the individual and commercial judgment. Given that these factors can include personal information, HREOC added:

... this necessarily means that reasonable requests or requirements for information or examinations to determine insurance (including workers compensation) or superannuation entitlements are permitted. (sub. 143, p. 34)

In the Bassanelli case, Mansfield J said ‘other relevant factors’ should include ‘any matter which is rationally capable of bearing upon whether the discrimination is reasonable’ (box 12.1). IFSA (trans., p. 1369) explained that in practice, this often means looking at the lifestyle and financial circumstances of the individual—that is, personal factors that might affect an individual’s risk rating. The ICA said this is a normal part of the risk assessment process undertaken for all insurance customers:

An insurer who acts in accordance with section 46 is merely performing a normal and necessary part of the insurance process that includes the assessment of individual risks. (sub. 234, p. 3)

IFSA noted there is a cost in obtaining information about an individual’s risk factors. It said this cost (relative to the commercial value of the insurance product) should be considered a relevant factor in itself, ‘particularly in those products where those decision points are set at very limited [premium] levels’ (sub. 242, p. 4). However, the Federal Court decision in the Bassanelli case (para. 54) made clear that first, a reasonable effort should have been made to obtain relevant data before

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turning to ‘other relevant factors’, and second, where there are no reasonable data, all ‘other relevant factors’ should be considered and not just the factors selected for consideration by the insurer. As noted by People With Disability Australia (sub. DR359, p. 19), this ‘decision will in all likelihood provide some much-needed clarity regarding section 46’ of the DDA.

### *Stereotypes and assumptions in ‘other relevant factors’*

Some participants were concerned that insurance and superannuation providers might sometimes base their underwriting decisions on stereotyped, outdated or incorrect assumptions about people due to their particular disability. They were concerned that insurers sometimes rely on ‘prejudicial assumptions related to disability’ (Blind Citizens Australia, sub. 72, p. 5) or make ‘blanket decisions ... without determining the functioning capacity of the individual applicant’ (Disability Rights Network of Community Legal Centres, sub. 74, p. 2). The Mental Health Legal Centre (sub. 108, p. 5) alleged that unjustified, stereotyped ‘relevant factors’ are used to deny insurance to people with psychiatric disabilities.

In response, IFSA (sub. DR 349, p. 7) agreed that it is inappropriate for insurance providers ‘to rely on stereotypical assumptions’, and argued that if they attempted to do so, they would not succeed in proving their discrimination was reasonable. Indeed, this was the outcome in the Bassanelli case (box 12.1), in which Mansfield J said ‘other relevant factors’ should not include stereotyped assumptions about a person’s disability. Significantly, one of the reasons given for dismissing the insurer’s appeal was that the insurer:

... applied a decision-making process which was too formulaic or which tended to stereotype the respondent by reference to her disability. Such grouping of individuals, whether by race or disability, without proper regard to an individual’s circumstances or to the characteristics that they possess, may cause distress or hurt. This case provides an illustration. Legislation such as the [DDA] is aimed to reduce or prevent such harm. Section 46 of the [DDA] recognises that there are circumstances in which discrimination by reason of disability may be justified (or, at least, not be unlawful). It requires that the particular circumstances of an individual who is discriminated against be addressed, but not in a formulaic way. Even if the exemption pathway provided by section 46(1)(f) is utilised, the reference to ‘any other relevant factors’ confirms that legislative intention. (*QBE Travel Insurance v Bassanelli* (2004) FCA 396)

### *Access to data and information used in underwriting decisions*

Under the DDA, failure to provide actuarial or statistical data to HREOC when requested (in relation to a discrimination complaint) is an offence that carries a

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penalty of up to \$1000 (s.107). However, there is no requirement to provide actuarial data or other evidence to complainants or to insurance applicants.

Many inquiry participants wanted greater transparency in underwriting decisions more generally—and not just the decisions subject to an official DDA complaint—so as to improve accountability, accuracy and dialogue. People with Disability Australia (sub. DR359) wanted clarification of ‘the nature of the information’ that insurers must disclose to applicants and, in the event of a DDA complaint, to complainants. The BCNA (sub. DR373, p. 1) said the paucity of information about underwriting decisions meant the ‘consumer is hard pressed to make an assessment of whether the insurer has acted lawfully’ in exercising the DDA exemption.

In relation to insurance cover for sports clubs that include people with disabilities, Action for Community Living Inc. said:

... [the sports clubs] are actually seen as a bigger risk in insurance when there’s not evidence—there hasn’t seemed to be much onus on insurance companies to provide arguments or evidence-based rationale ... because that’s been not terribly clear under the [DDA], it is a difficult area, but I think it’s one that needs certainly more guidelines, and we would support that area in particular. (trans., p. 2671)

Further, NAPWA said lack of information impedes dialogue with the industry:

... we don’t have access to the information, to the data, on which they base their underwriting decisions. Without that, it’s very difficult to have an objective discussion. We can come up with our own data from epidemiologists and the like, but the industry’s response tends to be, ‘Well, we just don’t accept that’, or, ‘We’re not going to accept data about longevity until the treatments have been available for another fifty years’. That’s just unrealistic. (trans., p. 2331–2)

## **Options for improving the insurance and superannuation exemption**

Inquiry participants suggested options ranging from abolishing the exemption and relying solely on the unjustifiable hardship and ‘reasonableness’ safeguards in the DDA; amending or clarifying the exemption; or retaining it in its current form.

Inquiry participants who suggested removing the partial exemption completely included the Mental Health Coordinating Council of NSW (trans., p. 1466); the Northern Territory Disability Advisory Board (sub. 121); the Physical Disability Council of New South Wales (sub. 78) and the Physical Disability Council of Australia (sub. 113). They argued that without the exemption, the ‘unjustifiable hardship’ defence (see chapter 8) and the ‘reasonableness test’ in indirect discrimination (see chapter 11) would still be available to insurers in cases where actuarial or other evidence supported differential treatment.

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Referring specifically to workers compensation and superannuation, the Northern Territory Disability Advisory Board (sub. 121, p. 1), suggested offering tax breaks or incentives to offset any costs to insurers from the removal of the exemption.

Other participants called for the exemption to be limited or reduced in some way. The Physical Disability Council of New South Wales (sub. 78, p. 9) and the Physical Disability Council of Australia (sub. 113, p. 8) qualified their calls for the removal of the exemption by saying that ‘in arguing for these exemptions to be ended we do not advocate ‘blanket’ application of unrealisable outcomes’ but ‘a shift of paradigm’. Robin and Sheila King (sub. 56, p. 1) suggested that: there be no DDA exemption in property insurance; that life insurance be assessed according to the individual’s situation only; and that pre-existing conditions clauses be applied in medical insurance.

HREOC, the ICA and IFSA supported retaining the exemption. IFSA (sub. 142, p. 25) went so far as to argue that ‘the continuation of the exemption in some form is fundamental to the continuation of the life insurance industry as we know it’. HREOC (sub. 219, p. 13) said most forms of insurance require ‘reasonable distinctions’ to be made and that the exemption ‘needs to be maintained, rather than insurers being left to rely solely on an unjustifiable hardship defence’.

Many inquiry participants wanted to clarify the meaning of ‘other relevant factors’ in insurance decisions (ACT Government, sub. DR366; Action for Community Living Inc., sub. DR330; NDAC, sub. DR358; People With Disability Australia, sub. DR359). Blind Citizens Australia (sub. 72, p. 5) recommended deleting ‘other relevant factors’ (in ss.46(1)(g) and (2)(g)) so as ‘to oblige insurance companies to obtain actuarial and statistical data to support exclusion or higher premiums’. HREOC (sub. 219, p. 13) said the DDA leaves much open to interpretation of what constitutes ‘other relevant factors’ and recommended ‘further specification of what is reasonable, including potentially through standards or industry codes and procedures’. This issue has been addressed, in part, by the Federal Court’s decision in the Bassanelli case (box 12.1).

The BCNA (sub. DR373, p. 1) said insurers relying on the exemption should be obliged to state their reasons for modifying or refusing an application ‘in a clear and meaningful manner’ and to provide copies of the actuarial reports, manuals and other documents relied upon in the underwriting decision (as recommended by the ALRC, see below). The BCNA also suggested amending section 107 of the DDA to require respondents to provide evidence of all ‘other relevant factors’ (as well as actuarial or statistical data) to HREOC when requested in relation to a DDA complaint. The National Disability Advisory Council suggested ‘HREOC undertake a further full inquiry into access to insurance and superannuation’, with a view to amending the exemption (sub. DR358, p. 5).

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In terms of mechanisms, the options for addressing continuing concerns with the insurance and superannuation exemption include:

- voluntary guidelines (as currently being revised by HREOC)
- voluntary industry codes of practice and standards (some of which already exist)
- rely on legal precedent (such as the Xiros and Bassanelli cases) to establish the scope of ‘reasonable’ data and ‘any other relevant factors’
- develop and impose disability standards on the industry
- amend the DDA by adding criteria, examples or other explanatory clauses to ‘other relevant factors’.

The first two of these options are already in place, and have already required revision. NAPWA said the guidelines have not been very effective in practice:

... they look fairly good; they have stood up pretty well since 1998 when they were introduced. However, they weren’t being used ... . So they were just advice that was sitting there really, not being taken. (trans., p. 2331)

Given the continuing concerns of people with disabilities regarding insurance, voluntary guidelines and codes do not appear to have been effective in ensuring the smooth operation of this exemption. Reliance on legal precedent for further clarification, while valuable, will be slow due to the small number of formal complaints and cases heard in this area. Other measures therefore seem necessary.

#### *Recommendations on genetic discrimination in insurance by the ALRC 2003*

In its report on protecting genetic information in Australia, the ALRC made a number of recommendations about genetic discrimination and the use of genetic information in insurance that are relevant to broad disability discrimination issues (ALRC 2003). The ALRC said that, as a general rule, there should be no departure from the principle of ‘equality of information between the applicant and the insurer’, but that where genetic information is used in insurance underwriting, the insurance process should be subject to the ALRC’s recommendations (box 12.2).

The ALRC’s approach was supported by the Anti-Discrimination Board New South Wales (sub. 101, p. 23), which proposed that lawful discrimination in insurance must be ‘based upon actuarial or statistical data which has been approved for use in underwriting by the relevant independent body’, so as to address concerns about genetic testing.

Although put forward by the ALRC in relation to genetic discrimination only, the Productivity Commission considers some of these recommendations to have

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potential to assist all people with disabilities. In particular, the ALRC recommendations to develop better industry policies, and to require insurers to explain clearly and meaningfully their underwriting decisions, could have benefits for all people with disabilities, including those with genetic disorders.

**Box 12.2 Genetic discrimination and genetic information in insurance**

In its report on genetic information, the Australian Law Reform Commission (ALRC) made several recommendations to address ‘genetic discrimination’ in insurance.

- A Human Genetics Commission of Australia should be established to (among other duties): ‘keep a watching brief on developments in the insurance industry in relation to the use of human genetic information’: review insurance practices regarding genetic information; and establish procedures and make recommendations on the use of particular genetic tests in insurance underwriting.
- IFSA and the ICA ‘should develop mandatory policies’ to ensure their members use genetic tests only as approved by the proposed Genetics Commission, and should develop policies about the use of family medical histories in insurance underwriting.
- The *Insurance Contracts Act 1984* should be amended to require insurers ‘to give reasons that are clear and meaningful and that explain the actuarial statistical, or other basis for decision’ in cases where an unfavourable underwriting decision has been based on genetic information or family medical history. Applicants should be advised by insurers of their statutory entitlement to such reasons, and IFSA and the ICA should develop policies for their members regarding this duty.
- The DDA should be amended to ‘clarify the nature of the information required to be disclosed by an insurer to HREOC in the course of resolving a complaint’ and to allow access to such information by the complainant.
- IFSA and the ICA should expand the jurisdiction of the Financial Industry Complaints Service Ltd and the Insurance Enquiries and Complaints Ltd to allow them to hear complaints and review underwriting decisions based on genetic information and family medical history.

Source: ALRC 2003, pp. 64–6.

## **Conclusions on the insurance and superannuation exemption**

The Productivity Commission considers that, on balance, an exemption is warranted for disability discrimination that is genuinely based on reasonable, relevant, up-to-date statistical and actuarial data. As HREOC and other inquiry participants acknowledged, insurance (and to a lesser extent, superannuation) is discriminatory by nature. If the risks carried by an individual with a disability renders the individual uninsurable or costly to insure, insurers need to be able to vary the price or conditions of their products or, in extreme cases, to refuse insurance altogether.

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Relying instead on unjustifiable hardship (and/or ‘reasonableness’ in indirect discrimination cases) in the DDA in order to justify variations to insurance policies on a case-by-case basis would carry significant transaction costs for all concerned, including legal costs, data costs and potentially lengthy delays in issuing policies.

In order to maintain flexibility in cases where no reasonable data are available, the Productivity Commission also supports the retention of the ‘any other relevant factors’ clause (ss.46(1)(g) and (2)(g)), but considers it could be improved upon. Uncertainty about this clause has been addressed, to some extent, by the Federal Court’s decision in the Bassanelli case. Further guidance will be available soon from HREOC’s revised guidelines (forthcoming). As noted above, HREOC suggested further clarification by the industry is required. Industry codes or standards could be developed, but they would have voluntary status only. If the DDA were amended, disability standards could be introduced to cover insurance and superannuation (see chapter 14).

More powerfully, the DDA itself could be amended to clarify the meaning of ‘any other relevant factors’. Criteria should be added, for example, about the types of information that insurance and superannuation providers should (or should not) consider in identifying ‘other relevant factors’. HREOC’s revised guidelines, conciliated complaints and case law could provide guidance for formulating such criteria. Following the Bassanelli case, they could make clear, for example, that the basis for underwriting decisions must not include stereotypes about people with disabilities or unfounded assumptions about individuals’ health status.

In the interests of improving transparency, accountability and accuracy in underwriting procedures, the data sources and ‘any other relevant factors’ relied upon in unfavourable underwriting decisions should be explained to the insurance applicant, in cases where the insurer plans to rely on the section 46 exemption in the DDA. Insurers should not be required to reveal confidential or commercially sensitive actuarial data, but they should be required to explain their reliance on the data (or in the absence of data, on ‘other relevant factors’) in a meaningful manner, if they are to rely on this exemption from the DDA. As recommended by the ALRC, insurers should be obliged to make this right to information known to insurance applicants at the time of their application.

FINDING 12.1

*A partial exemption for insurance and superannuation in the Disability Discrimination Act 1992 (s.46) is appropriate, but its current scope is unclear.*

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RECOMMENDATION 12.1

*The Disability Discrimination Act 1992 should be amended to clarify what are ‘other relevant factors’ for the purpose of the insurance and superannuation exemption (s.46). ‘Other relevant factors’ should not include:*

- *stereotypical assumptions about disability that are not supported by reasonable evidence*
- *unfounded assumptions about risks related to disability.*

RECOMMENDATION 12.2

*The Disability Discrimination Act 1992 should be amended to limit the application of the insurance and superannuation exemption (s.46). It should only apply if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied).*

*Applicants should be advised of their entitlement to request these reasons.*

## **12.2 Exemption of the *Migration Act 1958***

Section 52 of the DDA exempts the *Migration Act 1958*, all regulations made under that Act and anything done by a person in relation to the administration of that Act from the discrimination provisions of the DDA. In the absence of this exemption, the Migration Act (and its regulations) would be subject to the DDA in the context of the ‘administration of Commonwealth laws and programs’ (s.29).

The Migration Act and the Migration Regulations 1994 are the primary legislative instruments of the Australian Government for determining:

- the arrival and presence in Australia of non-citizens
- selection criteria, application processes and compliance for all visa categories
- migration sponsorships
- detention of, deportation of, and recovery of costs from non-citizens
- offences in relation to entering and remaining in Australia
- registration and duties of migration agents (who provide immigration assistance)
- establishment, functions and powers of the Migration Agents Registration Authority, the Migration Review Tribunal and the Refugee Review Tribunal.



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These functions are administered by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA). DIMIA also administers other Acts that relate to migration, such as the *Immigration (Education) Act 1971*, the *Australian Citizenship Act 1948* and various Acts for setting fees and charges. These are not exempt from the DDA and are not discussed here. Social security, disability and health services for migrants, as for other Australians, are provided under relevant social security, disability and health Acts and are also not exempt from the DDA.

### **Rationale for the Migration Act exemption**

One of the key functions of the Migration Act is to establish who may enter and remain in Australia, temporarily or permanently, under various visa categories. If the Migration Act were not exempt, some of the criteria for assessing visa applicants might be found to be directly or indirectly discriminatory under the DDA. However, the Australian Government considers these criteria necessary for other public policy reasons.

Criteria for migration visa categories are extensive and vary considerably across visa categories. Depending on the visa category, entry criteria can include, for example, family status, occupation, education qualifications, assets, age, and language skills, and may be determined using a points-based test or other methods of assessment. These criteria are set out for each visa category on the application forms, in the Migration Regulations 1994 and in explanatory material from DIMIA (all of which are available on the internet, in electronic and other formats). Some criteria change periodically (for example, priority occupations for skilled migration or assets requirements for business visas), but they apply equally to all applicants in each visa category. They are aimed at meeting a range of Australian Government policy objectives, including social, economic, financial and security objectives.

In addition to meeting the criteria for their particular visa category, all applicants for permanent visas to Australia, their spouses and dependents must meet separate and additional health requirements under the Migration Regulations 1994 (box. 12.3). Similar health checks also apply for temporary entry visas over a certain duration.

If the Migration Act were not exempt from the DDA, these health requirements might conceivably be found to discriminate against some people with disabilities indirectly (by setting rules that they do not or cannot meet), or discriminating directly (by requiring additional tests or medical evidence that are not required of people without disabilities). However, the Australian Government deems these health requirements to be necessary for other public policy reasons. These are to:

- minimise public health and safety risks to the Australian community

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- contain public health expenditures on health and community services
  - maintain access to health and community services for Australian residents (DIMIA 2003b; sub. DR365, p. 2).

**Box 12.3 Migration Regulations 1994: health requirements**

Public interest criteria for permanent migration to Australia require that the applicant:

- a) is free from tuberculosis; and
- b) is free from a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community; and
- c) (i) does not have a disease or condition that is such that the person would be likely to: (A) require health care or community services, or (B) meet the medical criteria for the provision of a community service, during the period of the applicant's proposed stay in Australia; and  
(ii) provision of the health care or community services relating to the disease or condition would be likely to: (A) result in a significant cost to the Australian community in the areas of health care and community services; or (B) prejudice the access of an Australian citizen or permanent resident to health care or community services, regardless of whether the health care or community services will actually be used in connection with the applicant.
- d) if a Medical Officer of the Commonwealth has requested a signed undertaking to present to a health authority in Australia for a follow-up medical assessment, the applicant must provide such an undertaking.

*Source:* Migration Regulations 1994, Schedule 4, ss.4005–7.

## **Issues arising from the Migration Act exemption**

Several inquiry participants argued the Migration Act exemption in the DDA is too broad. In particular, they argued that the health requirements for permanent migration have unfairly or unreasonably denied entry to some people with disabilities and their families. Their concerns appeared to relate mainly to the manner in which the health requirements may have been applied, rather than to the existence of the requirements themselves (box 12.4).

In response, DIMIA (sub. DR365, p. 2) said ‘decisions to refuse applications on the grounds of health are not made lightly’ and there are several checks and balances.

First, DIMIA emphasised that ‘each case is considered on its merits’ and that health requirements ‘do not automatically exclude persons with disabilities from visiting or migrating to Australia’ (sub. DR365, p. 2). Where they are required, health

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assessments are conducted for each applicant (and any dependants) by a medical officer approved for this purpose by the Australian Government. This can involve tuberculosis x-rays, HIV tests and other checks as deemed necessary by the medical officer. Under the Migration Regulations (reg. 225A), ‘the Minister must seek the opinion’ of a medical officer and DIMIA officers ‘must accept the opinion’ of the medical officer on whether the applicant meets the health requirement (DIMIA 2003b). This means that in practice, the decision must be based upon the individual’s health assessment results and not on assumptions based on stereotypes.

**Box 12.4 Inquiry participants’ views of the *Migration Act 1958* exemption**

If these [entry] decisions are to remain exempt from the DDA, HREOC would like to see improved criteria and procedures within immigration law in relation to admission of people with disabilities. (HREOC, sub. 143, p. 18)

... the Migration Act in particular ... has had the effect that people with a disability are often ineligible to emigrate to Australia because of their disability. ... it is not uncommon for immigrant families to leave behind a relative with a disability. (National Ethnic Disability Alliance, trans., pp. 1433–4)

... people with disabilities are discriminated against unreasonably because of the operation of the health rules. The rules should require that the estimated cost of entry or migration be offset against the skills and resources of the applicant ... [there are a] number of skilled migrants with disabilities who are denied permanent residency purely on the basis of disability. (Blind Citizens Australia, sub. DR269, pp. 21–2)

... if the Australian community supports the DDA, ... why doesn't that then translate to other sorts of overseas obligations? ... The positive contribution that people with disability can make both to the workforce and to the Australian community generally should be required to be taken into account, not just the supposed economic burden in terms of cost to the health care system. (NAPWA, trans., p. 2340–1)

... the [DDA] recognises the rights of citizens with a disability and their ability to participate ... the absence of human rights of non-citizens with the same mix of skills and abilities is contradictory and out of step with international obligations. (New South Wales Office of Employment Equity and Diversity, sub. DR354, p. 9)

... people with disabilities are often discriminated against in applying for residency and visas are rejected on the basis of a person's disability as a matter of course. ... while there may be a health related basis to reject an applicant ... being a person with a disability does not automatically provide a justifiable reason. (Disability Council of New South Wales, sub. DR291, p. 6)

[The DDA] should also prevent a person who has a disability or has a dependent family member or spouse with a disability, being refused immigration where that person would otherwise be eligible. This exemption serves only to permit discrimination, even where all other criteria have been met, and frequently serves to condone stereotypes regarding the capacity of the individual. (Guide Dogs Association of South Australia and the Northern Territory Inc., sub. DR292, p. 4)

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DIMIA provides detailed information about the basis for its decisions. For example, with regard to the health requirements for general skilled migration visas:

A decision is made on, first, any detection of tuberculosis, ... and then, of medical conditions which are likely to result in significant health treatment and community service costs in Australia, or which may use treatment or services in short supply. Some allowance is made for normal health and welfare costs (calculated as a multiple of average annual costs for an Australian). When the Medical Officer ... is of the opinion that an applicant's costs are beyond these and are therefore significant, this generally leads to refusal. The cost assessment takes no regard of whether a person has or intends to take private health insurance or make other financial or nursing arrangements to lessen the claim on public funds. (DIMIA 2004, p. 43)

Second, DIMIA advised that for applicants who have not met the medical requirements for humanitarian, refugee, family and some other visa categories 'it is possible for the Minister to waive the last requirement (to do with the cost of potential treatment)' for compassionate or other compelling reasons.<sup>3</sup> For sponsored employment visas (for permanent or long-term temporary entry), a health waiver may be granted if the sponsoring employer undertakes 'to meet all costs related to the disease or condition' of the applicant or dependents (Migration Regulations 1994, s.4006A(2)). A waiver could enable, for example, a person with unique skills to be sponsored by an employer, subject to the employer meeting any health costs related to their (or their dependants') pre-existing condition—not unlike pre-existing conditions clauses in health insurance policies. In such cases, it would be up to the employer to balance the value of the prospective employee to their business against the employee's prospective health costs.

Health requirement waivers are made at the discretion of the Minister (on advice from DIMIA and medical officers) and are mainly made for compassionate or family reasons. DIMIA (sub. DR365, p. 2) advised that health waivers are used regularly and that 'people with disabilities can and do migrate to Australia'. NAPWA, for example, confirmed that discretion has been exercised to grant visas to people with HIV/AIDS, but said such cases were rare:

There are cases ... of compassionate circumstances ... where people [with HIV/AIDS] can argue the economic case, in terms of them being able to cover their health costs and matters such as that, where visas have been granted, but they are the exception rather than the rule. (trans., p. 2338)

Third, review processes are available for applicants whose visa application is refused on health or other grounds through the Migration Review Tribunal, the Refugee Review Tribunal and, in some cases (such as some onshore applicants),

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<sup>3</sup> Waivers are not possible for offshore visa applicants who have untreated tuberculosis or other untreated diseases that may be a threat to public health in Australia. Applicants may be asked to re-apply following treatment.

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Australia's courts. Applicants are advised of 'any review rights and provided with information on how to apply for review' at the time of refusal (DIMIA 2003b). Further medical and other evidence can be submitted to a designated medical officer 'to have a fresh look' at the case. Based on the opinion of the medical officer, the review body can then: affirm the original refusal, set aside the refusal, or refer the case to DIMIA officers for further consideration of a waiver (DIMIA 2003b).

### *Exemption of administrative matters under the Migration Act and Regulations*

The DDA exempts not only the Migration Act and regulations from its discrimination provisions, but also 'anything done by a person in relation to the administration' of them (s.52(b)). This means all actions done in relation to the Migration Act and regulations are exempt from the DDA. Despite this, DIMIA advised that it has received legal advice to the effect that:

... section 52 of the DDA does not exempt DIMIA from complying with the DDA in respect of premises it occupies. That is, DIMIA is required to provide appropriate disabled facilities at detention centres. (sub. DR365, p. 3)

This approach to disability access is consistent with the DDA's application to the administration of Commonwealth laws and programs (s.29) and with the Commonwealth Disability Strategy that applies to all Australian Government agencies (see appendix E). This approach is to be commended. It also indicates that the current exemption of *all* administrative actions done under the Migration Act may be wider than necessary.

The *Age Discrimination Act 2004* contains a similar exemption for anything done in the administration of the *Migration Act 1958*, the *Immigration (Guardianship of Children) Act 1946* and their regulations. In its submission to the Senate inquiry into the Age Discrimination Bill, HREOC disagreed that all actions done under the Migration Act should be exempt. HREOC said that actions done in direct compliance of the law should be exempt, but discretionary acts done to administer immigration law (such as providing information or services to immigrants and applicants) should not, because to do so would be 'inconsistent with the general thrust of the provisions in the Bill in relation to Commonwealth laws and programs' (HREOC 2003j, pp.21–2). A similar argument would appear to apply to the DDA—that is, that the exemption of *all* actions done under the Migration Act and its regulations is inconsistent with the general application of the DDA to the administration of all other Commonwealth laws and programs.

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## Conclusions on the Migration Act exemption

The criteria for Australia's various visa entry categories are designed to address a wide range of health, labour market, social welfare, financial and other government policy considerations. They are, by nature and design, discriminatory. Some of these criteria may indirectly discriminate against some people with disabilities, in that they will be less likely to meet the criteria than people with no disability. However, the Australian Government considers these entry criteria necessary for the health and welfare of the Australian community. Their exemption from the DDA (s.52(a)) is therefore appropriate. Care should be taken in applying and explaining visa entry criteria to people with disabilities, so as to minimise unnecessary perceptions of disability discrimination.

On the other hand, the Productivity Commission considers general administrative functions, policies and practices under the Migration Act and its regulations should comply with the DDA in the same manner as other Commonwealth laws and programs (all of which are subject to the DDA and the Commonwealth Disability Strategy, see appendix E). Indeed, as noted above, DIMIA appears to have adopted this approach in some activities already. DIMIA agreed there may be a case for reviewing the Migration Act exemption and that:

... general administrative actions taken under the Migration Act and regulations should be separated in principle from those areas of the Act that are directly relevant to the criteria and decision-making for Australian entry and migration. (sub. DR365, p. 3)

However, DIMIA also emphasised that 'particular care' would need to be taken in separating 'general administrative actions' from 'the criteria and decision-making for Australian entry and migration visa categories' because the two parts are 'closely entwined' and may significantly overlap (sub. DR365, p. 3). DIMIA should be consulted about any review or amendment of section 52 of the DDA.

### FINDING 12.2

*An exemption for the Migration Act 1958 and its regulations in the Disability Discrimination Act 1992 (s.52) is appropriate, but its current scope may be wider than necessary.*

### RECOMMENDATION 12.3

***The exemption of the Migration Act 1958 and its regulations in the Disability Discrimination Act 1992 (s.52) should be reviewed and amended to ensure it:***

- *exempts only those provisions which deal with issuing entry and migration visas to Australia*
- *does not exempt administrative processes under the Act and its regulations.*

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## 12.3 Exemptions for specific activities

Many activities other than insurance and superannuation and the Migration Act are also expressly exempt from the DDA. Many of these exemptions are also only partial. They include: combat and peacekeeping duties in Australia's armed forces and Australian Federal Police; special measures (that is, disability services intended to benefit people with disabilities); capacity-based wages for people with disabilities; and domestic duties in employment. Some functions of charities are also exempt (s.49), however, this exemption did not attract comments from inquiry participants and is not discussed here.

### Combat and peacekeeping duties

The DDA exempts combat duties and peacekeeping by the defence forces (s.53) and peacekeeping services by the Australian Federal Police (s.54). However, the nature of these duties had to be prescribed in regulation, which was done in the Disability Discrimination Regulations 1996. Before the introduction of the regulations, this exemption did not operate, and discrimination against people with disabilities in these activities (primarily in the form of exclusion) had to be defended using inherent requirements, unjustifiable hardship or the 'reasonableness test' in indirect discrimination in the same manner as for other activities covered by the DDA. In the case of *X v the Commonwealth* ((1999) HCA 63), a person who tested positive to HIV was found to fail the inherent requirements for combat duty. In deciding on this case, the High Court observed that section 53:

... would appear to have been incorporated into the Act precisely ... to relieve the [Australian Defence Forces] from the necessity to conform with the Act in respect of such duties and services as specified, the 'combat duties' and 'combat-related duties' mentioned in section 53. (*X v the Commonwealth* (1999) HCA 63)

HREOC disputed the need for this exemption in the DDA (sub. 219, p. 15) on the ground that 'the concept of inherent requirements ought to be regarded as sufficient'. In its submission to the Senate inquiry into the Age Discrimination Bill—which contained an exemption for all Australian Defence Force positions rather than only combat-related positions as in the DDA (s.39(1) and schedule 1 of the Bill)—HREOC said such a wide exemption was inappropriate. It recommended replacing it with non-discriminatory recruitment tests (HREOC 2003j, p. 17).

Without this exemption in the DDA, the defence forces would have to rely on the inherent requirements (see chapter 8) and indirect discrimination test of reasonableness (see chapter 11) in the same manner as civilian employers. This approach could be costly and create uncertainty until suitable legal precedents have been established. If a whole class of employment positions are known to be

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unsuitable for people with disabilities, then a general exemption such as this one provides certainty and eliminates the need for expensive litigation on a case-by-case basis, which would be likely to achieve the same result as achieved by the exemption (in this case denial of employment in combat and peacekeeping duties).

FINDING 12.3

*The limited exemptions in the Disability Discrimination Act 1992 for combat duties and peacekeeping services in the Defence Forces (s.53) and peacekeeping services by the Australian Federal Police (s.54) are appropriate and do not require amendment.*

### **Special measures for the benefit of people with disabilities**

‘Special measures’ that provide services, programs, facilities or funds that are ‘reasonably intended’ to benefit people with disabilities are exempt from the DDA (s.45). This exemption aims to protect ‘special needs’ services and facilities for people with particular types of disabilities from being challenged by people who do not have the particular disability.

Other anti-discrimination Acts in Australia contain similar exemptions for special disability services. As noted by the New South Wales Law Reform Commission in relation to that State’s *Anti-discrimination Act 1977*, ‘not every treatment that involves a distinction is discrimination’, and not all discrimination is unlawful. In particular, ‘benign discrimination’, where a person’s characteristics justify different treatment that is to their benefit (such as medical, social welfare or other treatment), should not be unlawful (NSW Law Reform Commission 1999, para. 3.41).

HREOC argued that in one sense, this provision is not necessary because a person cannot make a valid claim of being discriminated against if they do not have the particular disability identified as necessary to secure an opportunity or benefit. However, HREOC also said the special measures exemption helps to protect information requests that are necessary or reasonable to establish eligibility for a benefit or opportunity directed at people with a disability (sub. 143, p. 11).

HREOC expressed concern about the wide interpretation given to a similar provision in the ACT’s *Discrimination Act 1991*. The ACT Administrative Appeals Tribunal found that a similar provision protected any act done in the course of administering a beneficial program and not just beneficial acts. The National Council for Intellectual Disability was similarly concerned, stating:

... there have been decisions which have held that once a service is characterised as a service for the purpose of meeting the ‘special needs’ of people with disability or an affirmative action program, then nothing done by the service provider in the course of



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that program or service can constitute an act of discrimination on the ground of disability even if the same action would be an act of discrimination in a similar context of a person without a disability. (sub. 112, p. 12)

HREOC (sub. 143) suggested that the appropriate test under the DDA is whether the action complained of was reasonably intended to be beneficial, not whether it occurred in the administration of a program or facility intended overall for beneficial purposes. Alternatively, the National Council for Intellectual Disability suggested looking to US legislation for an example of how to apply discrimination legislation to disability services:

One alternative is to follow the US approach of legislating to require service providers to deliver their services in the ‘least restrictive environment’ and with ‘maximum integration’ within the community. (sub. 112, p. 12)

In response, HREOC (sub. 219, p. 7) said this idea could be useful, but noted the principles suggested—least restriction and maximum integration—are relevant to all goods and services and not just to special disability services. The National Council for Intellectual Disability’s suggestion might be more relevant to service charters for disability services (such as those developed under the Commonwealth, State and Territory Disability Agreement, see chapter 15 and appendix E) than to anti-discrimination legislation.

### *Conclusions on the special measures exemption*

The Productivity Commission considers that the reason for introducing the special measures exemption—to ensure it is lawful to do things for the benefit of people with disabilities—is still relevant but has been misinterpreted or misunderstood. As stated in chapter 2, the DDA is aimed at eliminating discrimination on the ground of disability, so as to promote equality of opportunity for people with disabilities. The DDA does not (and cannot) aim to achieve equality of outcomes or of resources.

The eligibility, availability and quality of disability services are often the subject of complaint by people with disabilities, but rarely on the ground of discrimination. Some people might consider their access to disability services inadequate, inappropriate, undesirable or even unfair, but these problems are rarely due to disability discrimination. Complaints about them should be addressed directly through appropriate complaint mechanisms, such as those operated by State and Territory government health departments, disability services commissions and ombudsmen, and not through the DDA.

The Productivity Commission considers that it is therefore appropriate that the DDA does not apply to the establishment, funding or eligibility criteria for disability

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services designed to benefit particular groups in the community. However, the exemption should be clarified to ensure that people with disabilities are not discriminated against in the general administration of special disability services. Premises for special services, for example, should be accessible to all, and information about special services should be available in accessible formats to people with all types of disability who want to find out about those services.

FINDING 12.4

*An exemption for ‘special measures’ that are reasonably intended to benefit people with disabilities in the Disability Discrimination Act 1992 (s.45) is appropriate, but its current scope is unclear.*

RECOMMENDATION 12.4

***The exemption in the Disability Discrimination Act 1992 for ‘special measures’ that are reasonably intended to benefit people with disabilities (s.45) should be amended to clarify that it:***

- *exempts the establishment, eligibility criteria and funding of these measures*
- *does not exempt general actions done in their administration.*

## **Capacity-based wages for people with disabilities**

Under section 47(1)(c) of the DDA, it is not unlawful to discriminate against a person with a disability by paying them a capacity (or productivity)-based wage, as long as this wage is consistent with an Award, a certified agreement or an Australian workplace agreement, and the person would otherwise be eligible for the Disability Support Pension.

Many workers with a disability who are employed either in the ‘open’ labour market, or in the ‘supported employment’ labour market (also known as ‘business services’ or ‘sheltered workshops’) receive wages lower than full wages, based on their assessed relative capacity (or productivity). One scheme for assessing relative capacity is the federal Supported Wage System.

The Australian Government has developed a wage assessment tool as part of its Quality Assurance System reforms of disability services.<sup>4</sup> This tool is intended to assist business service providers to meet National Disability Services Standards 9,

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<sup>4</sup> The wage assessment tool was introduced on 21 April 2004 as part of new financial supports and wage increases for people with disabilities employed in business services (Howard 2004).

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which applies to the employment of people with disabilities. The tool allows business service providers to calculate the wages of their employees on the basis of capacity, competency and registered Awards or agreements. Its adoption by business services providers will be a condition of continued Australian Government funding after December 2004 (subject to some flexibility, so as not to disadvantage any person with a disability who is employed in business services).

A number of inquiry participants criticised the wages paid by business services providers (Job Watch, sub. 90; National Council in Intellectual Disability, sub. 112; New South Wales Council for Intellectual Disability, sub. 117; Disability Action Inc., trans., p. 929; Intellectual Disability Review Panel, sub. 207). They had four main criticisms.

- Wages are often not based on any Award or agreement registered by the Australian Industrial Relations Commission (AIRC).
- Capacity assessments are often not conducted by accredited, independent assessors.
- Employees are often not able to make informed decisions about their pay and conditions (for the purpose of making workplace agreements).
- The AIRC is not obliged to only make Awards or certify agreements containing a Supported Wage System clause.

Some of these issues have been raised in complaints to HREOC (under the DDA) and to the AIRC (under the *Workplace Relations Act 1996*).

Inquiry participants indicated there is uncertainty about how the DDA applies to these business services. Some considered that the specific provisions of section 47(1(c)) should govern capacity-based wages paid in the business services sector (Job Watch, sub. 90, sub. 215; HREOC, sub. 143). However, the Intellectual Disability Review Panel (sub. 207) argued that business services could be characterised as ‘special measures’ and hence be exempt from the DDA under the ‘special measures’ exemption (s.45).

The Productivity Commission considers that any uncertainty about the application of the DDA (and especially of the special measures exemption) to business services should be clarified. It is a general principle of statutory interpretation that specific provisions take precedence over general provisions. Therefore, the special measures exemption (s.45) should not apply to capacity-based wages that are governed by section 47 of the DDA.

Job Watch suggested that section 47 of the DDA be amended to prescribe the Supported Wage System wage assessment tool as the only method to be used by

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employers wishing to offer capacity-based wages. Job Watch also suggested that the DDA be amended to require the AIRC and State tribunals to only register Awards or agreements that include a Supported Wage System clause (sub. 90, sub. 215).

The Productivity Commission considers that it is not desirable either to prescribe a particular wage assessment tool within the DDA, or to include in the DDA a reference to the operation of the AIRC and State tribunals. The AIRC is entrusted with applying the Workplace Relations Act, which contains a requirement to adhere to the principles of the DDA in industrial relations. The Productivity Commission shares HREOC's wish to move the issue of wages for people with disabilities into the mainstream (HREOC, sub. 219).

#### FINDING 12.5

*The current provisions of the Disability Discrimination Act 1992 dealing with capacity-based wages are appropriate (s.47(1)(c)). However, there is some uncertainty about the interaction between provisions dealing with capacity-based wages and the exemption for 'special measures' (s.45).*

#### RECOMMENDATION 12.5

***The Disability Discrimination Act 1992 should be amended to clarify that the general exemption for 'special measures' (s.45) does not apply to wages paid to people with disabilities. Wages should be subject to the specific provisions for capacity-based wages in the Act (s.47(1)(c)).***

## Domestic duties in employment

Within some areas of activity listed in the DDA, there are small, specific exemptions. Domestic duties are exempt from the employment provisions of the DDA. A similar exemption appears in virtually all Australian anti-discrimination legislation, including the federal race and sex discrimination Acts and the State and Territory Acts.

Two inquiry participants questioned the need for the domestic duties exemption in the employment section of the DDA:

Such an anomaly needs to be addressed as discrimination against an employee should be unlawful regardless of the 'type' or location of employment. Other employees within the home (eg contract workers, support workers and attendants) are covered under the Act, thus it is not merely the location but the 'type of duties' that are exempted. (Joe Harrison sub. 55, p. 8; Disability Council of New South Wales, sub. 64, p. 20)

HREOC indicated that it does not know the underlying rationale for the domestic duties exemption in the Act (HREOC, trans., p. 1143) and that it favoured a review of the extent of this exemption (sub. 219, p. 13).

A similar exemption for domestic duties appears in the *Age Discrimination Act 2004*. The explanatory memorandum for the Bill to this Act explains the exemption ‘reflects the distinction between public life, where age discrimination is prohibited, and private life where a greater degree of individual choice is recognised’ (para. 45). This argument is likely to be relevant to disability discrimination also.

## 12.4 Exemptions for prescribed laws

The Disability Discrimination Regulations 1996 list the ‘prescribed laws’ referred to in section 47(2) of the DDA, which states that it is not unlawful under the DDA for persons to do something in compliance with a prescribed law. All of the current eight prescribed laws are from New South Wales and South Australia (table 12.1).

Table 12.1 **Prescribed laws, Disability Discrimination Regulations 1996**

<i>Jurisdiction</i>	<i>Act or Regulation</i>	<i>Sections or clauses</i>
New South Wales	<i>Mental Health Act 1990</i>	All
New South Wales	Mental Health Regulations 1995	All
New South Wales	Motor Traffic Regulations 1935	10(1)(c) and 11
South Australia	<i>Firearms Act 1977</i>	20 and 20A
South Australia	<i>Motor Vehicles Act 1959</i>	88 and 148
South Australia	<i>Education Act 1972</i>	75(3) and 75A
South Australia	Industrial and Employee Relations (General) Regulations 1995	11
South Australia	<i>Workers Rehabilitation and Compensation Act 1996</i>	30A and schedule 3

Source: Disability Discrimination Regulations 1996, Schedule 1 (regulation 2A).

HREOC supported the mechanism for prescribing laws, which it considered was

... an appropriate means for determining when the DDA should give way to other laws, noting that this mechanism provides for scrutiny through provision for parliamentary disallowance as well as through consultation between governments. (sub. 143, p. 14)

The South Australian Government (sub. DR356) also supported the mechanism. It argued that the reasons for prescribing its laws are still relevant and indicated it would formally request the retention of all its prescribed laws.

By contrast, the National Council on Intellectual Disability was critical of the mechanism (sub. 112, p. 11). Similarly, the Physical Disability Council of NSW

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recommended removing all exemptions, including actions taken under prescribed laws (sub. 78).

The Productivity Commission considers that the option for prescribing laws provides a useful mechanism for identifying when governments consider other laws should take priority over the DDA. However, the Commission notes the mechanism for prescribing legislation has been used inconsistently. As noted, New South Wales and South Australia are the only States to have prescribed legislation; other jurisdictions have similar legislation, but have chosen not to have it prescribed. These governments might believe that their laws fall within other exemptions contained in the DDA, or that the defences within the Act would apply.

The Disability Rights Network of Community Legal Centres (sub. 74) suggested that the list of prescribed laws be reviewed regularly or have a time limit:

Whatever gets prescribed should be reviewed because things change. It shouldn't just be permanent exemption. (trans., p. 401).

HREOC noted the advantages of this approach:

It may be appropriate to consider whether the power to prescribe laws should be for five years at a time similar to the temporary exemption power to ensure that the reasons for prescription remain current and that other laws provide for access and equity as far as is feasible (which may change over time including with technical developments). (sub. 219, p. 14)

The Productivity Commission recognises the advantages of introducing a time limit, of say five years, on laws prescribed under section 47. They should then be subject to review by the Attorney General. The Commission considers that it would be desirable to review the current prescribed laws as soon as possible. In doing so, the rationale for the inconsistent treatment of similar legislation in other States and Territories could be addressed. The South Australian Government (sub. DR356) argued that the relevant South Australian government agencies should be consulted before any changes are made to the current list of laws. The Commission considers it appropriate to give the New South Wales and South Australian Governments the opportunity to justify the ongoing prescription of their legislation.

#### FINDING 12.6

*There is no consistency in the prescription of laws under section 47 of the Disability Discrimination Act 1992. Some State laws are currently exempted by prescription, while similar laws in other States and Territories are not.*

*The laws prescribed under section 47 of the Disability Discrimination Act 1992 should be reviewed every five years to ensure that the reasons for their prescription remain current. The laws that are currently prescribed should be reviewed as soon as possible and delisted if necessary.*

## 12.5 Exemptions for health and safety reasons

The DDA exempts actions that are necessary to protect the public from infectious diseases. Measures that are ‘reasonably necessary to protect public health’ where a person’s disability is an infectious disease are exempt from the DDA (s.48). HREOC considered that this exemption has operated appropriately. Most other anti-discrimination Acts in Australia and other countries that include disability as a ground for discrimination include a similar exemption for infectious disease. However, unlike some other anti-discrimination Acts, the DDA does not exempt actions that are considered necessary for health and safety reasons more generally.

There are many health and safety regulations that apply in different contexts in Australia (such as employment, education and public safety). Some inquiry participants were concerned about potential conflict between the DDA and health and safety laws, and the lack of ‘protection’ from DDA complaints in these cases (box 12.5).

Gleeson CJ in *Purvis v New South Wales (Department of Education and Training)* ((2003) HCA 62) implied that where there is serious conflict between the DDA and occupational health and safety laws, the latter may override the former in practice:

In construing the Act, there is no warrant for an assumption that, in seeking to protect the rights of disabled pupils, Parliament intended to disregard Australia’s obligations to protect the rights of other pupils. Furthermore, a contention that the legislative power of the Commonwealth Parliament extends to obliging State educational authorities to accept, or continue to accommodate, pupils whose conduct is a serious threat to the safety of other pupils, or staff, or school property, would require careful scrutiny. (*Purvis v New South Wales (Department of Education and Training)* (2003) HCA 62, p. 3)

However, this intention is not evident in the DDA. Further, the DDA is silent about conflicts with other health and safety regulations, such as those covering air safety.

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### Box 12.5 Health and safety and the DDA

Some inquiry participants were concerned that where the DDA conflicts with health and safety requirements, the obligations under the DDA could prevail and jeopardise health and safety:

If the DDA were in direct conflict with State [occupational health and safety] legislation, the DDA would prevail to the extent of any inconsistency, due to section 109 of the Commonwealth Constitution. Within the DDA, there are no express exceptions relating to occupational health and safety or the general health and welfare of others. Whilst there is a so-called 'defence' of unjustifiable hardship, this is difficult to establish for government respondents and, in respect of schools, does not apply once a student is enrolled at the school. (Victorian Government, sub. DR367, p. 6)

It is essential that employers retain their ability to deal with unacceptable behaviour in the workplace, without being faced with discrimination complaints from persons arguing that their unacceptable behaviour was a symptom of, say, their depressed state or their addiction to a prohibited substance. Under occupational health and safety laws, employers have a duty of care towards employees, contractors, customers and all other persons in the workplace. Very large penalties apply if duties of care are breached. (Australian Industry Group, sub. DR326, pp. 8–9)

Schools are genuinely struggling in trying to accommodate the needs of students with disabilities with their duty of care obligations to other students and staff. ... Schools should have the flexibility and capacity to make decisions to protect the welfare of the student with a disability and the welfare of other students and staff. (Association of Independent Schools of South Australia, sub. DR357, p. 2)

... it may be possible to seek to use the [DDA], or to argue that it can be used, to prevent the prohibition of smoking in enclosed workplaces and public places. Certainly, anecdotal evidence indicates that some employers and occupiers of public venues are concerned about the possibility of action being taken against them under the [DDA] by a person who smokes in the event that they do introduce a prohibition, and that this concern may play a role in dissuading them from doing so. (Cancer Council Victoria, sub. DR294, p. 2)

... our fundamental concern is with [how] a conflict between the obligations imposed by the Commonwealth, through the Attorney-General's standards, and the aviation safety requirements imposed by the Commonwealth Civil Aviation Safety Authority would be resolved. (Australian Airports Association, trans., pp. 2138)

By contrast, other inquiry participants were concerned that legislation covering health and safety issues, particularly occupational health and safety legislation, was being used to undermine the rights of people with disabilities:

...this [Occupational Health and Safety] legislation is taking precedence over the needs of the children, yet the departments have a policy on inclusive education ... I'm really scared that a lot of kids are going to be adversely affected but it's not just a problem that's going to come up within the education system. It could be in employment, it could be in all sorts of areas when they've got to address issues of challenge, in my view. (People with Disability Australia, trans., p. 2473)

... it doesn't take into account the fact that people's lives are being significantly restricted by the application in a very rigid way of those sorts of [health and safety] considerations. (Action for Community Living Inc., trans., p. 2670)



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This conflict between the DDA and health and safety or air safety obligations raises issues about consistency between Australian Government laws generally; and about whether occupational health and safety obligations should take priority over DDA requirements specifically.

As a matter of principle, any new legislation introduced by the Australian Government (including subordinate regulation such as disability standards) should be consistent with existing legislation (Banks 2003). A number of processes are available for ensuring consistency: first, the Attorney-General's Department has a role in identifying any potential conflicts between new and existing Australian Government legislation; second, all new legislation affecting business must be accompanied by a regulation impact statement, which considers the costs and benefits of a regulatory proposal, including interactions with existing legislation; and third, with respect to the DDA, HREOC has powers to comment on inconsistencies (see chapter 9).

There are a number of options for addressing the potential conflict between the DDA and health and safety requirements specifically:

- make no changes to the current arrangements
- grant temporary exemptions for organisations facing conflicts between the DDA and health and safety obligations
- prescribe health and safety legislation (including regulations)
- address health and safety issues in disability standards
- introduce a general exemption for health and safety matters.

Each of these options is discussed below.

### **No change to the current arrangements**

The first option for resolving any potential inconsistency between the DDA and health and safety regulations is to do nothing. According to NAPWA, the DDA does not override health and safety legislation (including subordinate regulations):

The DDA ... already contains significant defences available to employers, service providers and accommodation providers that take into account safety concerns. The DDA does not require employers or service providers to not discriminate against someone if this would result in a safety risk. For example, an employer can lawfully discriminate against a person provided that the person is unable to properly perform the functions of the job, including ensuring the health and safety of others (the section 15(4) 'inherent requirements' defence has been interpreted by the courts in this way). (sub. DR315, p. 2)

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The main advantage of this approach is its simplicity because it relies on existing defences within the DDA. Further, there is little direct evidence of conflicts between the DDA and other health and safety requirements.

However, this option provides little certainty for organisations if and when conflicts arise. Organisations would have to rely on the complaints process to determine the extent to which complying with the DDA would result in unjustifiable hardship (see chapter 8). Some participants (such as the Australian Airports Association, sub. 213) expressed concern about whether health and safety issues are given sufficient practical consideration in unjustifiable hardship cases.

Because it relies on individual complaints, this option does not address the underlying, systemic conflict between health and safety and DDA requirements.

### **Grant temporary exemptions**

Second, organisations could seek a temporary exemption from the general provisions of the DDA. HREOC suggested that this may be an appropriate course of action in the short term while long term solutions (such as prescribing laws or formulating disability standards) are being developed:

... the exemption mechanism is available and ... one of the purposes for which we see that power as legitimate is to provide people with certainty while legislative or regulatory issues are resolved. (trans., p. 2862)

Like the first option, the main advantage of this approach is its simplicity: it requires no changes to the DDA. It may provide organisations with some certainty in the short term, but it does not provide a long term solution. Temporary exemptions are issued for a maximum of five years, with no guarantee of renewal, and are granted at HREOC's discretion. Further, temporary exemptions would not generally address systemic conflicts. The Australian Airports Association considered this an inappropriate response:

Suggesting that airports must seek exemption under the Disability Discrimination Act on the basis of 'unjustifiable hardship' completely fails to resolve those conflicts in any satisfactory way. (sub. 213, p. 11)

### **Prescribe health and safety obligations**

Third, health and safety legislation (including regulations) could be prescribed under section 47(2) of the DDA. As discussed above, acts done in compliance with a prescribed law are not unlawful under the DDA. The Australian Airports

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Association suggested prescribing Civil Aviation Safety Authority (CASA) regulations that potentially conflict with the transport disability standards:

Section 47(2) of the *Disability Discrimination Act 1992* allows regulations to be made to resolve conflict of this nature. We believe this avenue should be used rather than leaving airports in a state of doubt and uncertainty as to their legal obligations. (sub. DR285, p. 1)

This option is most effective in providing the certainty that many organisations are seeking. The Productivity Commission's recommendation to review the list of prescribed laws every five years would ensure the reasons for their prescription remain relevant, and provide reassurance to people with disabilities that the prescribed health and safety laws cannot be used to undermine the objectives of the DDA in the long term. However, these regular reviews would carry some administrative costs.

This option could not be used in all cases of inconsistency between the DDA and health and safety requirements because not all health and safety requirements are enforced through legislation. For example, air safety requirements can be imposed as licence conditions (Australian Airports Association, trans., p. 2140).

### **Include in disability standards**

Fourth, any conflicts between health and safety requirements and the DDA could be addressed in disability standards, where they exist. The disability standards for accessible public transport include a review mechanism, which means that they must be reviewed within five years of their introduction and then every five years after that (a similar process has been included in the draft disability standards for access to premises). HREOC suggested this as a means of addressing the concerns raised by the Airports Association of Australia about the potential for conflicts between the transport disability standards and CASA air safety requirements:

The standards set up a review process which allows for these issues to be raised and there's an ongoing accessible public transport and national advisory committee process which has modal subgroups for bus, rail, taxis. The aviation one hasn't met as often as the others, but the capacity for it is there. (HREOC, trans., p. 2863)

Similarly, the Disability Discrimination Commissioner, Dr Sev Ozdowski, suggested that there 'may be a role for standards in addressing some specific issues including perhaps about the relationship between occupational health and safety laws and discrimination laws' (Ozdowski, 2003a, p. 5).

Addressing any conflict directly through disability standards would provide certainty to the organisations to whom they apply. However, it would not address

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conflicts in areas not covered by disability standards. The Productivity Commission noted in chapter 14 that it is unlikely that disability standards will be developed for all areas covered by the Act, particularly employment, which is an area where the potential for conflict is high. Further, the Commission found that the process for developing standards is very slow, and hence this option will not address conflicts in the short term.

Using disability standards to give priority to health and safety requirements over the general provisions of the DDA may also be construed as using standards to extend the scope of the Act because no such exemption exists in the Act. The Productivity Commission recommends against using disability standards to alter the fundamental scope of the DDA elsewhere in this report (see chapter 14).

### **A general exemption for health and safety**

Finally, the DDA could be amended to provide a general exemption for actions done to protect health and safety. The Cancer Council Victoria submitted that:

... the operation of the *Disability Discrimination Act 1992* (Cth) would be enhanced by the inclusion of a section that exempts ‘discrimination which is reasonable in order to protect the health or safety of any person or of the public generally’ from the operation of the Act, or a similarly worded section. (sub. DR294. p. 1)

A general exemption for health and safety reasons appears in other anti-discrimination laws (box 12.6).

HREOC noted ‘it may be desirable ... to consider means of improving coordination between anti-discrimination and health and safety laws’ (trans., p. 2858). However, it submitted that any change to the DDA to allow a general exemption for a health and safety matter:

... should not lead employers or others to believe that people with disabilities generally present health and safety risks. ... Or, for that matter, that discriminatory measures are a generally necessary and permissible response to such risks. (trans., p. 2859)

The Productivity Commission considers that if such an exemption were available in the DDA, it must be clearly and narrowly defined, so that merely claiming there is a health and safety problem would not be enough of itself to trigger the exemption. The (otherwise discriminatory) proposed action would need to meet criteria such as:

- it is truly necessary to protect the health and safety of others and/or the person who would otherwise be unlawfully discriminated against
- it is reasonable in the circumstances
- there is no reasonable alternative that would avoid the discriminatory action

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- reasonable adjustments to address the discrimination should have been attempted, unless they would cause an unjustifiable hardship (see chapter 8).

#### **Box 12.6 Health and safety provisions in anti-discrimination legislation**

The *Equal Opportunity Act 1984* (Victoria) states:

s.80(1) A person may discriminate against another person on the basis of impairment or physical features if the discrimination is reasonably necessary:

- (a) to protect the health or safety of any person (including the person discriminated against) or of the public generally;
- (b) to protect the property of any person (including the person discriminated against) or any public property.

The *Human Rights Act 1993* (New Zealand) does not 'prevent different treatment based on disability' in employment where:

s.29(b)... the environment in which the duties of the position are to be performed or the nature of those duties, or of some of them, is such that the person could perform those duties only with a risk of harm to that person or to others, including the risk of infecting others with an illness, and it is not reasonable to take that risk.

The *Disability Discrimination Act 1995* (UK) states discriminatory treatment in the provision of goods, services and facilities is justified only if:

- s.20(3) (a) in the opinion of the provider of services, one or more of the conditions mentioned in subsection (4) are satisfied; and
  - (b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.
- ... (4) (a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person).

### **Conclusion on health and safety issues**

A number of inquiry participants were concerned about inconsistencies between the DDA and health and safety requirements. As a matter of principle, any new legislation introduced should be consistent with existing legislation. Government processes should, as a rule, minimise any potential inconsistencies. Further, the DDA has a range of mechanisms already in place to address this issue. These include the unjustifiable hardship defence, which the Productivity Commission has recommended be extended to all areas covered by the DDA (see chapter 8), temporary exemptions and the power to prescribe laws and regulations.

It would be possible to go further and amend the DDA to provide a general exemption for health and safety reasons similar to that applying in some other jurisdictions. However, as a rule, new regulations should only be implemented where there are demonstrable problems and regulation is the best way of addressing them. The Productivity Commission considers that the current mechanisms appear

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adequate to address inconsistencies between the DDA and health and safety requirements. It does not appear necessary to amend the DDA to include a specific exemption for health and safety matters at this stage.

FINDING 12.7

*Potential exists for conflict between the Disability Discrimination Act 1992 and health and safety laws and other requirements. A range of options is available for addressing this issue.*

## 12.6 General conclusions on exemptions

The DDA contains a number of exemptions that mean disability discrimination is not unlawful in specified situations. The Productivity Commission recommends retaining these exemptions. The reasons for retaining these exemptions include:

- to clarify the intent of the legislators regarding the scope of the DDA (for example, that it is not unlawful to discriminate to the benefit of people with disabilities, such as by providing ‘special measures’ or services for them)
- to provide certainty where the DDA might otherwise be ambiguous (for example, in determining what are the ‘inherent requirements’ of combat duties)
- to reduce (potentially unnecessary) legal processes and transaction costs
- to address other important Government policy objectives (for example, in migration policies or in the provision of special measures and programs).

However, some clarification of the scope and application of the exemptions seems necessary. In principle, any exemptions that are deemed necessary should be:

- kept to the minimum necessary to address the area of activity identified as requiring an exemption (for Government policy, community or other reasons)
- clearly defined and supported by appropriate explanatory material
- clearly justified for national policy reasons and community-wide benefits
- of a form that does not set up new discriminatory barriers (for example, they should exempt types or areas of activity, rather than groups or classes of people)
- able to operate in a transparent, consistent and accountable manner.

On balance, some exemptions from the DDA are appropriate. They must be clearly defined and restricted to only those actions for which an exemption is necessary for public policy reasons.