
13 Complaints

The main mechanism for enforcing compliance with the *Disability Discrimination Act 1992* (DDA) is the complaints process established under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOC Act). The complaints process is directly targeted towards achieving the first object of the DDA—eliminating discrimination on the ground of disability. It also contributes to the second object—ensuring equality before the law—by providing an avenue for people with disabilities to enforce their rights. Similarly, it contributes to the third object, attitudinal change, by promoting awareness of the rights of people with disabilities.

This chapter examines the general strengths and weaknesses of the complaints process and the respective roles of the Human Rights and Equal Opportunity Commission (HREOC) and the Federal Court and Federal Magistrates Court (‘federal courts’), and makes several recommendations for improving the complaints process.

13.1 Strengths and weaknesses of the complaints process

The HREOC Act complaints process commences with a conciliation phase conducted by HREOC. If agreement cannot be reached, complainants have the option of proceeding to the federal courts (see chapter 4).

Strengths

The main strength of the complaints process is its ability to address individual instances of discrimination. The existence of a complaints process can deliver benefits, even in the absence of a formal complaint (Disability Council of NSW, sub. 64, p. 15). In some cases it can also address systemic discrimination, although other DDA mechanisms have greater effects at a systemic level (see below).

By first attempting relatively informal conciliation, the complaints process can often redress discrimination without the stress, delays and cost of court proceedings. The complaints process attempts to balance education and awareness raising (through conciliation) with coercion (through the courts).

Conciliation

An initial emphasis on conciliation reflects the DDA's aim of changing attitudes and improving understanding of the rights of people with disabilities. Alternative models that relied solely on adversarial processes could encourage negative attitudes and lead to resentment of people with disabilities (see chapter 10).

Many inquiry participants acknowledged the benefits of conciliation as an alternative to the courts, including the National Council of Independent Schools' Associations (sub. 126), the Investment and Financial Services Association (sub. 142) and the Anti-Discrimination Board of New South Wales (sub. 101).

Confidentiality

There is no legal requirement in the DDA or HREOC Act for all aspects of a complaint to be kept confidential.¹ In practice, the parties are left to agree on how confidential they want to keep the details of the complaint and the conciliation outcome. In most cases, HREOC investigates complaints in a confidential fashion and publishes conciliation outcomes in a 'confidentialised' form that does not identify the parties. Complaints are investigated openly in two situations: first, when HREOC decides to investigate a complaint through a public inquiry; and second, when a terminated complaint is taken to the federal courts for public hearing.

The confidentiality of individual complaints preserves the privacy of complainants and respondents. This might encourage more complaints to be brought forward. Participants such as the Equal Opportunity Commission Victoria noted the importance of confidentiality for some complainants (sub. 129, p. 15).

By avoiding possible negative publicity for respondents, confidentiality might also encourage better outcomes in the conciliation process (Blind Citizens Australia (sub. 72, p. 16)). However, confidential conciliation shields respondents from public scrutiny that might encourage future compliance with the DDA.

The Productivity Commission recognises that confidentiality can encourage: complainants to come forward; the parties to contribute frankly to conciliation; and respondents to take remedial action that they might resist if it meant publicly admitting to discrimination. On the other hand, confidentiality can limit the spread

¹ Under the HREOC Act, HREOC has discretion over disclosing details of a complaint (s.14). However, if HREOC decides to hold a compulsory conference, that conference must be held in private (s.46PK(2)). If a complaint is terminated, the President of HREOC may make a written report on the complaint to the Federal Court or the Federal Magistrates Court, but the report must not set out anything said or done in the course of the conciliation (s.46PS).

of useful information. On balance, the Productivity Commission considers that the parties should determine the level of confidentiality, but that HREOC should give as much publicity to outcomes as possible while maintaining that confidentiality.

Weaknesses

The effectiveness of the complaints process depends to a large extent on its accessibility to complainants. The Equal Opportunity Commission Victorian summarised many of the barriers to access:

... our estimate is that some 70 per cent of people who think they've had their rights abused, generally across the board, in fact elected not to bring a complaint. It might be because of fear of victimisation or the cost. Sometimes it's barriers, it's the nature of the process itself. They fear the legalism, they fear the cost, they fear the exposure that a complaints process can entail. (trans., p. 1895)

General barriers to access are discussed below. Particular barriers to access for people with multiple disadvantages are discussed in chapter 5.

Costs of making a complaint

Although there is no fee for lodging a complaint with HREOC, the process can still involve both financial and non-financial costs. Additional costs are likely if the complaint is heard formally in the Federal Court. Costs can include:

- general costs of learning about the complaints process—many people need assistance from an advocate or lawyer
- costs of preparing a complaint, including the cost of the time required, which could be significant if the complaints process is drawn out
- costs of legal representation (box 13.1) if the person requires it but does not qualify for government sponsored legal aid or *pro bono* (free) assistance from private law firms
- costs associated with losing at court. If the complainant loses, there is a risk that they will have to pay the respondent's costs
- significant 'intangible' (non-monetary) costs, particularly related to stress (box 13.1).

Box 13.1 **Costs of making complaints**

There can be substantial tangible costs associated with making a complaint, especially if the complainant proceeds to the federal courts. Costs of legal representation in the federal courts are generally higher than those faced during HREOC conciliation.

Advice to HREOC from specialist legal firms operating in this area suggests that costs for one party alone are likely to be of the order of:

\$5,000–\$10,000 for a HREOC conciliation process; and

\$30,000–\$40,000 for a Federal Magistrates Court hearing, typically lasting two days. (Australian Building Codes Board 2004, p. 22)

The Australian Taxi Industry Association noted:

A major metropolitan network advised that in one case initiated by an individual that has so far proceeded to the Federal Magistrates Court, its legal costs have exceeded \$76,000, with the risk of escalating costs depending on the outcome of the case and any subsequent appeals. (sub. DR311, p. 5)

There are also intangible costs associated with making a complaint. It can be stressful for both parties, but particularly for complainants unused to such processes (Queensland Council of Carers Australia in Carers Australia sub. 32).

Many people with disabilities have conditions that can be exacerbated by the stress associated with making a complaint. Advocacy Tasmania noted:

If people have a mental health disability which is active at the time, they often find the stress of making a complaint to the Commission too stressful on top of managing their mental health problems. Alternatively they are fearful that taking up a complaint will put too much stress on them and they may then become unwell. (sub. 130, pp. 2-3)

Sources: Advocacy Tasmania sub. 130; Australian Building Codes Board 2004; Australian Taxi Industry Association sub. DR311.

Many inquiry participants argued that concern over costs discouraged disability discrimination complaints, particularly at the court stage (Public Interest Advocacy Centre, sub. 102; Disability Discrimination Legal Service, sub. 76; Law Institute of Victoria, sub. 81; Australian Federation of Deaf Societies, sub. 233). In a survey conducted by HREOC in 2002,² 26 per cent of complainants whose complaints were not conciliated stated that they did not proceed to court because of cost. Almost 30 per cent of complainants who settled despite being dissatisfied with the settlement terms did so because they thought the costs of court action would be too high (HREOC 2002f, pp. 18–19).³

² The survey covered complaints made under the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and the DDA in 2001, but gives a broad indication of the views of complainants under the DDA.

³ The percentage of complainants whose complaints were not conciliated but who did not proceed to court because of costs is, coincidentally, the same for those who did not proceed to court because of the complexity of the process (26 per cent). Likewise, the percentage of complainants

The Australian Taxi Industry Association argued that ‘these percentages are probably not unrepresentative of commercial disputes generally where court costs are a major factor in people settling for less than their ideal outcome’ (sub. DR311, p. 4). The Productivity Commission acknowledges that court costs might discourage commercial and other court cases but considers that the financial situation of disability discrimination complainants is likely to make them much more risk averse than parties to commercial disputes. In both cases, parties are influenced by the expected outcome (balancing the chance of winning against the chance of losing and associated outcomes). But discrimination complainants are likely to be much more concerned about the risk of losing, even with the same expected outcome as parties to a commercial dispute.

Even if similar proportions of parties to commercial disputes and complainants ‘dropped out’ of court action, a distinction should be drawn between decisions based on commercial imperatives and individuals seeking redress for unlawful discrimination. Decisions about defending legislated human rights should not be overly influenced by the financial consequences of losing. Cost orders in the federal courts are discussed in section 13.3.

The Productivity Commission considers that the potential costs could be a significant barrier to some individuals wishing to make a complaint or proceed to court.

Formality of the complaints process

Many people find the complaints process formal, complex, confusing and intimidating. A complaint sets a legal process in motion, and so a degree of formality is inevitable if the principles of natural justice are to be followed.⁴

The onus is on complainants to prove their complaint, and they must collect and document information relevant to their case. This work can be difficult, time consuming and potentially costly, although HREOC’s powers to request information from respondents can assist complainants to gather information (section 13.2). A considerable degree of literacy and comprehension is required, creating barriers for many people with disabilities, particularly those with cognitive or communication disabilities, and people with disabilities from non-English speaking or Indigenous backgrounds (Disability Council of NSW, sub. 64).

who settled despite being dissatisfied with the settlement terms because of costs is, coincidentally, the same as for those who settled because of the complexity of the process (30 per cent).

⁴ The principles of natural justice are general rules that ensure that people subject to the law are treated fairly.

However, the degree of formality depends on how far the complaint proceeds before being conciliated or terminated. Depending on the circumstances of the case, HREOC may attempt informal conciliation at the outset. For example, when a matter is relatively simple or the parties express interest in resolving the complaint quickly, HREOC may suggest early conciliation without lengthy investigation of the complaint (HREOC, sub. 235, p. 3). There might also be potential to encourage informal resolution at an early stage through co-regulatory resolution processes (see chapter 14).

Court processes are the most significant source of formality in the complaints process.⁵ In a survey conducted by HREOC in 2002, 26 per cent of complainants whose complaints could not be resolved by conciliation stated that they did not proceed to the federal courts because the process ‘would be complex and involve too much time and effort’. Almost 30 per cent of complainants who settled even though they were not satisfied with the settlement terms did so for this reason (HREOC 2002f, pp. 18–19).

As part of a broader reform aimed at making the Federal Court more user friendly, the Federal Magistrates Court was created in June 2000 (see chapter 4). As a court, it is still more formal than the tribunals used in the States and Territories to hear discrimination matters, but the Commonwealth Constitution prevents judicial matters from being heard in an administrative setting such as a tribunal.

The Productivity Commission recognises that the complaints process can seem daunting, particularly in relation to the federal courts. However, if federal anti-discrimination legislation is to be tested in law it must be heard in the courts. The introduction of the Federal Magistrates Court as an alternative to the Federal Court has been a positive step. However, the potential for costs to be awarded against unsuccessful complainants remains (section 13.3).

Inequality in the negotiating positions of complainants and respondents

The basis for successful conciliation is that the two parties meet as more or less equals to reach agreement on how the alleged discrimination might be addressed.

The HREOC Act provides that an individual is not entitled to be represented at conciliation by another person, and an organisation is not entitled to be represented by a person other than an officer or employee of that body, unless the person presiding consents (s.46PK). HREOC noted that it attempts to ensure fair and

⁵ Although the HREOC Act states that the courts are not bound by ‘technicalities or legal forms’ in anti-discrimination proceedings (s.46PR), the Commonwealth Constitution imposes unavoidable restrictions on the way in which courts operate.

adequate participation for both parties rather than necessarily excluding representatives (pers. comm., 17 March 2004). Guidelines in HREOC's complaints handling manual require that participants have adequate notice, representation be allowed and time to arrange such representation be allowed if desired. The guidelines also address the power balance in the conciliation process and in the conference itself.

However, even with this safeguard, the bargaining position of the two parties is rarely equal. Almost inevitably, respondents are better resourced to fund legal representation and more capable of mounting a case than complainants. The Australian Association of the Deaf argued:

... what the community wants is actually very clear and simple, ... but around the negotiating table with lawyers and technical experts this simple situation becomes extraordinarily complicated and tied up in legal and technical jargon and skullduggery. It is very difficult for community representatives and for the ordinary man or woman on the street to have the knowledge and expertise to argue with that level of professionalism. (sub. 229, p. 7)

Although legal representation is not required at the conciliation stage of the complaints process, it is becoming more usual (HREOC 2002f, p. 2). Virtually all complainants who go to the federal courts have legal representation. People with disabilities have options for obtaining legal assistance, ranging from general advice from advocacy organisations to legal advice and representation from government sponsored programs. The Disability Discrimination Legal Services, set up as part of the introduction of the DDA, are particularly important.

But even without formal legal representation on either side, complainants can find themselves in an unequal position in a conciliation meeting:

... an ordinary person with a disability ... having registered that complaint, then goes to a conciliation meeting or a mediation meeting and finds himself sitting across the table from four suits ... in those circumstances the complainant finds him or herself in a situation that they didn't think they were getting into. (Physical Disability Council of New South Wales, trans., p. 1244)

HREOC survey data suggest there is a substantial imbalance in the legal resources of the two parties. In 2002, 22 per cent of complainants settled, despite being dissatisfied with the settlement terms, because they were concerned about needing and obtaining legal representation. No respondents gave this reason. In cases that could not be conciliated, 19 per cent of complainants did not proceed to court because of concerns about needing and obtaining legal representation (HREOC 2002f, pp. 18–19).

However, respondents also face incentives to avoid going to court (National Council of Independent Schools' Associations, sub. 126; Australian Taxi Industry Association, sub. DR311; Australian Industry Group, sub. DR326). HREOC's survey found that 51 per cent of respondents who settled, despite being dissatisfied with the settlement terms, did so because they did not want to defend the matter in court (HREOC 2002f, p. 17).

The Productivity Commission considers that inequality between the parties can reduce the effectiveness of the complaints process. Complainants might not be in a position to present their case adequately against better resourced respondents. Concerns about court costs and legal representation can create incentives for complainants to accept less favourable settlements than they might otherwise accept. While facing incentives to avoid going to court, respondents also face incentives not to negotiate in good faith if they believe complainants do not have the resources to proceed to court.

The inequality of resources between complainants and respondents, and the complexity of the complaints process, emphasise the importance of legal assistance for people with disabilities who are making complaints (see chapter 15).

Fear of victimisation

Fear of victimisation (being treated badly because you have made or threatened to make a complaint) can make people reluctant to complain. The Anti-Discrimination Board of NSW noted that the fear of victimisation is real for many people with disabilities (sub. 101, p. 10).

The fear of victimisation can be greater in small communities or institutions where anonymity is rare (DDA Inquiry regional forums) and where complainants are dependent on the person or organisation about whom they would like to complain (Darwin Community Legal Service, sub. 110). Queensland Parents of People with Disabilities (QPPD) noted:

QPPD is deeply concerned by our contact with families across Queensland who have expressed fear of speaking out against abuse and/or neglect. Many families fear that there will be retribution shown towards their son or daughter if they take action. ... Others feel that if they speak out they may lose the little support they may be receiving. This risk is real. (QPPD, sub. DR325, p. 3)

Even if potential complainants do not fear active victimisation, they can be reluctant to complain when they know that their relationship with the alleged discriminator or their community will change irrevocably.

The DDA makes victimisation an offence, with a penalty of six months imprisonment.⁶ A person can make a complaint of victimisation to HREOC and have it dealt with as a complaint of ‘unlawful discrimination’, and if a matter is terminated, the complainant can then pursue the matter to the federal courts. In 2000-01 HREOC received five allegations of victimisation. In both 2001-02 and 2002-03 HREOC received two victimisation complaints. HREOC has no data on whether anyone has pursued a complaint of victimisation as an offence directly with the police. There have been no prosecutions under the DDA’s victimisation provisions.

Because victimisation is an offence, a complaint to the police would require the criminal law standard of proof of ‘beyond reasonable doubt’. A victimisation complaint to HREOC requires the civil law standard of proof ‘on a balance of probabilities’. The DDA also makes harassment (humiliating comments, actions or insults about a person’s disability) unlawful in many areas (see chapters 4 and 11). HREOC noted that the lower standard of proof for a DDA complaint might have encouraged people to make complaints rather than go to the police (sub. 219, p. 31).

The Productivity Commission considers that the fear of victimisation can create a significant barrier to people with disabilities using the complaints process. Increased awareness of the anti-victimisation provisions of the DDA is important, but victimisation can be insidious and difficult to prove, and its effects can be difficult to reverse.

Limited role in achieving systemic change

Although largely based on individual claims of unlawful discrimination, complaints can sometimes lead to systemic change (see chapter 10). In some circumstances, complaints can create publicity, from which other people in similar situations can learn. Where cases are heard in the federal courts, complaints can set binding legal precedents. Complaints can also be used strategically to drive broad change. The Deafness Forum of Australia, for example, lodged representative complaints against five hotels and made those complaints public (sub. 71, p. 9).

HREOC has specific powers under the HREOC Act to hold public inquiries where individual complaints have systemic implications. HREOC has used these powers to inquire into a small number of complaints—for example, to investigate captioned television, captioning in cinemas and self-service petrol stations (see appendix D).

⁶ Under the DDA, victimisation includes subjecting, or threatening to subject, a person to any detriment because they have made (or propose to make) a complaint under the DDA (s.42).

However, although some individual complaints have had important systemic effects, several factors limit the role of individual complaints in achieving systemic change.

First, it is difficult for a complaint to be lodged when discrimination is proposed but has not yet occurred—for example, in the design of a new building. The DDA’s definition of direct discrimination includes ‘proposed’ discrimination (s.5(1)), but a complaint can only be made by ‘a person aggrieved by the alleged unlawful discrimination’. It can be difficult to show that a person is an ‘aggrieved person’ when the discrimination has not yet occurred. In addition, the DDA does not cover proposed acts of indirect discrimination (s.6) (see chapter 11).

Second, it is not sufficient for a person to have a ‘purely moral or in principle grievance’ to make a complaint; complaints must be based on actual instances of discrimination. This is an appropriate limitation for a complaints-based system, but as noted by Joe Harrison, the requirement to be an ‘aggrieved person’ can limit the DDA’s effectiveness as a tool to address systemic discrimination (sub. 55, p. 7).

Third, there might not be sufficient incentive for an individual to complain, even though the complaint could create benefits for society as a whole. Complaints with wider societal benefits (or spillover effects) might not be pursued because no single individual has sufficient incentive to make a complaint.⁷

FINDING 13.1

The main strength of the complaints process is its ability to address individual instances of discrimination on the ground of disability. While individual complaints can sometimes lead to systemic change, there are limits to the extent they can do so.

FINDING 13.2

People with disabilities can face significant barriers to using the complaints process, including:

- *financial and non-financial costs of making a complaint*
- *complexity and potential formality of the process*
- *evidentiary burden on complainants*
- *inequality of the negotiating positions of complainants and respondents*
- *fear of victimisation if a complaint is made.*

⁷ Spillover effects occur when people other than those directly involved are affected. For example, one person complaining about lack of access can lead to improved access for many other people.

FINDING 13.3

There are net benefits from allowing parties to conciliation to determine the level of confidentiality, and for the Human Rights and Equal Opportunity Commission to publicise outcomes as widely as possible, subject to maintaining that confidentiality.

The following sections discuss the respective roles of HREOC and the federal courts, and recommend some improvements to the complaints process.

13.2 HREOC administrative issues

HREOC plays an important role in the complaints process (see chapter 4). This section examines several administrative issues, including: satisfaction with HREOC complaints handling; HREOC's timeliness; the influence of the location of HREOC on the complaints process; HREOC's investigative and advocacy roles; and arrangements with State and Territory anti-discrimination bodies.

Complaint handling

HREOC successfully conciliates a relatively high proportion of DDA cases compared to those State and Territory anti-discrimination bodies that publish comparable data. HREOC noted that:

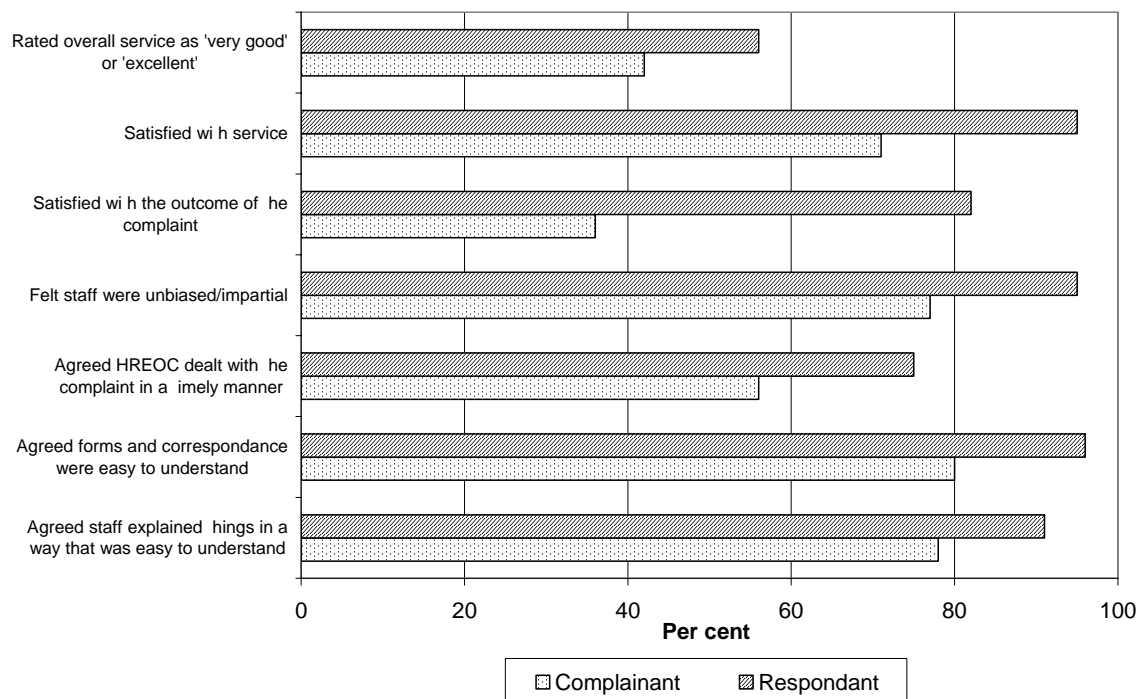
For example, in 2001-02 HREOC's rate of conciliation across all Acts was 30 per cent and 37 per cent in DDA. [The Western Australian Equal Opportunity Commission] reported 17.2 per cent of their matters were conciliated; [the Tasmanian Anti-Discrimination Commission] reported 25 per cent resulted in a conciliated agreement; [the Equal Opportunity Commission Victoria] reported 21.5 per cent.⁸ (sub. 235, att. C, p. 2)

HREOC conducts an annual survey of complainants' and respondents' satisfaction with its complaint handling processes (figure 13.1).

⁸ If complaints that were declined as lacking substance were excluded, the success rate for complaints referred to conciliation by the Equal Opportunity Commission Victoria rises to 45 per cent (Equal Opportunity Commission Victoria, trans., p. 2603).

Figure 13.1 Satisfaction with HREOC complaints handling

Percentage of DDA complainants and respondents satisfied with HREOC's handling of complaints, 2002-03



Data source: HREOC (sub. 235, att. A, p. 4).

HREOC's stated performance target is for 80 per cent of parties to be satisfied with the overall complaint handling process. For parties to DDA complaints in 2002-03:

- 86 per cent of parties to DDA complaints were satisfied with the service (compared to 84 per cent for all anti-discrimination complaints)
- respondents were more satisfied than complainants with all aspects of HREOC's complaint handling
- more respondents than complainants thought that forms and correspondence and staff explanations were easy to understand
- only 36 per cent of complainants were satisfied with the outcome, compared with 82 per cent of respondents—this might reflect the fact that 65 per cent of survey participants were involved with complaints that HREOC had declined or terminated.

HREOC surveyed parties' perceptions of the conciliator and conciliation processes in 2001. HREOC concluded that 'overall, these ratings paint a positive picture of HREOC's conciliation process' (sub. 235, att. A, p. 8).

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- Parties involved in a successful conciliation tended to have positive perceptions of the process—99 per cent of both complainants and respondents stated that they understood the process, and 79 per cent of complainants and 73 per cent of respondents stated that the conciliator helped them reach agreement. Only 3 per cent of complainants and no respondents stated that the conciliator was biased against them.
 - In unsuccessful conciliations, where complainants in particular could be expected to be unhappy with the result, the majority of both complainants and respondents understood the process (83 per cent and 100 per cent respectively) and felt the conciliator was assisting the process (59 per cent and 73 per cent respectively). As for successful conciliations, only 3 per cent of complainants and no respondents stated that the conciliator was biased against them.

These surveys appear to indicate that most people who have been party to a complaint are broadly satisfied with HREOC's complaint handling. However, some participants to this inquiry suggested that it would be useful to get more assistance from HREOC in making a complaint, particularly in filling out forms. Others suggested provision should be made for oral complaints (Victor Camp, sub. DR339, p. 3).

FINDING 13.4

Most complainants and respondents appear reasonably satisfied with the Human Rights and Equal Opportunity Commission's complaint handling process.

Timeliness

The benefit of a successful outcome from a complaint is eroded if the complaint takes too long to resolve (The Disability Rights Network of Community Legal Centres, sub. 74, p. 1). Long delays can also discourage people from making complaints (Anti-Discrimination Board of New South Wales, sub. 101, att. 1, p. 21).

In 2002-03, 17 per cent of DDA complaints were finalised in less than three months, and 43 per cent were finalised in less than six months. Over 90 per cent were finalised in under 12 months, well above HREOC's target of 75 per cent and above the 84 per cent achieved for complaints under all federal anti-discrimination Acts. All DDA complaints were finalised within 24 months (HREOC, sub. 235, att. B, p. 2).

Despite these results, several inquiry participants criticised HREOC's timeliness. The National Ethnic Disability Alliance, for example, stated:

Due to a lack of resourcing, the current waiting time for the processing of individual complaints is so excessive that many people with disability are deterred from even lodging a complaint. (sub. 114, p. 14)

Timeliness also received a relatively low satisfaction rating by parties to complaints in 2002-03, with a marked difference between complainants and respondents. Only 56 per cent of complainants felt HREOC had dealt with their complaint in a timely manner, compared with 75 per cent of respondents (figure 13.1).

HREOC stated that its timeliness is 'comparable with State discrimination bodies, where that information is available' (HREOC, sub. 235, att. B, p. 1).⁹

Some inquiry participants suggested imposing statutory limits on the time that HREOC would be allowed to take for particular processes once the complaint has been lodged. In other jurisdictions, limits apply to the time taken to decide whether to accept or decline a complaint. In the ACT, for example, the decision to commence an investigation must be made within 60 days (ACT Discrimination Commissioner, sub. 151, p. 7).

HREOC's timeliness in accepting or declining complaints depends on the number and complexity of complaints and the available resources. A surge in the number of complaints, coupled with limited resources, can add to delays. In such a situation, statutory time limits could create incentives to discourage complainants or terminate complaints prematurely (Australian Federation of Aids Organisations, sub. 88). The Productivity Commission considers that the absence of formal time limits for accepting or declining complaints gives HREOC some flexibility in meeting fluctuating workloads. However, administrative targets for case management purposes can assist performance monitoring and provide some guidance to parties to complaints.

No jurisdictions place time limits on conciliation. The amount of time required for each conciliation depends on the need for investigation and the requirements of the two parties. Many causes of delay are outside HREOC's control.

FINDING 13.5

Uncertain case loads and investigation requirements make it inappropriate to impose statutory time limits on either accepting or rejecting complaints, or conciliation. However, administrative targets can play a useful role in performance monitoring and providing guidance to parties to complaints.

⁹ HREOC provided data comparing its complaint handling timeframes with those reported by Western Australian, South Australian and Victorian anti-discrimination bodies in 2001-02. HREOC noted that other jurisdictions do not report comparable timeliness information.

Location of HREOC

HREOC is physically located in Sydney, but must deal with complaints from around Australia.¹⁰ It uses FreeCall telephone numbers, faxes and the Internet to communicate with complainants and respondents. If a complaint requires conciliation outside Sydney, HREOC schedules a number of conciliations to occur at a given time and location.

Some inquiry participants argued that HREOC's location is a barrier to complainants located outside New South Wales (Mackay Regional Council for Social Development in Queensland, sub. 87; ACT Anti-Discrimination Commissioner, trans., p. 718; Tasmanian Anti-Discrimination Commissioner, trans., p. 312).

HREOC argued that its geographic location is not a disadvantage in dealing effectively with complaints (trans., p. 1175). This view is supported by complaint information. HREOC receives a large number of complaints from New South Wales, but when the data are standardised by the number of people with disabilities in each State and Territory, that State does not appear to be overrepresented in DDA complaints data (figure 13.2).

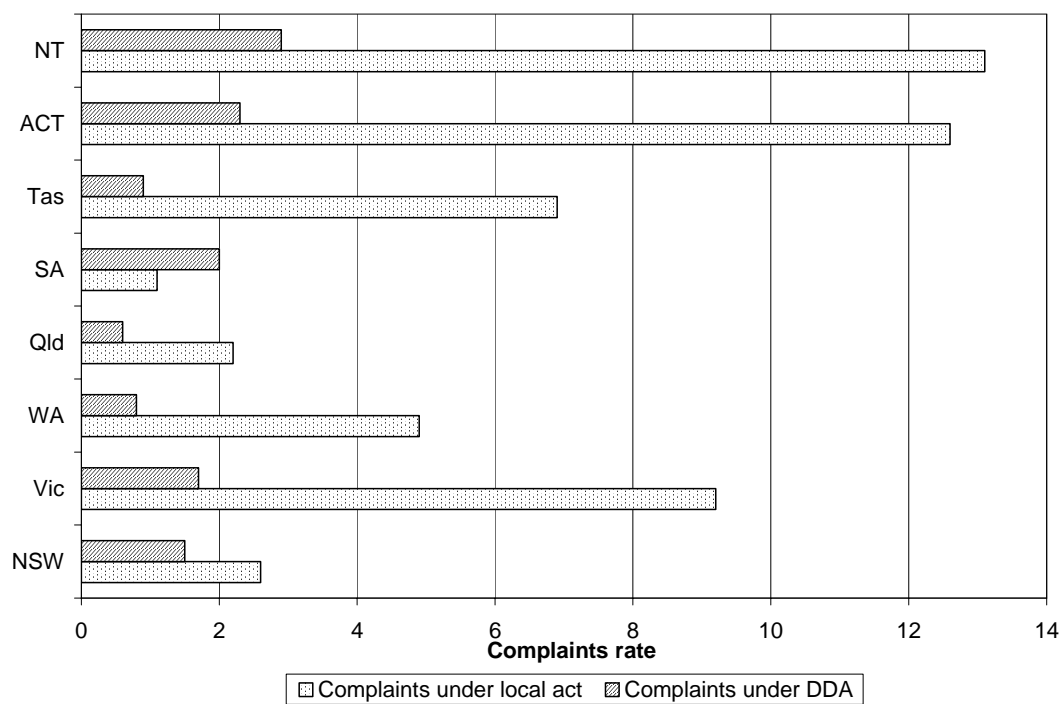
In all States and Territories, the majority of people with disabilities appear to favour their local anti-discrimination body over HREOC (figure 13.2). There could be many reasons for this preference, including familiarity with the local organisation or commissioner, and the less formal approach and lower cost of tribunals used by the States and Territories.

FINDING 13.6

The Human Rights and Equal Opportunity Commission's location in Sydney does not appear to be a barrier to Disability Discrimination Act 1992 complainants outside New South Wales. However, the majority of complainants favour State and Territory based anti-discrimination processes.

¹⁰ In the past, HREOC has had a physical presence in Tasmania, Queensland and the ACT, and various cooperative arrangements with State and Territory anti-discrimination bodies.

Figure 13.2 Disability/impairment complaints under the DDA and State and Territory legislation, per 10 000 population with a disability^{a,b}
 Complaints in 2002-2003, population with a disability in 1998



^a Different counting rules in different jurisdictions mean that State and Territory complaint rates are not strictly comparable. ^b The ABS Survey of Disability, Ageing and Carers excluded some remote areas of Australia. This is likely to have underestimated the number of people with disabilities in the Northern Territory, in turn overestimating the complaints rate.

Data sources: State and Territory anti-discrimination bodies annual reports; ABS 1999b cat. no. 4430.0; HREOC sub. 235, att. E, p. 1.

Investigative powers and advocacy

As described in chapter 4, HREOC investigates complaints in the first instance, to see if they can be resolved informally. In complex or disputed cases, HREOC conducts further investigations. Some inquiry participants argued that HREOC should make more use of its investigative powers and take on a more active advocacy role.

Investigative powers

As noted above, the complaints process places a substantial evidentiary burden on complainants, who must prove (on a balance of probabilities) that unlawful discrimination occurred. Complainants are assisted in collecting evidence by HREOC's general practice of requesting information from respondents, assessing it

and advising the complainant how the complaint will proceed (HREOC, sub. 235).¹¹

Several participants argued that HREOC should provide more assistance to complainants. The Disability Discrimination Legal Service, for example, stated:

HREOC is not meant to act merely as a conduit of correspondence between the complainant and respondent to a complaint. A comprehensive and rigorous investigation at such stage would greatly assist complainants in weighing their options or accepting a compromise. (sub. 76, pp. 11–12)

The need for investigation varies according to the complaint. It is not appropriate to turn the investigation into a ‘mini-hearing’, because this would compromise HREOC’s role as a neutral conciliator. However, it is important that HREOC is not merely a ‘letterbox’ for conveying information from one party to the other.

The Productivity Commission considers that the existing statutory powers to request information are appropriate. The Commission is not in a position to assess the adequacy of HREOC’s investigations, but has already noted that complainants and respondents are generally satisfied with HREOC’s complaint handling, which includes collecting and assessing information. HREOC also appears to be following good administrative practice, with well documented procedures and ongoing monitoring of performance.

Advocacy role

As discussed above, many inquiry participants expressed concern about the inequality of parties involved in complaints (section 13.1). Complainants must make important decisions at various stages of the process, including whether to lodge a complaint (and in which jurisdiction), whether to accept a conciliation offer and whether to proceed with a terminated complaint to the federal courts.

HREOC can assist complainants to lodge complaints but it cannot provide legal advice (other than to assess whether a complaint has sufficient substance to be formally accepted and referred for conciliation). Further, HREOC cannot recommend settlement of a complaint on specific terms—that is up to the parties concerned. HREOC recognised that this created concern for many complainants:

... many complainants approach HREOC with an expectation that HREOC will advocate for them and are therefore dissatisfied with impartial handling of the complaint. (sub. 235, att. A, p. 4)

¹¹ The HREOC Act empowers HREOC to require people to provide information or documents (s.46PI) and direct people to attend compulsory conferences (s.46PJ).

Several participants questioned why HREOC does not do more to assist complainants as an advocate. The Physical Disability Council of Australia (sub. 113) suggested that HREOC or its complaints/legal section could cease to be a conciliator in DDA complaints and become the legal advocate for complainants.

In other Australian jurisdictions, some State anti-discrimination Acts grant their anti-discrimination bodies some advocacy functions. Western Australia's *Equal Opportunity Act 1984* specifies that where a complaint is referred to the tribunal and the complainant requests, the Equal Opportunity Commission of Western Australia must assist the complainant in presenting his or her case. Larry Laikind (sub. 70) noted that human rights organisations in other countries can act as advocates for complainants. However, many of these bodies initiate complaints but do not conciliate them.

The HREOC Act makes some provision for addressing inequality of the parties. HREOC must assist a complainant who has difficulty formulating or writing a complaint. HREOC can conduct conciliations as it sees fit, so long as they are held in private (s.46PK(2)) and do not disadvantage either party (s.46PK(3)). This reflects considerations of natural justice that require impartiality. HREOC noted that its 'complaint practice aims to be flexible and responsive to individual complaints' and that 'the conciliation process may take many forms depending on the circumstances of the complaint' (sub. 235, pp. 5–6).

The Productivity Commission considers that HREOC should not be an advocate for complainants, because this would create a potential conflict with HREOC's role as an impartial conciliator. The HREOC Complaint Handling Section appears to be maintaining an appropriate balance between 'flexible and responsive' processes and the requirements of impartiality.

This is not to imply that complainants do not need support. The importance of access to legal assistance is discussed in chapter 15. The potential for disability organisations to play a larger role in making representative complaints is discussed below (section 13.4).

FINDING 13.7

The Human Rights and Equal Opportunity Commission's current complaints handling role is appropriate and should not extend to advocacy for individual complainants.

HREOC initiation of complaints

Under the original DDA, HREOC was able to initiate complaints. Constitutional concerns meant HREOC never used this power and it was removed in 2000, when the DDA was amended to transfer the power to determine disputes from HREOC to the Federal Court (see chapter 4).

Many inquiry participants argued that transferring the determinations power to the Federal Court greatly reduced any potential conflict of interest arising from HREOC initiating complaints, and that this power should be re-introduced (Queensland Anti-Discrimination Commission, sub. 119; Anti-Discrimination Board of New South Wales, sub. 101). HREOC itself noted that ‘a more active HREOC enforcement role could be provided for ... by re-instating a revised version of HREOC’s ability to initiate complaints itself’ (sub. 143, p. 49).

Comparable powers are held by some other government bodies in Australia, including the Australian Competition and Consumer Commission, and by anti-discrimination bodies overseas (HREOC, sub. 219, p. 19). A slightly different approach is adopted in Victoria, where under certain circumstances the Equal Opportunity Commission Victoria is empowered to investigate matters on referral from either the Minister or the Victorian Civil and Administrative Tribunal (s.157(1) of the *Equal Opportunity Act 1995* (Victoria)).

Although HREOC no longer determines complaints, the re-introduction of a power to initiate complaints could still create a potential conflict of interest with its conciliation role. Some participants believed a power for HREOC to initiate complaints would adversely affect the conciliation process:

Effective conciliation requires trust. There is a potential for conflict of interest and diminished mutual trust between parties to a dispute if HREOC’s power to initiate complaints was reintroduced. (National Council of Independent Schools’ Associations, sub. 126, p. 15)

HREOC noted:

...some concerns are also expressed [in submissions] ... regarding possible conflict of this role with the conciliation role. HREOC agrees that this concern would need to be addressed in considering reinstatement of a self-start power. (sub. 219, p. 19)

Perceptions of HREOC’s independence are important to maintaining confidence in the complaints system. The Australian Taxi Industry Association noted that:

... our own organisation and others must be concerned about the question mark about HREOC being both, if you like, the prosecution and also the judge, at least during the conciliation period. (trans., p. 2368)

If HREOC was to be given such powers it should be subject to HREOC establishing to the Federal Attorney General's satisfaction that initiation of the complaint was of sufficient importance to be in the national interest. Our strong preference, however, is that such powers should not be created. (sub. DR311, pp. 4–5)

Blind Citizens Australia had similar concerns about HREOC initiating complaints:

Given the importance of [HREOC's] complaints handling functions we believe that respondent confidence in the independence of [HREOC] is likely to be compromised. Such confidence is crucial to the respondent participating in the complaint investigation process let alone the chances of a successful outcome. (sub. DR269, pp. 28–29)

To avoid this perceived conflict of interest, HREOC suggested an alternative approach based on a power to proceed directly to the federal courts, bypassing the conciliation stage (trans., p. 2849). HREOC stated that this approach would not apply to trivial issues, and would only be triggered where there was a serious systemic problem.

Such a power could be useful to help enforce disability standards, for example, where a railway operator fails to achieve its required percentage of accessible facilities by the first five-year compliance point under the Disability Standards for Accessible Public Transport. It would be more effective for HREOC to take action rather than rely on an individual complaint, since individuals might have difficulty establishing that they are personally aggrieved (HREOC, pers. comm., 17 March 2004).

The Productivity Commission considers that the potential conflict of interest between HREOC initiating complaints and conducting conciliations makes it inappropriate to reinstitute HREOC's power to initiate complaints. The suggestion that HREOC be able to proceed directly to court has some attraction as a means of addressing serious systemic issues. However, while it lessens the potential for a conflict of interest, it does not altogether remove it. Furthermore, it denies the respondent the opportunity for conciliation.

FINDING 13.8

Reintroduction of the Human Rights and Equal Opportunity Commission's power to initiate complaints or introduction of a new power to commence court actions do not appear to be warranted. Such powers have the potential to undermine its impartiality.

Cooperative arrangements

As noted above, the majority of complainants favour State and Territory anti-discrimination bodies over HREOC. Improved cooperative arrangements with the States and Territories could enhance the effectiveness of the DDA. Cooperation is needed to minimise confusion and ensure complaints are handled appropriately. In chapter 10, the Productivity Commission recommends an expanded role and membership for the Australian Council of Human Rights Agencies to facilitate such cooperation.

Many people with disabilities and many disability groups are unaware that there are both federal and State and Territory systems in place. Those who are aware are often unsure as to which system best suits their needs. The Equal Opportunity Commission Victoria noted:

... two overlapping statutes dealing with disability discrimination causes considerable confusion for many complainants. Most who know about both schemes do not feel confident that they know the differences between the two. It can be difficult for some people with disabilities to access advice about choice of jurisdiction, and it is probable that many elect jurisdiction without making an informed decision. (sub. 129, p. 36)

In the past, HREOC has had largely informal DDA complaint handling arrangements with the States and Territories. The only formal arrangement (with Victoria) ceased in February 2003 (Equal Opportunity Commission Victoria, sub. 129). However, HREOC and the State and Territory anti-discrimination bodies continue to maintain informal links by:

- referring complainants to each other according to the circumstances
- sharing premises for conciliations (the State and Territory bodies commonly allow HREOC to use their premises to conduct conciliations)
- coordinating public information and education activities—for example, in 2003 all jurisdictions cooperated with HREOC to co-host the local release of *Ten Years of Achievements using Australia's DDA* (HREOC 2003d)
- regular meetings of Commissioners and officers to discuss common issues—for example, the establishment of the Australian Council of Human Rights Agencies in February 2003 (see chapter 10).

Some State and Territory anti-discrimination bodies argued that more formal cooperative arrangements for complaints handling worked well in the past. The Queensland Anti-Discrimination Commission noted that ‘as far as arrangements on the ground went it worked well’ (trans., p. 255). Similarly, the South Australian Equal Opportunity Commission stated that its previous cooperative arrangement

with HREOC 'was a really good system' (trans., p. 1004). Victoria Legal Aid stated:

The one-stop shop is good because you have that one initial focus, and then you could make your decision as to which way you wanted to go. I would submit some of that freedom of flexibility has been lost since HREOC has moved. (trans., p. 2747)

The Victorian Government noted that the cooperative arrangement between the Equal Opportunity Commission Victoria and HREOC had been of limited usefulness to complainants and suggested an improved cooperative approach:

Equal Opportunity Commission Victoria would be willing to further consider a model for co-operative arrangements which would provide a more sophisticated and streamlined service to the community. Equal Opportunity Commission Victoria is open to considering the concept of a 'shop-front,' envisaging a more proactive co-operative system, in which the State and Territory equal opportunity commissions provide high quality advice and information at the pre-lodgement stage in order to best inform the complainant. That is, the Equal Opportunity Commission Victoria would provide first stop education and information about the relative benefits and disadvantages of lodging a complaint in a particular jurisdiction. ... If the complainant then decides to lodge with HREOC, the Equal Opportunity Commission Victoria would then provide support through this process. (Victorian Government, sub. DR367, pp. 14–15)

HREOC argued that the reintroduction of formal cooperative arrangements was not justified. It cited inconsistent decision making, the generally higher costs of the States' and Territories' complaint handling processes and the need to monitor all complaints as reasons for keeping the process in-house. HREOC also noted that ending previous cooperative arrangements was consistent with amendments to the complaints process in 2000, which, among other things, made the President of HREOC responsible for addressing complaints (sub. 143).

The Productivity Commission considers that appropriate formal arrangements between HREOC and State and Territory anti-discrimination bodies would help overcome confusion about the dual systems and improve the effectiveness of the DDA. A joint presence in each jurisdiction would provide an initial point of contact for people wishing to obtain advice or lodge a complaint under either the federal or local system. The Victorian Government noted the advantages of cooperative arrangements:

This evaluation at a pre-lodgement stage would ensure that less people choose a system simply due to misinformation or lack of knowledge, and then risk their complaint being terminated due to lack of jurisdiction. ... If complainants get high-quality advice at the beginning of the process, the incidence of confusion and people lodging their complaint in the wrong jurisdiction would be lessened. This form of pro-active shop-front approach could reduce forum shopping and ensure that complainants are also provided with sufficient information to enable them to attempt to resolve their complaints at the

local level, the point where the discrimination has occurred. Use of localised complaint handling and improved information dissemination will assist to streamline the equal opportunity complaints system at both State and Federal level. (Victorian Government, sub. DR367, p. 15)

Concerns about the consistency of advice could be addressed through staff training and support materials provided by HREOC and the relevant jurisdiction. As in any ‘purchaser–provider’ model, contract specification can address concerns about the cost and quality of services. However, it would not be appropriate for different complaint handling processes to apply to DDA complaints in different jurisdictions. HREOC should remain responsible for accepting or declining DDA complaints.

There may also be scope for HREOC and State and Territory anti-discrimination bodies to ‘pool’ conciliators, allowing HREOC matters to be conciliated by local staff. This could increase the local knowledge of conciliators, improve the response time of HREOC conciliations and allow for some savings in travel costs. Again, staff training and support and contract specification of cost and quality would be important to ensure consistency of conciliation services.

The Productivity Commission acknowledges that HREOC could face additional costs in establishing and monitoring cooperative arrangements. However, there should also be scope for some administrative efficiencies and savings—for example, in travel. Issues of HREOC resources are discussed in chapter 15. Most importantly, some of the confusion about the complaints process should be reduced for people with disabilities.

FINDING 13.9

The existence of separate federal and State and Territory complaints handling processes can create confusion for people wishing to make a complaint. Improved cooperation has the potential to minimise this confusion.

RECOMMENDATION 13.1

The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a ‘shop front’ presence in each jurisdiction but retain responsibility for managing complains under the Disability Discrimination Act 1992.

13.3 Role of the federal courts

This section examines the role and function of the federal courts in the complaints process. It addresses the issues of time limits on bringing an action, enforcing conciliated agreements and awarding court costs.

The Human Rights Legislation Amendment Act 1999

The *Human Rights Legislation Amendment Act 1999* transferred the power to make determinations (legally binding decisions) from HREOC to the Federal Court (see chapter 4). Many inquiry participants were concerned that the increased formality and the potential for costs to be awarded against complainants by the Court would discourage people from making complaints and from pursuing matters to determination in the Court.

One way of gauging this would be to compare the proportion of ‘referred’ complaints that went to hearing under the old arrangements with the proportion of ‘terminated’ cases that proceeded to court under the new arrangements. However, suitable data are not available, as HREOC does not maintain systematic records of terminated cases that proceed to court. In any case, the two situations are not strictly comparable. Under the old arrangements, only complaints with ‘no reasonable prospect of conciliation’ were referred to a hearing. Under the new arrangements, any terminated complaint can be taken to court (see chapter 4).

HREOC surveyed complainants and respondents under all federal anti-discrimination legislation in the first year of the new arrangements. It found no decrease in the number of complaints brought under federal anti-discrimination law, suggesting there was no significant effect discouraging people from approaching HREOC. The survey also found an increase in the proportion of complaints that were conciliated, an increase in the conciliation success rate and a decrease in the proportion of complaints that were withdrawn (HREOC 2002f, p. 2).

The survey found that respondents were more concerned than complainants about losing at court and the public nature of the determination process. This was supported by the Australian Industry Group, which noted that some respondents settled at conciliation even where they did not believe they were at fault because they were reluctant to become involved in lengthy and expensive court processes (sub. DR326).

The survey also found that costs generally ‘followed the event’ in the Federal Court (that is, the loser paid the winner’s costs). In the Federal Magistrates Court, successful applicants (complainants) were generally awarded costs and unsuccessful

applicants were most likely to have no costs order made against them (parties were ordered to bear their own costs). However, more recent cases suggest that the Federal Magistrates Court is now also applying the ‘costs follow the event’ rule (HREOC 2002f, p. 2).

Acknowledging the short period considered by the survey, HREOC suggested:

... the procedural changes introduced by [the *Human Rights Legislation Amendment Act 1999*] have not significantly impacted on the manner in which parties approach complaints before HREOC nor has it deterred complainants from bringing matters under federal anti-discrimination law. (HREOC 2002f, p. 3)

The Productivity Commission considers that the transfer of the determination-making power to the Federal Court and Federal Magistrates Court has not discouraged complaints being brought to HREOC. However, the transfer appears to have increased complainants’ and respondents’ concerns about proceeding to determination and encouraged conciliation rather than the pursuit of claims to the federal courts.

FINDING 13.10

Transfer of the determination-making power to the Federal Court and Federal Magistrates Court does not appear to have discouraged complaints to the Human Rights and Equal Opportunity Commission, but reluctance to proceed to court might have made parties more willing to conciliate.

Time limits

Complainants have 12 months from the time of the alleged discrimination to lodge a complaint with HREOC. Once HREOC terminates a complaint, complainants have 28 days to lodge an application with the Federal Court or the Federal Magistrates Court. The HREOC Act allows for an extension of time if good reason can be shown and the courts have granted such extensions in the past (s.46PO(2)).

Some inquiry participants argued that, despite the possibility of an extension, 28 days is often not enough time for the complainant to decide whether to proceed, particularly given the need to obtain affordable legal assistance.

It can often take a complainant considerable time to arrange legal advice and support. The current arrangement of 28 days is totally inadequate. (Blind Citizens Australia, sub. DR269, p. 27)

There are a lot of issues that a person has to weigh up, particularly the potential costs that they may face. People are trying to get information. They try and get to the organisations that can give them relevant information. They might be referred to several different peak bodies or law firms or advisory services before they can actually

get to someone who actually says, “Okay. Let’s sit down and consider the implications for you on this.” It’s a pretty tight ask to get all of that done within the 28 days and what we’re saying is, for some people even 60 is a bit tight. (Disability Council of New South Wales, trans., p. 2259)

HREOC compared the 12 month limit for making an initial complaint with the 28 day limit for applying to the court, stating that the latter:

... is more demanding in terms of legal process and in relation to the decision whether to accept the risk of a costs order. There might thus be merit in considering the proposal for extension on the time limit for lodgement of complaints with the court. (sub. 219, p. 19)

On the other hand, a time limit on lodging a complaint with the courts limits the period of uncertainty for respondents about whether action will be taken against them. The Australian Industry Group was concerned that the 12 months period to lodge a complaint with HREOC already placed employers in the situation where key staff relevant to the complaint might have left employment or might not be able to recall the details of the alleged incident (sub. DR326, p. 21).

Other jurisdictions allow complainants a longer period to decide whether or not to proceed. Under the Equal Opportunity Act (Victoria), after being advised that their complaint could not be conciliated, complainants have 60 days to request the Equal Opportunity Commission Victoria to refer their complaint to the Victorian Civil and Administrative Tribunal.

An alternative to increasing the time limit would be to allow complainants to file a holding summons similar to that allowed in the New South Wales Court of Appeal (Public Interest Advocacy Centre, sub. 102, p. 11). Under this approach, the complainant would have a relatively short period (say 28 days) in which to lodge a holding summons, and a longer period (for example, three months) in which to lodge an application relating to unlawful discrimination.

The Productivity Commission considers that the benefits of allowing complainants more time to make such a crucial decision outweigh the longer period of uncertainty for respondents. The time constraint appears to be a general issue, rather than being relevant to only a few complainants. Requiring all complainants needing an extension to request a holding summons places an additional burden on them and is an inefficient use of court resources. Increasing the time limit for all complainants is more appropriate.

FINDING 13.11

The 28 day limit to lodge an application with the Federal Court or Federal Magistrates Court following a terminated complaint is too short and has caused

problems for complainants that outweigh the benefits of greater certainty to respondents.

RECOMMENDATION 13.2

The Human Rights and Equal Opportunity Commission Act 1986 (s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful disability discrimination with the Federal Court or Federal Magistrates Court.

Enforcing conciliation agreements

Conciliation agreements are private agreements between the parties, and HREOC has no formal monitoring or enforcement role. Depending on their individual circumstances, some conciliation agreements might amount to common law contracts and, if breached, could be enforced through the courts like other contracts. However, the Australian Government Solicitor advised that conciliation agreements do not fall within the jurisdiction of the federal courts, and complainants would have to approach State or Territory courts to determine whether an agreement amounted to a common law contract, and to have that contract enforced (AGS 2004a, p. 5).

HREOC surveyed parties who were involved in conciliation during 2001. It found that 85 per cent of complainants and 96 per cent of respondents reported full compliance with settlement terms (sub. 235, att. A, pp. 7–8). HREOC noted that full compliance might be somewhat higher than these figures indicate, because some complainants might not be aware of the completion of all settlement terms by respondents (sub. 235, att. A, p. 8). However, if complainants cannot verify respondents' actions, it is also possible that compliance might be lower.

Despite this apparently high level of compliance, the lack of a clear enforcement mechanism is a significant issue. Several inquiry participants criticised the lack of enforceability of conciliation agreements, and Women's Health Victoria argued that it is a major deterrent to bringing a claim in the first place (sub. 68, p. 4).

There might be cases where parties do not intend conciliation agreements to be legally binding, and in such cases it is appropriate that the agreement cannot be enforced through the courts. But there might be cases where the parties did intend to create a legally binding contract, but failed to do so for some technical reason. There might also be cases where a conciliation agreement is a contract, but a court might not regard an order to abide by the contract as an appropriate remedy for a breach. (In some circumstances, courts consider the payment of damages to be more appropriate than an order to carry out a contract.)

The Productivity Commission considers that it is not appropriate to rely on State and Territory courts to determine whether conciliation agreements made following DDA complaints amount to enforceable contracts, and to make orders to enforce such agreements.

The Australian Government Solicitor advised that the Australian Government could legislate to give conciliation agreements the force of a legally binding agreement, and to grant the federal courts jurisdiction to enforce them. This would raise no Constitutional issue because the agreements themselves would not take effect as court orders. In the event of a breach of an agreement, complainants would seek an order from a court for its enforcement. Proceedings for enforcement of such an agreement would not involve consideration of the particulars of the discrimination complaint (AGS 2004a, pp. 5, 15–17).

The Productivity Commission considers that, where it is the clear intent of the parties, conciliation agreements should be legally binding and the federal courts should have jurisdiction over such agreements. This could be achieved by including clauses in agreements indicating that the parties intend the agreement to be binding and that the parties understand application can be made to the federal courts to enforce it. The federal courts should have the ability to make a range of orders in respect of a breach of such an agreement, including orders to carry out the terms of the contract.

RECOMMENDATION 13.3

The Australian Government should legislate to ensure that, where it is the clear intent of the parties, conciliation agreements should become legally binding agreements. The legislation should grant Federal Court or Federal Magistrates Court jurisdiction over such agreements. The legislation should also set out the remedies that may be granted by those courts in respect of a breach of such an agreement.

Awarding court costs

The general rule in most discrimination cases in the federal courts is that ‘costs follow the event’—that is, the unsuccessful party pays the successful party’s costs. However, the courts have discretion in how they award costs and they may take into account the circumstances of individual cases.

HREOC reviewed the federal courts’ unlawful discrimination jurisdiction over the period September 2000 to September 2002, and found that although the ‘costs follow the event’ rule was not always followed, by the end of the review period, the

courts appeared to be applying the principle that ‘costs should follow the event ... subject to ... the proper exercise of discretion’ (HREOC 2003b, p. 117).

In *Ball v Morgan & Amor*, Innis FM summarised what appears to be the current approach:

It is not appropriate for courts to exercise a discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply. (*Ball v Morgan & Amor* (2001) FMCA 127 in HREOC 2003b, pp. 116–7)

As noted earlier, the possibility of facing cost orders can discourage complainants (and respondents) from going to court (section 13.1). The National Disability Advisory Council stated:

There is also a very real fear that in initiating a complaint there is the distinct possibility of ending up before the Federal Court with all its inherent costs and legal requirements. The cost of taking a complaint to the Federal Court not only involves high initial costs but also the risk of costs being awarded against complainants. The fear of these costs and risks is quite effective in ‘frightening off’ a number of complaints that should otherwise be lodged. (sub. 225, p. 4)

Although transfer of the determinations power to the federal courts does not appear to have discouraged complaints to HREOC, incentives and outcomes at the conciliation stage appear to have been affected by the possibility of cost orders if the complaint was to be subsequently taken to court. It is therefore likely that some cases of unlawful disability discrimination are not being adequately addressed (section 13.1).

FINDING 13.12

Uncertainty about cost orders in the Federal Court and Federal Magistrates Court affects incentives and outcomes at the conciliation stage of complaints handling. It is likely that some cases of unlawful disability discrimination are not being adequately addressed.

The Disability Discrimination Legal Service (sub. 76, p. 11) and others suggested the DDA should provide clear guidelines on how costs should be awarded in disability discrimination cases. Guidelines would reduce uncertainty about cost orders and thereby might encourage complainants to pursue their complaints to the courts. However, it is not possible to know beforehand how the guidelines will be applied in an individual case. As long as the starting point is ‘costs follow the event’, there will always be a degree of uncertainty about cost orders. And given

their generally risk averse nature, this means many complainants will still be unwilling to pursue their disability discrimination complaints to the courts.

An alternative approach is to make the disability discrimination jurisdiction of the Federal Court and Federal Magistrates Court cost neutral—that is, make the starting point that each party will bear his or her own costs, rather than ‘costs follow the event’.

Although the federal courts are established on the ‘costs follow the event’ principle, they are cost neutral in some jurisdictions already.¹² The various State and Territory Tribunals that hear discrimination cases are also cost neutral. The Family Court of Australia was also directed to be cost neutral, ‘to encourage persons to settle their differences’ (Family Law Bill Explanatory Memorandum 1974, p. 5348).

Under the cost neutral principle, complainants can be fairly confident that although they will pay their own costs, they will not have to pay the respondent’s costs, regardless of which party is successful. As complainants have a degree of knowledge and control over their own costs, this gives them some certainty about the costs of proceeding to court. With greater certainty, complainants may be more willing to proceed to the courts, which in turn might affect the incentives and outcomes at the conciliation stage.

However, the cost neutral principle is not without its own shortcomings. Although the principle that each party bears his or her own costs protects complainants from paying the respondent’s costs, it does not address the complainant having to pay their own costs even if they win. The relatively poor resources available to many people with disabilities could prevent some from taking action. The burden of paying one’s own costs is the tradeoff for greater certainty about costs. On balance, the Productivity Commission considers that cost neutrality achieves an appropriate balance between placing a burden on complainants to pay their own costs, even if they win, and giving complainants a sufficient degree of certainty about costs to overcome their aversion to proceeding to court. Nonetheless, the Commission emphasises the importance of access to legal assistance to maintain the accessibility of the courts (section 13.1 and see chapter 15).

A related issue is whether cost neutrality would discourage complainants from bringing forward complaints that have a broader impact on the community (often

¹² *The Federal Court of Australia Act 1976* (s.43) grants the Court jurisdiction to award costs in all proceedings, at the discretion of the Court, unless another Act provides otherwise. These provisions are mirrored in the *Federal Magistrates Act 1999* (s.79). The Federal Court is cost neutral in its jurisdiction inherited from the former Industrial Relations Court, the Administrative Appeals Tribunal and the Residential Tenancies Tribunal.

referred to as ‘public interest’ cases). This would occur if the private costs of taking action (bearing one’s own costs in the courts) exceed the private benefits. However, bearing one’s own costs would seem to be an improvement over the current situation, in which there is no guarantee that cases with a public interest element will avoid the application of the principle that costs follow the event (HREOC 2004c). Allowing disability organisations to make representative complaints (discussed in the next section) might lessen the need for individuals to bring public interest cases forward. Access to legal assistance (see chapter 15) will also influence the ability of individuals to mount public interest cases.

Cost neutrality also places a burden on successful respondents to bear their own costs. As noted earlier, respondents are often reluctant to become involved in lengthy and expensive court processes. As for complainants, similar incentives and disincentives would be at work; bearing their own costs might discourage legal action but would promote certainty.

Reducing barriers to complainants’ participation in the courts must be balanced against the burden on respondents and the court system. It is important that courts retain discretion to award costs under some circumstances. Frivolous or vexatious complaints (or defence strategies), for example, impose unnecessary costs on other parties and the court system, and might need to be discouraged by the prospect of costs being awarded in such cases.

The National Council on Intellectual Disability argued:

We favour the approach that costs should only be awarded against the unsuccessful litigant where they have not demonstrated ‘an arguable case’ to the court. It is neither fair to the other party nor in the public interest to allow people to litigate cases which do not have a reasonable arguable basis in fact and/or law. (sub. 112, p. 8)

One problem with this approach is that complainants might have difficulty knowing in advance whether their case is arguable. However, the HREOC Act (s.46PH) makes provision for the President to give complainants a termination notice which explains why their complaint was terminated. The reasons for termination are generally more detailed when a matter is terminated on the ground that the complaint was lacking in substance, compared to one which had no reasonable prospect of conciliation (HREOC, pers. comm., 20 April 2004). The explanation of why the complaint was terminated can provide a useful indication to the complainant of whether their case is arguable. Additionally, the HREOC Act (s.46PS) allows HREOC to provide a report to the courts. There might be scope for HREOC to give an indication in this report as to the merit of the case. Such information would be useful for both the complainant and respondent and might help the complainant decide whether to proceed to court.

Alternatively, the Australian Industry Group (sub. DR326, p. 20) proposed that the approach applying to unfair dismissal applications under the *Workplace Relations Act 1996* be considered:

This involves each party paying its own costs, except where:

- The applicant pursues an application in circumstances where it should have been reasonably apparent that he or she had no reasonable prospect of success; or
- The applicant has acted unreasonably in failing to discontinue a proceeding or in failing to agree to terms of settlement that could lead to discontinuance of the application. (*Workplace Relations Act 1996*, s.170CJ)

While the Australian Industry Group's proposal provides protection for respondents, it is of little assistance to complainants facing a respondent who acts unreasonably in the proceedings. More balance between the requirements on complainants and respondents would be desirable. For example, guidance might be drawn from the cost order guidelines in the *Family Law Act 1975* (box 13.2).

The Productivity Commission considers the HREOC Act should be amended to establish the principle of cost neutrality in discrimination proceedings in the federal courts, subject to guidelines based on those in the Family Law Act.

RECOMMENDATION 13.4

The Human Rights and Equal Opportunity Commission Act 1986 should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the Family Law Act 1975.

13.4 Representative complaints

The HREOC Act allows representative complaints to be made 'on behalf of one or more other persons aggrieved by the alleged unlawful discrimination' (s.46P(2)(c)). A representative action can be brought on behalf of a class of members, without having to name the members of the class, specify the number of members or gain their consent (s.46PB).

Where a complaint to HREOC is terminated, any 'affected person' may apply to the federal courts (s.46PO(1)). An 'affected person' means a person on whose behalf the complaint was lodged. Under the *Federal Court of Australia Act 1976*, representative proceedings are allowed, but to bring a representative action, a person must have 'a sufficient interest to commence a proceeding on his or her own behalf' (s.33D).

Box 13.2 Provision for cost orders in the *Family Law Act 1975*

The general costs rule in the Family Court is that each party should bear his or her own costs (s.117(1)). However, if the court is of the opinion that there are circumstances that justify it in doing so, it may make such orders as to costs and security for costs, as it considers just (s.117(2)).

In considering what cost order (if any) should be made, the court is directed to have regard to:

- (a) the financial circumstances of each of the parties to the proceedings;
- (b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;
- (c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;
- (d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;
- (e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;
- (f) whether either party to the proceedings has ... made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and
- (g) such other matters as the court considers relevant (s.117(3)).

In addition, if the court is satisfied that the proceedings are frivolous or vexatious, it may dismiss the proceedings or make such order as to costs as the court considers just (s.118).

Source: Family Law Act 1975, ss.117, 118.

There was some disagreement about the interpretation of these sections of the HREOC Act. Many disability organisations appeared to consider that they are not entitled to initiate representative complaints in their own right. The Equal Opportunity Commission Victoria stated that 'representative complaints in their current form require affected individuals, or their carers or support persons, to initiate action' (sub. 129, p. 21). Several disability organisations argued that the legislation should be amended to allow them to initiate complaints, implying that they believe that they are not currently entitled to do so (Blind Citizens Australia, sub. 72; National Ethnic Disability Alliance, trans., p. 1388).

HREOC argued that the DDA did not require amendment to address this issue:

There is already provision in the HREOC Act for representative complaints to be made on behalf of a class of aggrieved persons without needing to identify particular individuals. (sub. 219, p. 19)

The Australian Government Solicitor advised that a disability organisation can lodge a complaint of unlawful discrimination with HREOC on behalf of one or more persons aggrieved by the alleged discrimination, or in some circumstances might be able to lodge a complaint on its own behalf if the organisation is a ‘person aggrieved’ by the alleged unlawful discrimination (AGS 2004a, p. 3).

However, unless organisations are themselves ‘a person aggrieved’, they cannot pursue a complaint to the federal courts. This is likely to discourage advocacy organisations from initiating complaints with HREOC. Knowing that a representative complaint could not proceed to the courts unless an ‘affected person’ is prepared to pursue it might affect the respondent’s willingness to conciliate.

FINDING 13.13

There appears to be some confusion about the ability of disability organisations and advocacy groups to initiate representative complaints with the Human Rights and Equal Opportunity Commission and to proceed to the Federal Court or Federal Magistrates Court. This is likely to have discouraged organisations from making such complaints.

This confusion could be avoided if disability organisations were entitled to bring actions in the federal courts in their own right. Such complaints could still be regarded as representative complaints, because the organisations would be representing the interests of their constituents in general.

Representative complaints initiated by disability organisations or advocacy groups have the potential to achieve greater systemic change than can be achieved by individual complaints. There are fewer concerns about the confidentiality of the complainant, and disability organisations are more likely to have the experience and resources (although still limited) to tackle the complexities of the complaints system than individual complainants. Many inquiry participants, in stressing the barriers to individuals making complaints, pointed to the potential benefits of representative complaints. The Equal Opportunity Commission Victoria argued that other vulnerable groups had benefited from representative complaints:

... looking at representative complaints under the Racial and Religious Tolerance Act, many people feel very comforted and reassured by the fact that the complaint is being taken up by another body rather than them as an individual. It lessens their exposure. It lessens their isolation. It lessens their fear of victimisation and backlash. (trans., p. 1900)

The Australian Industry Group, however, raised concerns about widening the existing rights of disability organisations to pursue representative complaints, stressing that ‘it is important that cases of alleged discrimination be based on specific facts and issues’ (sub. DR326, p. 21).

This appears reasonable, and could be addressed by ensuring that representative complaints be allowed only in relation to specific instances of alleged discriminatory conduct as defined in the DDA—not purely hypothetical or abstract legal questions (Australian Government Solicitor 2004a, p. 10). The complaint would also need to be accepted by HREOC as not frivolous or vexatious.

Some inquiry participants were concerned that giving organisations greater scope to initiate complaints could disempower people with disabilities. ParaQuad Victoria stated:

... there’s always that whole conflict of not wanting to encourage dependency ... of not wanting to go back to the old model ... people with disabilities are always relying on an organisation or someone else to carry things forward for them. (trans., p. 1859)

The Australian Government Solicitor advised that:

It would be possible to amend the HREOC Act to enable disability organisations to lodge complaints in respect of alleged unlawful discrimination otherwise than on behalf of any particular ‘aggrieved person’, and to enable HREOC to inquire into and conciliate such complaints. In our view, there would also be scope to amend the HREOC Act and the federal courts legislation to enable disability organisations to pursue such actions in the Federal Court and the Federal Magistrates Court. (AGS 2004a, p. 4)

The Australian Government Solicitor advised that this could be achieved by means of relatively simple amendments to the HREOC Act to include an extended standing provision for disability organisations that meet specified criteria, as is the case under the *Environment Protection and Biodiversity Conservation Act 1999* (box 13.3).

The Equal Opportunity Commission Victoria suggested defining the appropriate organisations or bodies to bring forward representative complaints by including provisions in the DDA similar to those in the *Racial and Religious Tolerance Act 2001* (Victoria). That Act provides that a representative body may complain on behalf of a person or persons if that body has a ‘sufficient interest’ in the complaint. Sufficient interest is to be found if:

... the conduct that constitutes the alleged contravention is a matter of genuine concern to the body because of the way conduct of that nature adversely affects or has the potential to affect the interests of the body or the interests or welfare of the persons it represents. (Equal Opportunity Commission Victoria, sub. 129, p. 21)

Box 13.3 Extended standing for judicial review under the *Environment Protection and Biodiversity Conservation Act 1999*

- (3) An organisation or association (whether incorporated or not) is taken to be a person aggrieved by the decision, failure or conduct if:
- (a) the organisation or association is incorporated, or was otherwise established, in Australia or an external Territory; and
 - (b) at any time in the 2 years immediately before the decision, failure or conduct, the organisation or association has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment; and
 - (c) at the time of the decision, failure or conduct, the objects or purposes of the organisation or association included protection or conservation of, or research into, the environment.

Source: Environment Protection and Biodiversity Conservation Act 1999, s.487.

The Productivity Commission considers that greater use of representative actions could improve the effectiveness of the complaints process, particularly in achieving systemic change. Organisations making representative complaints can avoid many of the barriers faced by individuals wishing to make a complaint, such as fear of victimisation.

The Productivity Commission considers that disability organisations should be permitted to initiate complaints in their own right, at both HREOC and federal courts stages. However, some limitation on this right is necessary to protect the interests and self-determination of people with disabilities. This protection could be achieved by limiting the right to initiate a complaint to organisations with a demonstrated connection to the subject matter of the complaint. Representative actions should also be limited to alleged actual or proposed discrimination rather than hypothetical scenarios.

Organisations will also tend to be limited by the risk of cost orders in the federal courts, although the Productivity Commission's recommendation on cost orders (see above) would give greater certainty in this regard. Some participants requested that a guarantee of no costs in the federal courts be given for representative complaints (Anti-Discrimination Commission Queensland, sub. 119). However, the Productivity Commission considers that the same rules should apply regardless of the nature of the complainant.

The Human Rights and Equal Opportunity Commission Act 1986 should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court and Federal Magistrates Court if required.

13.5 Conclusions

This chapter has examined the strengths and weaknesses of the DDA complaints process. An effective complaints mechanism is an essential feature of the DDA, in order to allow individual grievances to be resolved. It can also play a limited role in driving systemic change.

Many inquiry participants acknowledged the strengths of the complaints process, particularly the emphasis on conciliation before proceeding to the courts. In addition, complainants and respondents (with some notable exceptions) appeared to be satisfied with HREOC's complaint handling and conciliation processes.

However, many barriers affect the effectiveness of the complaints process, including the costs and formality of the process, fear of victimisation and the inequality of resources available to the parties. The Commission has made a series of recommendations that aim to reduce some of these barriers.

Finally, there appears to be some confusion and misunderstanding about how the complaints process works. Many people with disabilities and disability organisations appear to be uncertain of how to enforce their rights, and the role of HREOC and the federal courts. HREOC could give further attention to promoting awareness of the complaints process, particularly through cooperative arrangements with State and Territory anti-discrimination bodies.

The HREOC Act complaints process applies to complaints under the *Sex Discrimination Act 1984* and the *Racial Discrimination Act 1975* and will apply to the *Age Discrimination Act 2004*, as well as complaints under the DDA. Recommendations in this chapter therefore will have implications for the handling of complaints under the former three Acts, which are outside this inquiry's terms of reference.

RECOMMENDATION 13.6

The Attorney-General's Department should investigate the implications of this inquiry's recommendations about the disability discrimination complaints process for other federal anti-discrimination legislation.