
14 Regulation

Governments use a range of regulatory devices to influence the behaviour of individuals and organisations. The term ‘regulation’ encompasses a wide variety of instruments. It includes primary legislation (such as Acts of Parliament), subordinate legislation (such as statutory rules), quasi-regulation (such as industry–government agreements and accreditation schemes), co-regulation and self-regulation, and international treaties (box 14.1).

The *Disability Discrimination Act 1992* (DDA) is a significant piece of Australian Government legislation. It contains several high level provisions, making it unlawful to discriminate against people with disabilities on the ground of disability. A variety of other regulatory tools (regulations, disability standards, guidelines and advisory notes) are (or can be) used to supplement the Act.

As a general rule, regulation of any form should be used only where it is the most effective way of addressing a problem and it imposes the least possible burden on those being regulated and the wider community. Good regulation should not be unduly prescriptive—that is, where possible, it should be expressed in terms of desired outcomes, and allow flexibility in how those outcomes are achieved. It should be able to accommodate different or changing circumstances, and to enable those affected to decide how best to comply. It should also be consistent with other laws, regulations and agreements. Inconsistency creates confusion for those organisations bound by the regulations and could undermine the objectives of regulation.

This chapter discusses disability standards, guidelines and action plans, which are used to supplement the DDA, and attempts to assess their effectiveness in achieving the objects of the DDA. The chapter also considers the potential role for other approaches, including self-regulation and co-regulation.

Box 14.1 Types of regulatory tool

Explicit government regulation refers to both primary and subordinate legislation and is the most commonly used form of regulation. Primary legislation (Acts of Parliament) receives scrutiny and passage by Parliament. Subordinate legislation can be made in a variety of forms. The three main forms at the federal level are:

- statutory rules, which must be approved by the Governor-General in Council and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples include the Disability Discrimination Regulations 1996 and the Income Tax Assessment Regulations 1997
- disallowable instruments, which are made by Ministers or government agencies and are subject to review by the Senate Standing Committee on Regulation and Ordinances and possible disallowance by Parliament. Examples are the Disability Standards for Accessible Public Transport 2002
- other subordinate legislation, which is not subject to Parliamentary scrutiny.

Co-regulation typically refers to the situation where industry develops and administers its own arrangements, but government provides legislative backing to enable the arrangements to be enforced. This is known as 'underpinning' of codes, standards etc. Sometimes, legislation sets out mandatory government standards, but provides that compliance with an industry code can meet those standards. Legislation may also provide for government-imposed arrangements if industry does not develop its own arrangements.

Quasi-regulation refers to a wide range of rules or arrangements which governments can use to influence businesses, but that do not form part of explicit government regulation. Examples include industry codes of practice, guidance notes, industry-government agreements and accreditation schemes. Federal quasi-regulation can be broadly divided into two categories:

- industry arrangements where industry organisations play a critical role in formulating and/or administering codes, guidelines, standards and the like, and where government involvement means that the requirements become quasi-regulatory
- other government initiated arrangements that use methods other than direct legislation to encourage compliance.

Self-regulation involves industry formulating rules and codes of conduct, and enforcing compliance with those rules.

Sources: Commonwealth Interdepartmental Committee on Quasi-regulation 1997; ORR 1998.

14.1 Disability standards

The DDA prohibits discrimination on the ground of disability in a number of areas. These prohibitions are expressed in very general terms: for example, section 23 of the DDA states that it is unlawful for a person to discriminate against another person on the ground of the other person's disability by refusing access to, or the use of, any premises that the public is entitled or allowed to enter or use.

However, the DDA does not prescribe the actions that a person or organisation must take to avoid discrimination. This can be an advantage because it allows for flexibility in how discriminatory barriers are removed, but it can create problems, such as the uncertainty experienced by people with disabilities and service providers in how the general provisions will apply to particular areas.

The DDA was designed to address these issues by including the power to introduce subordinate regulation in the form of disability standards. Section 31 of the DDA gives the Attorney General the power to formulate disability standards. These are disallowable instruments that the Federal Parliament must approve and that are subject to the formal regulation impact statement (RIS) process.¹

Disability standards can:

- set out the requirements implicit in the DDA in a more immediately accessible format
- provide information on the steps necessary to comply with the DDA, and reduce uncertainty for potential complainants and respondents
- provide timetables for complying with the DDA, ensuring changes occur within an appropriate period
- allow input from all interested parties and specify the relationship of standards to other relevant sources of law
- encourage the use of voluntary action plans to meet the deadlines set by standards
- reduce the reliance on litigation and complaint processes because standards provide greater certainty for people with disabilities and organisations covered by the DDA

¹ At the federal level, a regulatory impact statement contains a formal assessment of the costs and benefits of regulation. This process is mandatory for all reviews of existing regulation, proposed new or amended regulation, and proposed treaties involving regulation, that will directly affect business, have a significant indirect effect on business or restrict competition (ORR 1998).

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- present, as part of the usual operating environment, measures that facilitate the access and participation of people with disabilities (HREOC 1993b).

The Disability Standards for Accessible Public Transport, for example, apply to public transport vehicles, conveyances, premises and infrastructure, and set out a timetable for adjustment by public transport operators over 30 years, with fixed milestones every five years. They list detailed accessibility requirements including access paths, ramps, boarding devices, allocated spaces, handrails, doorways, controls, signage, information provision and much more (see appendix C).

Many inquiry participants acknowledged the important role that standards play in addressing the discrimination faced by people with disabilities. The Public Interest Advocacy Centre noted:

Standards would provide certainty and would thus assist those seeking to comply with the DDA as well as those regulating compliance. (sub. 102, p. 9)

The Human Rights and Equal Opportunity Commission (HREOC) (sub. 143) and the ACTU (sub. 134) expressed similar views.

However, inquiry participants did not unanimously support standards. Some were concerned about using disability standards to extend the scope of the Act. Some questioned the suitability of standards for some areas, while others suggested extending the ability to formulate standards to all areas covered by the DDA. Others were concerned with procedural issues, such as formulating, monitoring and enforcing standards. These issues are discussed below.

Consistency with the Disability Discrimination Act

General principles of administrative law require standards under the DDA to serve the same objects and underlying scope as the existing DDA provisions.² The Productivity Commission considers that the underlying scope of the Act includes the areas covered by the DDA and the checks and balances it contains (such as unjustifiable hardship and inherent requirements for employment) to ensure that any adjustments generate net benefits.

By contrast, HREOC argued that in furthering the objects of the Act, disability standards can alter the underlying scope by:

- providing obligations greater than those which already exist

² The scope of an Act is determined by adopting a construction of its provisions which will promote rather than defeat its underlying purpose or object.

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- prescribing obligations for persons who might not already be covered by the DDA
 - removing or providing defences or exceptions beyond those that already exist (HREOC 2003e).

HREOC bases its argument on sections 32, 33 and 34 of the DDA. Section 32 states that it is unlawful for a person to contravene a disability standard. According to HREOC, this section implies that a standard may make something unlawful that is not already unlawful (HREOC 2003e). Section 33 states that Division 5 (which contains the exemptions) does not apply in relation to a disability standard. The Australian Government Solicitor interprets this to mean that disability standards need not necessarily include, or be limited to, the exemptions set out in Division 5 (AGS 2000). Section 34 states that if a person acts in accordance with a disability standard, the existing unlawful discrimination provisions (set out in Part 2 of the DDA) do not apply to the person's activity. HREOC interprets this section to mean that a standard may make something lawful that otherwise would have been unlawful, or potentially unlawful (HREOC 2003e). HREOC argued:

We think the standards power has to mean that it can both make things unlawful that are not or may not be unlawful now, and can make things lawful which are not or may not be lawful now ... That admittedly rather strong effect of standards in relation to the Act is why they're subject to a positive parliamentary approval process rather than the standard regulation disallowance provision. (HREOC, trans., pp. 2876–7)

HREOC's position is supported by legal advice from the Australian Government Solicitor to the then Department of Education, Training and Youth Affairs on the draft disability standards for education. The Australian Government Solicitor argued that section 34 of the DDA, which provides that Part 2 of the Act does not apply to a person who acts in accordance with a disability standard, indicates that a standard can apply differently than the Act, provided it is not 'repugnant' to the Act (that is, that the standard does not subvert the objects of the Act) (AGS 2000).

The Productivity Commission accepts that disability standards can make some things lawful that otherwise would have been unlawful. It will be lawful for public transport operators, for example, to discriminate against some people with disabilities because the transport disability standards require that only 25 per cent of buses and trains be made accessible by 31 December 2007. Similarly, the access to premises standards will specify a minimum door width. This specification might not fulfil the needs of every person with a disability, but failure to provide a wider door will not be unlawful.

However, in other instances draft standards, if adopted, would change the application of the DDA in a way that is inconsistent with what the Productivity

Commission regards as the underlying scope of the Act. The draft education standards are a case in point. The unjustifiable hardship defence is limited to enrolment situations under the DDA (s.22(4)). The Draft Disability Standards for Education propose extending the unjustifiable hardship defence beyond the point of enrolment to include all education activities. On the other hand, the draft Access to Premises Standards propose limiting the unjustifiable hardship defence to the owners and developers of existing buildings and excluding the owners and developers of new buildings. Section 23(2) of the DDA does not make this distinction. Further, HREOC would not be able to grant temporary exemptions to organisations covered by the draft access to premises standards. This is in contrast to the public transport standards, which allow for such temporary exemptions.

HREOC argued that including the defence for post-enrolment situations in the disability standards for education was preferable to amending the DDA because the defence is perceived as part of a package of rights and responsibilities:

Certainly some people in the community that we have spoken to have taken the view that it's preferable to do it in the standard as part of a package, that in return for accepting an expansion of unjustifiable hardship that they will get better definition of rights across the board, whereas if you just amend the Act to expand unjustifiable hardship by itself then people might say, 'Well, what have we got out of that?' on the disability side of the equation. (HREOC, trans., p. 1147)

Some inquiry participants argued that disability standards should not be used to change the fundamental scope of the DDA: Queensland Parents for People with a Disability (sub. DR325); Australian Industry Group (sub. DR326); NSW Office of Employment Equity and Diversity (sub. DR354); Blind Citizens Australia (sub. DR269); and the ACT Government (sub. DR366).

The Productivity Commission acknowledges HREOC's point that subjecting disability standards to positive parliamentary approval provides some assurance that they will not undermine the scope and objects of the DDA. However, the Commission considers that standards should not be used to change the application of the Act in the ways discussed above.

The DDA provides a balance of prohibitions and defences in the areas it covers which, as a matter of principle, should be reflected in the disability standards developed for particular areas. Defences, such as unjustifiable hardship and the inherent requirements test for employment, are important to ensure that the DDA provides necessary checks and balances. These defences encourage changes where the benefits to the community outweigh the costs and discourage changes where costs outweigh benefits. Removing these defences via disability standards could result in regulations that impose significant costs on organisations covered by the DDA (see chapter 8).

It is the Commission's view that important statements of law should be made in the primary legislation, not in subordinate instruments. For example, the Productivity Commission recommends elsewhere in this report amending the DDA to extend unjustifiable hardship to all areas covered by the DDA, including the standards (see chapter 8). If this recommendation were accepted, it would be inappropriate for disability standards to undermine its intention. It is the Commission's view that the purpose of standards should be to clarify the operation of the Act, not remove important defences.

FINDING 14.1

The draft disability standards for education and access to premises have the effect of altering, in a fundamental way, the scope of the Disability Discrimination Act 1992 provisions concerning discrimination in education and access to premises.

RECOMMENDATION 14.1

Section 31 of the Disability Discrimination Act 1992 should be amended to clarify that disability standards cannot alter in a fundamental way the scope of the Act. The scope should only be altered via amendment of the Act, not via disability standards.

Flexibility

A clear advantage of standards is that they provide a degree of certainty for stakeholders who need to know what actions would be regarded as complying with the legislation. A potential shortcoming of standards, however, is that they can be inflexible, thereby imposing higher costs and requiring constant updating to keep them in line with technological developments.

Some inquiry participants (Job Watch, sub.215; Australian Taxi Industry Association, trans., p. 1336; Victorian Government, sub. DR367) criticised the inflexible nature of disability standards. By their nature, standards will limit the flexibility with which service providers comply with the DDA and adapt to changing circumstances—that is the tradeoff for creating some degree of certainty through a legislative instrument. However, there are ways of minimising these costs and creating a balance between certainty and flexibility. Where possible, the standards could use performance-based approaches that allow organisations to develop alternative ways of meeting standards, and they could incorporate mechanisms for updating (without continually redrafting) as technology changes. These and other features should be assessed during the drafting process.

Only the transport disability standards have been enacted. The RIS assessed options for improving the accessibility of public transport against six criteria, one of which was flexibility. It acknowledged that disability standards might be less flexible than other options, such as guidelines or the *status quo*, but noted that the transport disability standards incorporated flexible elements (Attorney-General's Department 1999). The draft disability standards for access to premises (released for public comment in January 2004) also provide some flexibility (box 14.2).

The Productivity Commission agrees that it is important for disability standards to be as flexible as possible, both promoting choice and being adaptable over time. As far as possible, these characteristics should be included when standards are formulated. The RIS process, which is designed to facilitate the introduction of good regulation, provides an opportunity to ensure flexibility is considered in the design and implementation of disability standards. This process appears to be working effectively, given that flexibility has been an important feature of the disability standards that have been assessed to date.

Effects on the rights of people with disabilities

Disability standards have been criticised for diminishing the rights of people with disabilities. The Victorian Government argued:

Under the complaints based approach people are free to lodge a complaint if and when they felt discriminated against. Introducing disability standards could mean the alleged instance of discrimination would be evaluated against the set standard. The respondent could be able to avoid action provided they meet specific conditions, regardless of the actual discrimination suffered by the person with the disability. This disregards the individualised and interactive nature of discrimination. (sub. DR367, p. 9)

The Anti-Discrimination Commission Tasmania (trans., p. 32), the Anti-Discrimination Commission Queensland (trans., p. 260) and Disability Council of NSW (sub. 64) expressed similar concerns.

Bruce Young-Smith suggested that people with disabilities be given the right to lodge a complaint if the standards do not meet their needs (sub. 80). HREOC objected to this suggestion, arguing that it would undermine the ability of disability standards to clarify the responsibilities of service providers and to provide certainty:

For example, any standard on access to premises needs to specify a minimum door width. If standards are to be meaningful it is not feasible to add a requirement that it is also unlawful not to have a wider door if anyone requires it. (sub. 219, p. 27)

Box 14.2 The flexibility of disability standards

According to the Attorney-General's Department, the Disability Standards for Accessible Public Transport incorporate flexibility in three ways.

- The standards are performance based. That is, generally they are not hardware specific but assume that a variety of solutions will satisfy any potential requirement.
- The standards allow operators and providers to comply with requirements, and thus the DDA, by following the specifications in the document or by providing an alternative means of 'equivalent access'. An operator may choose, for example, to provide equivalent access to bus services by using a high floor bus with a boarding platform rather than a low floor bus with a ramp.
- The DDA provides exemptions in cases where 'unjustifiable hardship' can be demonstrated. This provision allows added flexibility in those cases in which unjustifiable hardship exists.

Section 34 of the standards states that they must be reviewed within five years of being introduced and then every five years. The review, to be conducted by the Minister for Transport and Regional Services in consultation with the Attorney General, must include whether discrimination has been removed and any necessary amendments to the standards.

The Draft Disability Standards for Access to Premises will initially comprise the access components of the Building Code of Australia (BCA) that have been revised to comply with the provisions of the DDA. Like the transport standards, the access to premises standards are performance based. The acceptable performance requirements for buildings and other structures described by the disability standards may be met using:

- deemed-to-satisfy provisions, which are detailed prescriptive technical requirements within the BCA about how to construct and equip buildings
- an alternative solution that can be demonstrated to meet the performance requirements by other means. An administrative protocol has been developed to assist building control authorities assess applications for alternative solutions.

The draft premises standards include a timetable for review (Part 5). The Minister for Industry, Tourism and Resources, in consultation with the Attorney General, must review the effectiveness of the standards within five years of being introduced and then every five years. The review should identify any necessary amendments. The BCA is updated annually, but the access requirements for people with disabilities will not be changed until Parliament approves changes to the premises standards.

Sources: Attorney-General's Department 1999; Australian Building Codes Board (subs. 153 and DR297); ABCB 2001; Disability Standards for Accessible Public Transport 2002; Draft Disability Standards for Access to Premises (Buildings).

Blind Citizens Australia (sub. DR269), the South Australian Government (sub. DR356) and People with Disability Australia (sub. DR359) agreed that service providers complying with disability standards should be protected from complaints.

Compliance with disability standards will not address the needs of every person with a disability where short term tradeoffs are made to achieve better outcomes in the future. The phased introduction of the transport disability standards, for example, means that some people's needs will not be addressed initially, yet those people will have lost the opportunity to seek redress via the complaints process.

However, it is possible that disability standards will meet the needs of a wider range of people with disabilities in a shorter time than if they had relied on each lodging a complaint under the general provisions of the DDA. Elsewhere in this report, the Productivity Commission found that complaints have a limited role in achieving systemic change (see chapters 10 and 13). For example, complaints must be based on actual instances of discrimination, which makes it difficult to extend the outcomes of a case affecting people with mobility impairments to discrimination experienced by people with visual impairments. The outcomes of many complaints are also confidential, limiting their role in establishing precedents. By contrast, disability standards specify the actions that organisations must undertake to remove discriminatory practices affecting a wide range of people with disabilities.

It is important for people with disabilities to have the facility to complain about discriminatory behaviour. Indeed, the complaints mechanism plays a pivotal role in encouraging compliance with disability standards. However, the Productivity Commission considers it appropriate that compliance with disability standards is a defence if a complaint is lodged. People with disabilities need to be aware of the role of disability standards and their effect on the general anti-discrimination provisions of the DDA.

FINDING 14.2

Disability standards offer the potential to meet the needs of a wider range of people with disabilities in a shorter timeframe than individual complaints. It is appropriate that compliance with disability standards should provide protection from complaints made under the general provisions of the Disability Discrimination Act 1992.

Relationship with State and Territory legislation

Some inquiry participants questioned the relationship between disability standards, which are federal legislation, and State and Territory government legislation. For example, the Anti-Discrimination Commission Queensland (trans., p. 260) raised

the desirability of using State anti-discrimination legislation to establish a higher level of compliance in some areas than that negotiated under disability standards.

Section 13 of the DDA states that the Act is not intended to exclude or limit the operation of a law of a State or Territory that deals with discrimination on the grounds of disability that is capable of operating concurrently. That is, so long as there is no inconsistency between the DDA and State and Territory anti-discrimination legislation, both can be used to address discrimination on the ground of disability.

It is likely that State and Territory governments also have other laws and regulations that apply to areas covered by disability standards. It is possible that this legislation could impose a different requirement on a specific matter also contained in disability standards. The DDA is silent on the relationship between the DDA and other State and Territory legislation.

Generally, there are two potential forms of inconsistency between federal and State/Territory laws:

- ‘direct inconsistency’, which occurs where the State or Territory law would alter, impair or negate the operation of the federal law (including where the two laws are contradictory)
- ‘covering the field inconsistency’, which occurs where it appears from the terms, nature or subject matter of the federal law that it was intended as a complete statement of the law governing a particular matter, and the State or Territory law purports to deal with that matter (AGS 2004a).

If there is inconsistency between federal and State and Territory laws, section 109 of the Commonwealth Constitution states that federal laws displace the operation of State and Territory laws. This would apply to inconsistencies between the DDA and any inconsistent State and Territory laws, be they anti-discrimination laws or other laws.

The Victorian Government argued that because disability standards are subordinate legislation, they cannot displace State legislation:

Crown Counsel’s opinion is that disability standards are delegated legislation and as such, cannot cover the field and render State legislation invalid. (sub. DR367, p. 8)

According to the Australian Government Solicitor, the reference to laws in section 109 of the Constitution includes regulations and other instruments made under a law, such as a DDA standard (AGS 2004a).

At present, it is unclear what would amount to inconsistency between disability standards and State and Territory legislation. For example, the Anti-Discrimination Commission Queensland (trans., p. 260) argued that an organisation complying with a higher State-based standard would also meet the obligations of the federal disability standards and therefore there would be no inconsistency.

The Productivity Commission is more concerned about an organisation that might comply with the federal disability standards but not the higher standard imposed by the relevant State or Territory government. Allowing States and Territories to impose greater obligations than those contained in disability standards would create uncertainty for organisations subject to inconsistent requirements.

The Australian Government Solicitor suggested that a State law would probably be held to be incapable of operating concurrently with a DDA standard if the State law covering the same matter imposed a higher standard:

... where there are two distinct requirements, the courts have generally held that there is a clear inconsistency ... This is often the case because a law which makes unlawful actions below a minimum standard is generally seen as allowing, or making lawful, actions above that minimum standard. (AGS 2004a, p. 13)

Similarly, HREOC (trans., p. 2870) argued ‘that the standards, when they are passed, cover the field’.

This lack of clarity undermines the ability of disability standards to create certainty for organisations. There are a number of options for clarifying the situation. The first approach is to do nothing. The Anti-Discrimination Commission Queensland suggested no legislative intervention is required:

There is a persuasive argument that where an operational inconsistency occurs, the State Commission would lose jurisdiction to investigate or conciliate, as on those facts the DDA would prevail by virtue of [section] 109 of the Constitution. (sub. DR368, p. 1)

However, this option does not create the required certainty for organisations. A second option would be for State and Territory governments to adopt the DDA disability standards in their own laws. The Anti-Discrimination Commission Queensland recommended this as its preferred solution because it encourages cooperation between the Australian and State and Territory governments and if adopted across all jurisdictions, provides certainty to industry and the disability sector (sub. DR368).

This approach has a number of weaknesses:

- getting the agreement of all States and Territories would be difficult, particularly where some are arguing for higher levels of compliance

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- adoption of the standards may be delayed as different States and Territories move to adopt them at different times
 - differences in State and Territory anti-discrimination laws may mean the same standards would be interpreted and enforced differently in different jurisdictions.

A third option is to amend the DDA (s.13) to clarify that disability standards displace State and Territory legislation dealing with the same specific matter. This approach was supported by Blind Citizens Australia (sub. DR269), NSW Office of Employment Equity and Diversity (sub. DR354) and People with Disabilities Australia (sub. DR356).

The Victorian Government (sub. DR367) and the Anti-Discrimination Commission Queensland (sub. DR268) rejected this approach, arguing that it undermined the role of State and Territory laws. However, all State and Territory governments are involved in negotiating disability standards. The Productivity Commission considers it to be generally inappropriate for them subsequently to impose higher levels of compliance than negotiated. To the extent that there is any doubt about the primacy of disability standards over State and Territory legislation that deals with the same specific matter (both anti-discrimination laws and other laws), the Productivity Commission considers the DDA should be amended to clarify the position. Disability standards should not override all State and Territory laws dealing with a particular area but, where a DDA standard and a provision contained in State or Territory legislation address the same specific matter, the disability standards should prevail over that provision. The Australian Government Solicitor advised there were no constitutional or other legal obstacles to amending the Act in this way if that was the intent of the federal law (AGS 2004a).

FINDING 14.3

There is some uncertainty about the relationship between State and Territory legislation and disability standards that deal with the same matter.

RECOMMENDATION 14.2

The Disability Discrimination Act 1992 (s.13) should be amended to clarify that where disability standards and State and Territory legislation address the same specific matter, the disability standards should prevail.

Areas covered

The nature of disability standards will differ according to the area being addressed. Some areas, like public transport and premises, lend themselves well to prescription and measurement. Others, like employment and education, need a more procedural

approach. Whether these areas need to be clarified through statutory standards or can be adequately addressed through non-binding guidelines is an issue.

Section 31 limits the ability to formulate disability standards to the areas of employment, education, access to premises, public transport, accommodation and the administration of Commonwealth laws and programs (table 14.1). The areas not covered are the provision of goods and services, the purchase and disposal of land, clubs, sport, and requests for information. Further, the Act does not specifically allow for disability standards in areas covered by exemptions (such as insurance and superannuation).³

Table 14.1 Areas in which disability standards may be formulated and the status of each standard, April 2004

<i>Area of discrimination</i>	<i>Covered by DDA</i>	<i>Standard possible</i>	<i>Status of standard</i>
Employment	ss.15–21	✓	Draft not active
Education	s.22	✓	Second draft rejected by State/Territory Ministers; Australian Government to introduce standards unilaterally
Access to premises	s.23	✓	Draft released in January 2004
Public transportation	s.23 ^a	✓	Approved in October 2002
Provision of goods, services and facilities	s.24	X	..
Accommodation	s.25	✓	Draft not active
Purchase of land	s.26	X	..
Clubs and incorporated associations	s.27	X	..
Sport	s.28	X	..
Administration of Commonwealth laws and programs	s.29	✓	Commonwealth Disability Strategy implemented

^a Public transport is indirectly covered by the access to premises section of the DDA, because vehicles and aircraft are defined as 'premises' (s.4). .. Not applicable.

Sources: DDA; DDA Standards Project nd.

Hastings (1997) suggested that one factor influencing the decision to limit the areas covered by disability standards was concern about the costs to government and business of imposing standards in all areas covered by the DDA. There was no formal mechanism to assess the possible effect of new regulations on stakeholders when the DDA was introduced in 1992. In the absence of such a mechanism, the Government appeared to address concerns about imposing high costs on organisations by limiting the areas disability standards could cover.

³ As discussed earlier however, section 33 states that Division 5 (which deals with exemptions) does not apply in relation to a disability standard.

Now, all new legislation (including subordinate legislation such as disability standards) is subject to a review mechanism through the RIS process. The Productivity Commission considers that this is an appropriate mechanism for assessing whether regulations are the most cost-effective means of achieving the objects of the DDA.

Some inquiry participants argued disability standards cover too few areas:

Restriction of the areas under which standards can be developed appears too arbitrary and subject to changing views to be enshrined in the Act. (Victorian Government, sub. DR367, p. 7)

The Mental Health Legal Centre (sub. 108), Paraquad (trans., p. 123), and the Equal Opportunity Commission Victoria (sub. 129) expressed similar views. The Acting Disability Discrimination Commissioner, Dr Sev Ozdowski, also questioned the limitation on the provision for standards. He has suggested that progress towards equality and accessibility for people with disabilities would have been 'faster and broader' had the DDA allowed standards to be set in all areas (Ozdowski, 2002b, p. 8).

Previously, the Australian Government responded to changing priorities for disability standards by amending the DDA. For example, the DDA was amended in 2000 to allow for disability standards for access to premises, an area initially not considered for standards development.

Inquiry participants, such as Blind Citizens Australia (sub. DR269), People with Disabilities Australia (sub. DR359), the Disability Services Commission Western Australia (sub. DR360) and the NSW Office of Employment Equity and Diversity (sub. DR354) supported extending the provision to make standards to all areas covered by the Act. HREOC (sub. 143, p. 73) was also supportive but noted that this 'does not involve any conclusion that standards should necessarily be introduced in any particular area, only that it should be possible to make standards if and when this is decided to be appropriate'. The Victorian Government expressed similar views (sub. DR367).

Some inquiry participants noted areas where standards proved unsuitable. Most concerns were raised about disability standards for employment and education. Draft disability standards for employment were prepared following consultations with industry representatives, people with disabilities and government between 1994 and 1998 (see appendix A). These draft standards are not proceeding towards finalisation because interested parties could not agree on the form that they should take:

... while most participants in the process agreed that prescriptive standards were not appropriate, the principle based draft standards which were produced instead were not seen by all parties as delivering sufficient outcomes. (HREOC, sub. 143, p. 62)

The Australian Industry Group summarised inquiry participants' concerns with disability standards for employment:

Each business is unique. Therefore, it is very difficult to draft standards which are appropriate for all businesses. ... Not only would such standards need to be sufficiently flexible to have application to all workplaces and business operations, a further complication arises due to the vast array of disability which people have. (Australian Industry Group, sub. DR326, pp. 23–24)

The Productivity Commission considers that there are potential benefits from allowing the possibility for standards to be introduced in any area covered by the DDA. Further, the power should extend to areas covered by exemptions such as insurance and superannuation. Expressing the standard power in a general sense provides greater flexibility in determining priorities for future standards development.

Extending the standards-making power does not imply that standards should be made in all areas covered by the DDA. The very considerable costs associated with developing and complying with disability standards should be matched by a realistic prospect that those standards will address disability discrimination in an area better than the general provisions of the DDA. The Commission considers that the rigorous application of RIS processes provides safeguards against costly and inappropriate regulation.

RECOMMENDATION 14.3

The Disability Discrimination Act 1992 (s.31) should be amended to allow disability standards to be introduced in any area in which it is unlawful to discriminate on the ground of disability. The standards-making power should extend to the clarification of the operation of statutory exemptions.

Given the range of areas disability standards could potentially cover, it is important to establish a rigorous and transparent process for identifying priorities. The Attorney-General's Department could be charged with this responsibility in consultation with HREOC and the relevant stakeholders, including State and Territory government departments and agencies, people with disabilities and organisations covered by the DDA.

Monitoring and enforcement

Section 67(1)(e) of the DDA requires HREOC to monitor the operation of standards and report to the Attorney General, but there is no separate enforcement regime for standards. Non-compliance with a standard is an unlawful act under the DDA in the same way as non-compliance with one of the general anti-discrimination provisions. In each case, a complaint can be made by or on behalf of a person or class of persons aggrieved by the act of discrimination (see chapter 13).

The lack of a specific enforcement regime for disability standards was a concern for many inquiry participants, such as the National Ethnic Disability Alliance (sub. 114), the Disability Council of NSW (sub. 64) and Advocacy Tasmania (sub. 130).

Most participants commenting on this issue recommended that disability standards include both monitoring and enforcement procedures (for example, the Mental Health Legal Centre, sub. 108; Advocacy Tasmania, sub. 130; the Equal Opportunity Commission Victoria, sub. 129; the NSW Council for Intellectual Disability, sub. 117; and the Physical Disability Council of Australia, sub. 113). Some suggested that an independent authority be given responsibility for ensuring compliance with disability standards, while others suggested that HREOC should be resourced to undertake this role.

HREOC disagreed with this suggestion:

HREOC does not regard these detailed monitoring roles as appropriate or realistically achievable for HREOC, other than through the complaint process as a backup to other regulatory and monitoring processes. In addition to issues of availability of resources for such a role, HREOC considers a more effective model involves responsibility for accessibility to be incorporated as far as possible into the responsibilities of mainstream regulatory bodies for each subject matter. (sub. 219, p. 28)

The Productivity Commission considers that compliance with disability standards should be incorporated into existing regulatory processes where possible. Disability standards can be made in various areas of activity and it is sensible to rely on experts from those areas (with input from the disability community) to develop, implement and monitor standards. The draft building standard, for example, is linked formally to the BCA and thus will be enforced by State and Territory building planning approval processes. The NSW Office of Employment Equity and Diversity supported this approach, arguing:

This regulatory framework is more efficient than setting up a separate disability standard and separate compliance framework. A similar approach should be adopted for disability standards wherever practical to do so. (sub. DR354, p. 6)

Similarly, compliance with the transport standard will be monitored by a national Ministerial taskforce (see chapter 5). Although formal compliance is still enforced only through complaints, providers should have more incentive to comply and breaches will be easier to identify. HREOC's role should be limited to ensuring monitoring takes place and reporting on the operation of standards to the Minister. Other inquiry participants, such as Blind Citizens Australia (sub. DR269), Andrew van Diesen (sub. DR333), People with Disabilities Australia (sub. DR359) and Disability Services Commission Western Australia (sub. DR360) supported this approach.

RECOMMENDATION 14.4

Where possible, monitoring and enforcement of disability standards should be incorporated into existing regulatory processes. The Human Rights and Equal Opportunity Commission's role should be to report to the Attorney General on the operation and adequacy of those processes.

Development process

Aside from concerns about the concept of disability standards, many inquiry participants were also concerned about the process for developing standards. Most concerns related to the consultation process and the timeliness of standards.

Consultation

Consultation with people with disabilities, governments and those organisations with responsibility to implement the standards is vital in developing disability standards that are effective in reducing discrimination. Section 132 of the DDA requires that the comments of State and Territory Ministers responsible for matters relating to disability discrimination must be considered when disability standards are developed, but the DDA does not prescribe how consultation on disability standards should occur.

Many inquiry participants expressed concerns about the consultation process. Industry and State government representatives felt little attention was given to their concerns. The Property Council of Australia (trans., p. 3012) argued many of its comments were ignored while developing the draft access to premises standards.

The Victorian Government emphasised the need for wide ranging consultation:

Relevant sectors should be consulted in an inclusive manner, to ensure that disability standards are developed that address both the needs of the disabled and the capacity of sectors of business and industry. (sub. DR367, p. 10)

However, most inquiry participants commenting in this area were dissatisfied with the level of consultation among people with disabilities and suggested that it could lead to standards that compromised their needs. For example, the National Ethnic Disability Alliance stated:

... the resource imbalance between industry and the disability sector means that it is not an equal bargaining arrangement and there is a risk that standards developed will actually reflect the interests of industry and not the rights of people with disability. (sub. 114, p. 16)

Disability community input into standards development is coordinated by the DDA Standards Project (funded by the Attorney-General's Department). It is a network of organisations that represent people with disabilities throughout Australia (box 14.3). Despite this broad consultative framework, Marrickville Council (sub. 157) and the Disability Council of NSW (sub. 64) criticised the ability of the DDA Standards Project to reflect the needs of people with disabilities accurately, arguing that it represents a narrow range of views and supports the introduction of standards against the wishes of the broader disability community. By contrast, HREOC argued that a broader framework was also used for consulting with people with disabilities:

Project representatives have put forward a range of community views in standards development processes including views opposed to adoption of particular standards. Consultation on standards to date has in fact been very much wider than peak level. (sub. 219, p. 26)

Box 14.3 The DDA Standards Project

The DDA Standards Project is headed by a Steering Committee currently comprising representatives of nine national peak bodies: the Australian Association of the Deaf, Blind Citizens Australia, the Deafness Forum of Australia, the Head Injury Council of Australia, the National Council on Intellectual Disability, the National Ethnic Disability Alliance, the Physical Disability Council of Australia, Women with Disabilities Australia and the National Indigenous Disability Network.

Among other things, the DDA Standards Project consults with people with disabilities during the development of specific DDA standards. It aims to reflect all the views expressed by people with disabilities during consultations and protect the rights of people with disabilities from erosion during standards development processes. It encourages the development of legally binding standards, but will support alternatives if standards are not acceptable to the disability sector as a whole.

Source: DDA Standards Project nd.

The Productivity Commission recognises that it is difficult to obtain unanimous support for disability standards. The process of negotiating standards will

necessarily involve tradeoffs, and consultation with the various stakeholders gives the opportunity for feedback on where those tradeoffs should be made. It is important, therefore, that all sections of the community be involved.

Although consultation is important in developing better, more effective, standards, it is not an end in itself. Consultation is a means to allow different views to be expressed and advice to be sought from the disability sector, industry and governments. It is almost inevitable, however, that translating those views into workable standards will mean that one or more groups will feel that their views have been inadequately addressed. Governments need to play a balancing role that promotes the objects of the Act and the interests of the broader community.

FINDING 14.4

Those affected by disability standards have had sufficient opportunity to consult and comment during their development. The Disability Discrimination Act Standards Project is an important way of engaging people with disabilities in the consultation process and is not their only means for providing input.

Timeliness

Many inquiry participants were concerned about the timeliness of the development of disability standards. The Public Interest Advocacy Centre noted:

The development of the current disability standards has however proven to be time-consuming and costly to formulate. This has to some extent been a result of a political process which has been driven by competing needs of the various parties. (sub. 102, p. 9)

Similarly, the National Ethnic Disability Alliance argued:

... developing standards has been a painfully slow process with only one standard adopted and appended to legislation to date ... (sub. 114, p. 16)

Only the Disability Standards for Accessible Public Transport (approved in October 2002) are in effect (see appendix C). The draft Disability Standards for Access to Premises and associated RIS were released for comment in January 2004. It is hoped that the standards will be introduced in May 2005 when the BCA is updated, although the Property Council of Australia has suggested that May 2006 is a more likely date (trans., p. 3019). Two major drafts of the Disability Standards for Education and accompanying RISs have been released for public comment (in 2001 and 2003). The Ministerial Council on Employment, Education, Training and Youth Affairs has not agreed on the draft, although the Australian Government announced plans in July 2003 to 'move unilaterally to implement the standards' (Nelson 2003, p. 1).

ParaQuad Victoria proposed amending the DDA to impose deadlines for developing disability standards, as was done in the United States (sub. 77). The Productivity Commission does not support this proposal for a variety of reasons. First, the absence of standards in an area should not be interpreted as an absence of activity. In relation to Commonwealth laws and programs, the Australian Government implemented the Commonwealth Disability Strategy in 1994 (revised in 2000), which operates as a *de facto* standard for Australian Government departments and agencies (see appendix E).

Second, the lack of formal disability standards in some areas is a consequence of genuine disagreements over the form that standards should take. As discussed earlier, many inquiry participants argued against disability standards for education and employment. Imposing deadlines may result in the premature adoption of standards that are ill designed and do more harm than good.

Third, the time taken to formulate standards is also a consequence of the consultation process. As discussed above, some inquiry participants are concerned about the lack of consultation. Imposing deadlines may limit opportunities for interested parties to provide meaningful input to the standards process.

The Productivity Commission notes that formulating disability standards has been a more protracted exercise than envisaged. This delay reflects a tradeoff between developing standards in a timely manner and achieving a consensus between people with disabilities and affected organisations. Any attempts to limit the time taken to develop standards may compromise their effectiveness. However, the Commission's recommendations to allow other regulatory approaches (discussed below) may also result in more timely regulations.

FINDING 14.5

The development of disability standards has been very slow and only one—the Disability Standards for Accessible Public Transport 2002—has been introduced to date. However, imposing deadlines as a way of expediting formulation of standards could constrain the consultation process and result in inferior standards.

As noted earlier, disability standards may not necessarily be suitable for all areas covered by the DDA. Alternatives to disability standards include self-regulation and co-regulation (discussed below) and guidelines (discussed in section 14.3).

14.2 Self-regulation and co-regulation

Although the Productivity Commission has recommended that the power to make disability standards be extended to all areas covered by the DDA, they might not always be the most appropriate form of regulation in some areas. There might be a role for other approaches that draw on greater involvement by organisations to which the Act applies. HREOC stated that ‘consideration should also be given to adding to the DDA more explicit provision for self-regulatory and co-regulatory mechanisms such as are provided in more recent Commonwealth legislation, for example in the area of telecommunications’ (sub. 143, p. 52).

The voluntary industry standards developed by the banking industry for Internet and phone banking, EFTPOS facilities and automatic teller machines are examples of self-regulation in the area of disability discrimination. The voluntary standards, developed by the Australian Bankers’ Association following a HREOC inquiry into the accessibility of electronic banking services, provide details on how to design, install and operate electronic banking services to improve their accessibility.

As the name suggests, self-regulation involves affected organisations, including industry, formulating rules and codes of conduct, and encouraging compliance with those rules. Inquiry participants were concerned about the lack of enforceability of such mechanisms:

[Blind Citizens Australia] has seen through the *ad hoc* adoption and implementation of the Australian [Bankers’] Association’s disability standards that these documents are often considered aspirational rather than mandatory. Moreover, there is no guarantee that industry standards will actually comply with the DDA. (Blind Citizens Australia, sub. 72, p. 13)

Tasmanians with Disabilities submitted:

... I use the telecommunications industry. They have been required to self-regulate ... and the uptake of the various telcos to sign to the various codes has been a really hard, long and arduous process. It’s only when [the Australian Communications Authority] was finally given the power to say, ‘You must comply,’ that in actual fact some of the telcos have been actually complying with some of the codes. (trans., p. 2174)

Similar concerns were expressed by Dorothy M. Bowes (sub. DR386), Barbara Prideaux (sub. DR340), B. Well (sub. DR258) and D. Buckland (sub. DR252).

On the other hand, co-regulation involves a joint approach by organisations and government. For example, an industry (through industry bodies and their members) could develop and administer codes of conduct which the government formally recognises. Such an approach can be flexible and responsive, especially if initiated by industry. A sense of ownership from the development of codes may encourage a

greater awareness of, and willingness among industries to comply with, the requirements of the DDA.

Codes of conduct could be developed by organisations to eliminate discrimination in the provision of products or services and/or in employment in particular industries. This is one mechanism that could be adopted to address concerns that disability standards for employment cannot adequately reflect the variety of workplace arrangements and business practices that exist.

Codes of conduct could be recognised in the DDA in a number of ways. First, compliance with codes of conduct could be considered if a complaint is lodged, as is currently done with action plans. Blind Citizens Australia (sub. DR269) suggested that this is unlikely to provide sufficient incentives for organisations to develop and adhere to codes. However, as noted, codes of conduct already operate in a number of industries, such as the banking and insurance industries and, though not formally recognised by the DDA, could be taken into account in determining complaints.

A second option could be to allow industry bodies with an adequate code to manage complaints of discrimination about their members in the first instance. Any complainant unhappy with how their complaint was handled could then lodge a formal complaint with HREOC. The Investment and Financial Services Association cited a recent example from the insurance industry:

... all life insurance companies have an established process of internal complaints handling as well as an independent body to hear complaints unable to be resolved internally. Under recent reforms this process is required to meet minimum standards set by [the Australian Securities and Investment Commission]. The adequacy of these arrangements can be demonstrated by the level of complaints made and frequency of referral to external bodies. (sub. 242, p. 21)

Similar processes are used to address complaints about television and radio broadcasting content (under the *Broadcasting Services Act 1992*) and about violations of privacy codes (under the *Privacy Act 1988*). This option might be possible under the *Human Rights and Equal Opportunity Commission Act 1986* complaints process, because HREOC can refuse to accept a complaint if there is a 'more appropriate remedy available' (s.46PH(1)(e)).

Third, organisations developing and implementing a code could be granted temporary exemptions by HREOC under the DDA. Under its current guidelines, HREOC can link exemptions to a satisfactory action plan. These guidelines could be expanded to link temporary exemptions to the development and implementation of codes of conduct. A variation on this approach would be to amend the DDA to allow HREOC to certify compliance with a code as meeting the requirements of the

DDA. It would have the practical effect of protecting an organisation which complies with the code from complaints under the general provisions of the DDA. Organisations implementing a code would be protected from complaints for a period of up to five years. It could be argued that limiting the period to a maximum of five years reduces certainty for organisations, but it also provides opportunities to update codes over time and ensure that the actions taken by organisations to eliminate discrimination remain appropriate.

The Productivity Commission considers that the benefits of co-regulation, particularly its flexibility to deal with a variety of different circumstances and changes over time, are compelling. The Commission is not suggesting that it be mandatory for industry organisations to formulate and implement codes of conduct, just that this form of regulation be an option.

The Commission considers that HREOC should be able to approve and register codes of conduct, including dispute resolution mechanisms, subject to criteria such as consistency with the objects of the DDA and adherence to good regulatory practice. Consultation is fundamental to developing good regulation, including codes of conduct. Codes of conduct should be certified only after organisations have consulted with stakeholders, including people with disabilities and relevant government departments and agencies. Compliance with a registered code could be linked to exempt or deemed to comply status.

FINDING 14.6

Co-regulatory arrangements—including codes of conduct—between organisations and government could increase awareness of, and willingness to comply with, the Disability Discrimination Act 1992.

RECOMMENDATION 14.5

The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.

14.3 Guidelines and advisory notes

Under the DDA, HREOC may issue guidelines (in practice termed ‘advisory notes’ by HREOC) to assist people and organisations with responsibilities under the legislation to avoid discrimination and comply with their responsibilities (s.67(1)(k)). Examples include the guidelines on insurance and superannuation and the advisory notes on accessibility of world wide web pages.

The main advantage of guidelines over standards and other regulatory measures is their flexibility; they can be easily updated to reflect changes in best practice and precedents set in case law. The Anti-Discrimination Board of NSW noted with respect to employment:

Guidelines provide a more flexible approach to providing guidance and are more amenable to regular updating as knowledge in this area is likely to change rapidly over time. (sub. 101, att. 2, p. 13)

Their greatest weaknesses are that they are not legally binding or certain. Service providers are not obliged to comply with the requirements and responsibilities set out in guidelines; even if they do, compliance with guidelines is not necessarily a defence if a complaint is lodged. The Investment and Financial Services Association noted:

... because the law does not recognise the guideline in relation to evidence that supports an insurer's decision (that is, underwriting manuals, census statistics or local and international experience), its usefulness in assisting the sensible cost-effective resolution of complaints may be limited. (sub. 142, p. 28)

Some inquiry participants argued that guidelines would be better than standards at clarifying the general provisions in the DDA relating to education and employment:

does not consider that the DDA draft Education Standards will give the necessary clarity to schools and in their current format offer little practicable benefit to schools. ... [The Association] considers that 'guidelines and best practice', instead of uniform standards, will more effectively enhance both the inclusion of students with disabilities into school communities and the operation of the DDA. (Association of Independent Schools of South Australia, sub. DR357, p. 3)

Similarly, the National Council of Independent Schools' Associations stated:

Given the difficulties inherent in interpreting the processes outlined in the draft Disability Standards for Education, [our] preference would be for a policy of guidelines rather than standards. (sub. 126, p. 14)

Job Watch recommended that guidelines be developed for employment:

Job Watch favours the development of guidelines/advisory notes which provide a greater understanding and guidance about what is required by the DDA and retain the necessary flexibility for the proper application of the Act. (sub. 215, p. 5)

Presently, no guidelines exist in the area of employment. HREOC has developed 'frequently asked questions' (FAQs), but these have been criticised for providing little practical advice to employers:

At present, 'frequently asked questions' serves as the educative material in the area of employment. This information is difficult to understand, provides little or no practical examples which an employer can relate to and is not at all user-friendly. The

‘frequently asked questions’ information should not take the place of guidelines in the employment area. (Job Watch, sub. 215, p. 5)

Although not legally binding, guidelines are explicitly recognised in the DDA; FAQs are not. It is important that guidelines be developed in this area, that explain clearly the general provisions of the DDA, including practical examples of the adjustments employers could make to workplaces as well as information on assistance programs. This is particularly important given the Productivity Commission’s recommendations to introduce a reasonable adjustment duty and expand the criteria for unjustifiable hardship to include steps taken to obtain assistance for adjustments (see chapter 8).

RECOMMENDATION 14.6

The Human Rights and Equal Opportunity Commission should replace the Frequently Asked Questions for employment with guidelines in order to provide more formal recognition under the Disability Discrimination Act 1992 and greater clarity for employers regarding their responsibilities.

14.4 Action plans

Section 60 of the DDA allows ‘service providers’ to develop and implement an action plan. Such plans are voluntary and detail the actions that they intend to take to identify and eliminate discrimination in providing goods or services or making facilities available to people with disabilities. The DDA provides only general indications of what an action plan should contain (box 14.4). HREOC has developed detailed guidelines for each sector and an ‘action plan kit’ to assist organisations to prepare plans.

Once developed, a voluntary action plan can be registered with HREOC, which then makes it publicly available. A service provider’s action plan must be considered in determining unjustifiable hardship in providing services or making available facilities to people with disabilities (s.11(d)). The success of an action plan, in terms of eliminating disability discrimination and as a defence against complaints, will largely depend on the effectiveness of the actions taken.

Box 14.4 What is in an action plan?

The action plan of a service provider must include provisions relating to:

- (a) the devising of policies and programs to achieve the objects of the Act; and
- (b) the communication of these policies and programs to persons within the service provider; and
- (c) the review of practices within the service provider with a view to the identification of any discriminatory practices; and
- (d) the setting of goals and targets, where these may reasonably be determined against which the success of the plan in achieving the objects of the Act may be assessed; and
- (e) the means, other than those referred to in paragraph (d), of evaluating the policies and programs referred to in paragraph (a); and
- (f) the appointment of persons within the service provider to implement the provisions referred to in paragraphs (a) to (e) (inclusive).

Source: *Disability Discrimination Act 1992*, s.61.

HREOC had registered 305 action plans as at 24 March 2004 (table 14.2). Most plans were submitted by local governments (122), State, Territory and Australian government departments and agencies (73), and tertiary education providers (40). Only two non-government schools and one State education department (Tasmania) registered action plans. Nationally, only 38 action plans were registered by private businesses. Many State government departments and agencies make action plans under State legislation rather than under the DDA. No Northern Territory Government agencies have registered an action plan.

Table 14.2 Number of registered action plans, March 2004

Location	Govt ^a	Local			Universities	Non-govt ^b	Business ^c	Total
		govt	Schools	TAFE				
NSW	12	41	0	1	6	..	..	60
Vic.	5	45	1	5	6	..	..	62
Qld	4	6	0	4	4	..	..	18
SA	13	18	1	5	3	..	..	40
WA	3	5	0	0	0	..	..	8
Tas.	2	5	0	1	1	..	..	9
ACT	1	..	0	1	2	..	..	4
NT	0	2	0	0	1	..	..	3
Australian Govt	33	..	..	..	..	..	..	33
National ^d	..	..	..	0	..	30	38	68
Total	73	122	2	17	23	30	38	305

^a Australian, State or Territory government. ^b Includes unions, employer associations, community groups, Skillshares, a folk festival and a church. ^c Includes private companies and a small number of government business enterprises. ^d Businesses or organisations that operate in more than one State. .. Not applicable.

Source: HREOC 2004a.

When implemented effectively, voluntary action plans can proactively reduce the barriers that restrict opportunities for people with disabilities, without those people having to rely on the reactive complaints mechanism. Some inquiry participants were very supportive of voluntary action plans. The National Australia Bank stated:

... in 1997 the National recognised the need to demonstrate leadership and best practice within financial services to provide equal access ... to banking and financial service, products, premises and also to employment opportunities ... So we did in 1997 develop a disability action plan which was the first to be lodged with the Human Rights and Equal Opportunity Commission under the Disability Discrimination Act, and we still have that disability action plan in place today ... (trans., pp. 1610–11)

Disability Action Inc. commented:

DDA action plans have been a valuable tool for facilitating change and changing discriminatory practices. ... The development of a DDA action plan requires an organisation to spend focused time on considering how organisational practice and attitude might lead to discrimination. The very act of reflecting on organisational practice and attitude can lead to a raising of consciousness and attitude change. (sub. 43, p. 3)

Janet Hope and Margaret Kilcullen (sub. 165), the Leichhardt Council Disability Access Committee (trans., p. 1184) and McDonalds (trans., p. 1609) expressed similar views.

Others acknowledged the theoretical benefits of action plans, but questioned their usefulness in practice. Inquiry participants often regarded action plans as ‘paper compliance’—that is, service providers develop and lodge a plan but never act on it. The most commonly cited problems with action plans were:

- the small number registered
- their quality and consistency with the provisions of the DDA
- the lack of monitoring and enforcement of those lodged with HREOC.

Inquiry participants made recommendations to improve the effectiveness of action plans. It was suggested that action plans be made compulsory for certain types of organisation (like all Australian Government agencies or all businesses over a certain size) and that implementation of action plans be monitored and enforced. People with Disability Australia argued ‘it would be much better that the action plan process was mandatory and that there was some monitoring agency established around it’ (trans., p. 1324).

The Northern Territory Disability Advisory Board (sub. 121), the Physical Disability Council of Australia (sub. 113), the Association for the Blind of WA (sub. 83), Disability Action Inc. (sub. 43), the Disability Rights Network of

Community Legal Centres (sub. 74) and Alexa McLaughlin (trans., p. 646) made similar recommendations. Many cited the action plan and monitoring arrangements for State government agencies in Western Australia and New South Wales (arrangements introduced under the disability services Acts in those jurisdictions). They suggested that HREOC take on a similar role monitoring and enforcing compliance with DDA action plans.

However, mandatory action plans that are monitored and enforced by an independent agency, such as HREOC, may not be a cost-effective means of eliminating discrimination. First, some participants argued that mandatory action plans may be counterproductive. SPARC Disability Foundation Inc. (trans., p. 1057) argued that compulsory action plans would foster resentment among service providers.

Second, a focus on action plans incorrectly implies that only those organisations with an action plan are taking steps to eliminate discriminatory practices:

Many enterprises have their own internal policies for equal opportunity in employment and, while these may not be cast in the precise terms of an action plan as specified by the DDA, they serve to promote equity in those workplaces and operate to maximise equality outcomes. (Australian Chamber of Commerce and Industry, sub. DR288, p. 8)

Few education providers have prepared and lodged action plans, but they have made other significant attempts to reduce the barriers faced by students with disabilities, such as the guidelines adopted by private schools in South Australia (Association of Independent Schools of South Australia, sub. 135).

A requirement for Australian Government departments and agencies to lodge action plans with HREOC was removed following a review of the Commonwealth Disability Strategy. The evaluation of the Commonwealth Disability Strategy argued that existing mechanisms (such as workplace diversity plans, customer service charters, annual corporate planning processes and output-based budgeting and reporting processes) should be used as the primary means to improve the access and participation of people with disabilities (KPMG 1999) (see appendix E).

Third, the monitoring and enforcement arrangements would be costly to comply with and administer. HREOC noted:

... we would have to be resourced along the lines of the affirmative action agency to do even ... what was assessed as a reasonably minimal job of assessing the reports ... we don't think that more money and more power for us is the only way forward in this issue ... (trans., pp. 1157–8)

The Productivity Commission considers action plans to be a useful way of addressing the discrimination faced by people with disabilities. The small number

registered with HREOC prompted many inquiry participants to recommend that action plans be made compulsory and that compliance with plans be monitored and enforced. However, this approach ignores the other actions organisations take, generally through internal planning processes, to address discrimination and the costs associated with complying with and administering such a scheme. The Commission recommends elsewhere in this report that organisations be required to make reasonable adjustments (see chapter 8). They may find action plans a useful device for outlining how they intend to make such adjustments.

FINDING 14.7

Action plans can be an appropriate mechanism for reducing barriers to people with disabilities. However, only a small number of private organisations have registered plans. More government departments and agencies have registered them, but coverage is still far from complete.

FINDING 14.8

Making action plans mandatory would not be a cost-effective way to eliminate the discrimination experienced by people with disabilities.

Section 59 of the DDA defines a service provider as someone who ‘provides goods or services; or makes facilities available, whether for payment or not’. HREOC interprets the term ‘service provider’ very broadly to include government departments and agencies at all levels (for example, Australia Post, local councils, municipal services such as libraries and swimming pools, and public schools), private and public businesses and organisations (such as retailers, solicitors, travel agents, cinemas, banks, broadcasters, transport providers and charitable and religious organisations) and individuals (HREOC 2003a).

The Productivity Commission is concerned that this interpretation of a ‘service provider’ is not reflected in Part 3 of the DDA as it currently exists. Some organisations reading this part of the Act may interpret action plans as only applying to organisations and their activities covered by section 24 of the Act (discrimination in the provision of goods, services and facilities). That is, that organisations covered under other areas of the Act cannot use action plans as a means of addressing discrimination.

HREOC (2003a) concedes that action plans do not cover employment issues, but suggests that organisations review their employment practices when developing an action plan. The Productivity Commission considers there are benefits in formalising this advice.

One approach would be to amend Part 3 of the DDA to describe in greater detail who can develop and submit an action plan (for example, service providers, employers, sporting associations). Alternatively, part 3 could be amended to extend the ability to develop action plans to all types of organisations operating in all areas covered by the DDA. This second option has the benefit of removing any uncertainty about who can develop an action plan or the activities which can be covered by a plan (such as the provision of goods and services or employment practices). The Productivity Commission prefers the latter approach.

FINDING 14.9

Limiting action plans to ‘service providers’ unnecessarily restricts their usefulness in eliminating discrimination.

RECOMMENDATION 14.7

The Disability Discrimination Act 1992 (Part 3) should be amended to clarify that action plans can be developed and registered by any organisation or person covered by the Act.