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## E Commonwealth laws and programs

Like any other public or private organisation, the Australian Government must comply with the provisions of the *Disability Discrimination Act 1992* (DDA) in areas such as employment, education and accommodation. Unlike other organisations, however, the Australian Government is the subject of a specific section of the DDA (s.29), which governs the administration of Commonwealth laws and programs. This singling out of some Australian Government activities reflects one of the reasons for introducing the DDA—namely, the Constitutional inability of State and Territory disability discrimination legislation to address alleged discrimination by Australian Government departments and agencies (see chapter 4). Separate treatment of Australian Government activities may also be linked to the common law doctrine of legal equality (and thus to the DDA’s object regarding equality before the law) (see chapter 9).

Within the DDA, the activities of Australian Government agencies and departments also stand out in two other respects. First, the unjustifiable hardship defence is unavailable to organisations administering Commonwealth laws and programs (see chapter 8). Second, unlike for other providers of goods and services, the DDA allows for disability standards to be made with respect to the administration of Commonwealth laws and programs (see chapter 4). However, no standards have yet been developed in that area. Instead, federal agencies are required to comply with the Commonwealth Disability Strategy. The strategy is a planning framework that, although not based in law and not a substitute for standards, outlines federal best practice in eliminating barriers to full participation by people with disabilities.

### **E.1 Australian Government’s response to the Disability Discrimination Act**

Following the introduction of the DDA, the Australian Government initiated two responses dealing with its responsibilities under the Act. The main response, the Commonwealth Disability Strategy, is ongoing. The other response, the disability standard setting process, is now inoperative. Both responses are examined below.

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## Disability standards for Australian Government laws and programs

In 1993, the Attorney General established the DDA Standards Working Group to advise on the need for and the development of disability standards. This working group identified federal information services as a priority. In 1996, a working party— comprised of the Attorney-General’s Department (Chair), the Disability Discrimination Commissioner, interested federal Departments and representatives of the DDA Disability Standards Project—drafted a discussion paper on standards for Australian Government information and communications. A draft of these standards was intended to be released in 1997, but was not. No follow-up action appears to have been taken, either on information standards or on more general standards for the administration of Commonwealth laws and programs. This delay appears to be due to other areas (transport, access to premises and education) taking a higher priority. However, the Department of Family and Community Services stated that ‘the establishment of standards for Australian laws and programs is still open to consideration’ (sub. DR 362, p. 16).

One inquiry participant suggested that making some of the provisions of the Commonwealth Disability Strategy (for example, regarding online accessibility) part of standards on Commonwealth laws and programs could provide for stronger monitoring mechanisms (Tedicore, trans., pp. 266–7).

HREOC indicated that it does not perceive the need for comprehensive standards for all aspects of the administration of Commonwealth laws and programs, but it nonetheless suggested that standards could provide:

- an avenue for complaint when commitments under the Commonwealth Disability Strategy (for example, the lodgement of actions plans) are not met
- a clearer legal framework regarding the rights of people with disabilities and the duties of Australian Government bodies (HREOC, sub. 143, p. 80).

## Commonwealth Disability Strategy

The Commonwealth Disability Strategy was introduced in 1994 to provide Australian Government Departments and agencies with a planning framework to ensure access to all federal programs, services and functions for people with a disability (OoD 1994, p. iii). The original strategy applied to the activities of all departments, agencies and authorities for 10 years (1994–2004) and aimed to ‘enhance access opportunities for people with a disability to the programs, services and infrastructure of society’ (OoD 1994, p. 5).

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Departments were originally required to report biennially on their progress in implementing the strategy by undertaking self-assessment. The Australian Government's Office of Disability was responsible for collating the assessments and overseeing the preparation of a progress report, examining the performance and progress of the Commonwealth Disability Strategy. Two such reports have been tabled in Parliament (1995 and 1997). In addition, KPMG conducted a mid-term evaluation of the strategy in 1999. As a result of this evaluation, the strategy's objectives and reporting requirements were changed in 2000. Below is a brief chronology of the Commonwealth Disability Strategy, from its inception in 1994 to its re-launch in 2000.

### *Commonwealth Disability Strategy (1994)*

The strategy was intended to provide a 10 year planning framework to remove barriers for people with a disability progressively and to enable the Australian Government to provide leadership to others in the community so 'people with a disability can live, work and participate as valued and equal citizens' (OoD 1994, p. 1). The strategy's objectives are to:

- promote acceptance of the fact that people with disabilities, and their families and carers have the same fundamental rights as the rest of the community
- identify and remove barriers in program development and delivery
- eliminate discriminatory practices of employers and program administrators
- develop plans, strategies and actions to ensure the needs of people with disabilities and their families and carers are taken into account in planning and service delivery. (OoD 1994, p. 3)

To achieve these objectives, the Commonwealth Disability Strategy introduced core strategies for Australian Government departments, outlining areas of administrative responsibility in which reforms could occur. These included:

- requiring that each department and authority lodge a DDA action plan with HREOC by 1997
- making a commitment that legislation would not contain discriminatory provisions
- encouraging equal employment opportunities, by including more flexible working arrangements to accommodate the needs of people with a disability
- requiring departments at a minimum to comply with AS1428, the minimum standard for building accessibility
- setting a target of 4 per cent for the employment of people with a disability in the Australian Public Service (APS), to be increased to 5 per cent by 2000.

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The above core strategies aimed to promote access for people with a disability across all federal agencies. In addition, the Commonwealth Disability Strategy recognised that the Australian Government, through its responsibilities in key economic and social areas, is well placed to influence the integration of people with disabilities into the rest of society. The strategy thus called on Government departments and agencies to exert their influence in a variety of areas, such as buildings, transport, education, telecommunications and the justice system. It recommended, for example, that the Human Rights and Equal Opportunity Commission (HREOC) ensure telecommunications' carriers and major equipment manufacturers be made aware of their obligations under the DDA and develop action plans. It also recommended that the then Department of Communications and the Arts, when reviewing telecommunications policy and regulatory arrangements, consider the specific issues facing people with a disability (OoD 1994, p. 27).

#### *Progress reports (1995 and 1997)*

The 1995 and 1997 progress reports sought to measure the performance of Australian Government departments and agencies against criteria laid out in the Commonwealth Disability Strategy. The 1995 progress report concluded that good progress had been made overall, but recorded limited progress in the areas of consultation, participation, planning and accountability. A particular concern was the failure of any agency to lodge a disability action plan with HREOC, given the target that all agencies lodge such a plan by the end of 1997.

The 1997 progress report detected progress in physical access across many departments and agencies. It also noted some progress in employment opportunities for people with a disability. However, it was critical of the slow progress made in increasing the participation of people with disabilities on advisory bodies, and measuring agencies' effectiveness in meeting the needs of people with disabilities. By August 1997, progress on action plans was still deemed to be unsatisfactory, with only 13 out of 69 Australian Government departments and agencies having lodged plans with HREOC (KPMG 1999, p. 18).

#### *Mid-term evaluation (1999)*

KPMG's mid-term evaluation of the Commonwealth Disability Strategy sought to explain why the strategy had not been as successful as envisaged, and to develop ways of improving the strategy. The evaluation found that it was difficult to evaluate the strategy's success and progress, given a lack of objective performance measurement criteria and also the absence of independent monitoring mechanisms (KPMG 1999, p. i). The evaluation report suggested ways in which the strategy

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could be improved, which primarily involved recognising that the strategy applies more to some agencies than others, and developing a framework and set of principles that apply to each role of the Australian Government. It also recommended developing a performance monitoring framework that existing Australian Government reporting and accountability measures (such as annual reports) could incorporate (box E.1).

The mid-term evaluation report noted a lack of clarity regarding the strategy's scope. The initial strategy applied to the 'activities of Commonwealth departments and authorities'. The report noted that statutory authorities and government business enterprises (GBEs) were uncertain about whether they were bound by the strategy. This uncertainty arose from those organisations having some degree of independence from government control and a commercial focus.

The report also detected a tension between the human resources and client service aspects of the strategy. Implementation and reporting of the strategy often gave precedence to Equal Employment Opportunity considerations, while neglecting client service issues.

The mid-term evaluation provided some insights into the low action plan compliance rate of departments and agencies. In particular, it identified concerns that lodging a plan would not be sufficient to protect an agency from a complaint and may incriminate it further, if it did not carry out the commitments in the plan (KPMG 1999, p. 29). When plans had been lodged, the evaluation found that the 'major focus had been the development of the disability action plan, rather than a focus on its implementation' (KPMG 1999, p. 29).

These findings led the mid-term evaluation to recommend that the requirement for federal organisations to develop and lodge action plans be removed from the Commonwealth Disability Strategy (box E.1). The evaluation suggested that 'departments and agencies should be encouraged to develop mechanisms that ensure they address the needs of people with disabilities in the most suitable manner for their business', which may or may not include action plans (KPMG 1999, p. 67).

On the positive side, the mid-term evaluation found that the strategy 'had been an effective tool in raising awareness of the needs and rights of people with disabilities in their interactions with Australian Government departments and agencies' (FACS, sub. DR362, p. 16).

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**Box E.1 Recommendations of the mid-term evaluation of the Commonwealth Disability Strategy**

The mid-term evaluation of the Commonwealth Disability Strategy made 13 recommendations:

1. That the Government reaffirm its commitment to the full participation of people with disabilities in the Australian community by establishing a clear policy framework for Government activities.
2. That the Government show evidence of commitment to people with disabilities by refining the Commonwealth Disability Strategy so it is more appropriately targeted in identifying and reducing discriminatory practices in Government programs, service delivery and employment.
3. That the Commonwealth Disability Strategy recognise the differing core roles of the Government—funder/policy adviser, purchaser, provider and employer—and the varying accountabilities that attach to these roles in catering for the needs of people with disabilities.
4. That the Government, in refining the Commonwealth Disability Strategy give specific attention to:
  - (a) the need for ongoing education and promotion of the needs and rights of people with disabilities to address the attitudinal barriers that exist
  - (b) more flexible program design and service delivery to ensure more streamlined access to the services required to meet the needs of people with a disability
  - (c) identifying and reducing discriminatory barriers and sharing best practice through improved coordination of programs between federal departments and agencies, and also between the Australian Government and the State and Territory governments
  - (d) increasing access to information in appropriate formats
  - (e) increasing access to appropriate employment opportunities.
5. That the refined Commonwealth Disability Strategy be based on a more flexible framework using identified principles and agreed performance indicators that address issues of planning, the accessibility of buildings, communication, staff training, consultation, participation, coordination and accountability. Principles and performance indicators should be developed jointly by Government departments and agencies and key stakeholders. Individual agencies should set annual performance targets.
6. That clear accountability mechanisms be established and linked to the core reporting and planning process of Government departments and agencies, so as to increase public accountability and participation outcomes for people with disabilities.

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**Box E.1** (continued)

7. That the compulsory requirement for disability action plans to be lodged with HREOC be removed. Departments should be encouraged to develop mechanisms that ensure they address the needs of people with disabilities in the most suitable manner for their business. If departments consider disability action plans to be useful in identifying and progressing disability issues, then they should be encouraged to use them.
8. That the Office of Disability take a leadership role within the Government in providing information and establishing networks to support the Commonwealth Disability Strategy and assist agencies in removing barriers and improving program development and delivery for people with disabilities.
9. That the Office of Disability take a leadership role in providing advice to ensure the Commonwealth Disability Strategy is integrated within the evolving accountability, reporting and planning framework of the Government.
10. That the revised Commonwealth Disability Strategy be developed by departments and agencies, peak disability organisations and people with disabilities.
11. That the responsibility for overseeing the Commonwealth Disability Strategy, including the development of performance indicators, rest with the Office of Disability in consultation with other agencies.
12. That the Office of Disability have the revised Commonwealth Disability Strategy framework ready for implementation from 1 January 2000.
13. That the Commonwealth Disability Strategy be reviewed within three years of commencement to assess its effectiveness in reducing discriminatory practices and removing key barriers. The review should also identify opportunities for further integrating the strategy into core Government accountability, reporting and planning processes.

Source: KPMG 1999, pp. 6–9.

### *Commonwealth Disability Strategy (2000)*

Based on the recommendations of the mid-term evaluation, and following consultation with departments and agencies and the disability community, a revised Commonwealth Disability Strategy was launched in October 2000. It is based on the principles of equity, inclusion, participation, access and accountability.

The revised strategy discards the one-size-fits-all approach evident in the initial strategy. Instead, it links an agency's disability strategy to the specific role of that agency as a policy adviser, regulator, purchaser, provider or employer (box E.2).

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## Box E.2 Case study: the employer role

Employer agencies provide employment and ensure workplace procedures and practices support equitable working conditions for employees, including those with disabilities. Typical activities undertaken within this role include:

- the development of employment policies and procedures
- recruitment
- the induction of new staff
- staff training and development
- individual performance monitoring
- the payment of wages and salaries
- human resource management.

Employers need to ensure:

- employment policies and procedures comply with the DDA
- staff training and development programs (for example, induction, supervision, policy development, contract management, client services):
  - incorporate education and information about the needs of people with disabilities as members of the wider community, consumers, clients and staff
  - are accessible to staff with disabilities.
- agency recruiters and managers apply the principle of 'reasonable adjustment'
- the ongoing employment of people with disabilities includes some capacity to support the individual's changing needs and ability to pursue a career path
- workplace strategies are in place to address attitudes inhibiting people with disabilities from securing and maintaining employment.

The indicators that can be used to measure the success of these outcomes include whether:

- employment policies and procedures comply with the requirements of the DDA
- recruitment information for potential job applicants is available on request in accessible formats
- managers and recruiters apply 'reasonable adjustment' principles
- training and development programs consider and respond to the needs of people with disabilities, and include information on disability issues where they relate to the content of the program
- a complaints/grievance mechanism (and access to external mechanisms) is in place to address issues raised by staff and the public.

Source: OoD 2000b.



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The agency's Performance Reporting Framework accounts for those roles in defining agency duties and performance indicators appropriate for the interaction between the agency and people with disabilities. From 2000-01, agencies are required to report against these indicators in their annual report. Under the revised strategy, agencies and departments are no longer expected to lodge action plans. Although such plans are still encouraged, they are perceived more as a symbol of commitment to improving accessibility for people with disabilities.

The revised strategy does not apply to GBEs. However, like departments and agencies, GBEs are encouraged to report in their annual reports on strategies for improving access for people with disabilities.

## **E.2 Evaluating the Australian Government's performance**

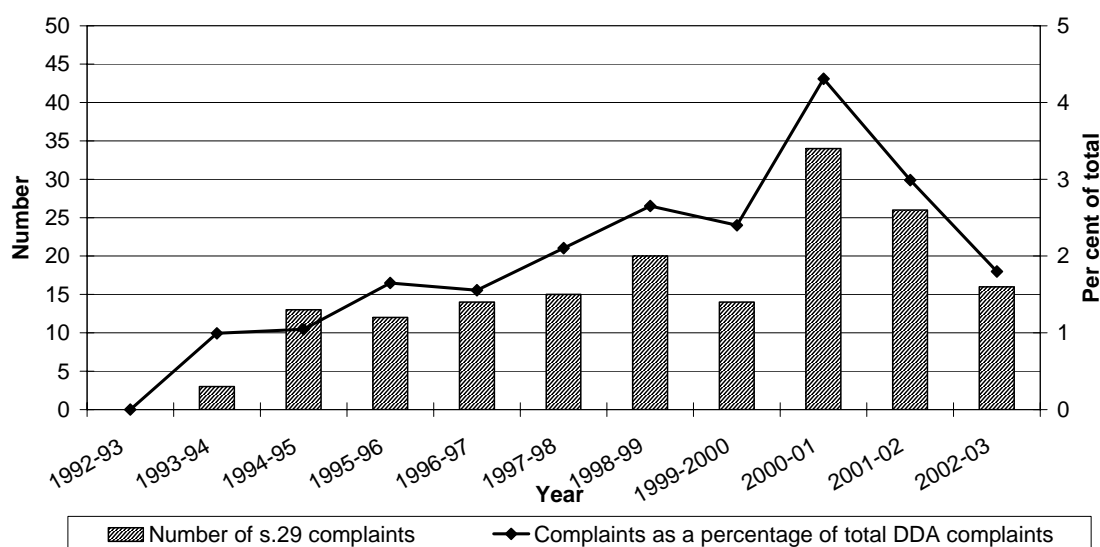
As noted earlier, the Commonwealth Disability Strategy represents the Australian Government's response to the DDA. The strategy provides a guide to departments and agencies for meeting their obligations under the DDA. Moreover, by introducing the strategy, the Australian Government acknowledged its 'role in providing leadership and setting an example for others in the community' (OoD 1994, p. 1). The complementarity between the DDA and the Commonwealth Disability Strategy means that the Australian Government's performance in addressing its own discrimination against people with disabilities can be assessed in two ways. First, it is possible to examine DDA complaints data, keeping in mind the caveats about interpreting those data (see chapter 5). Second, the Australian Government's own reporting framework under the Commonwealth Disability Strategy can be used. These two approaches are now adopted in turn.

### **Complaints lodged under the Disability Discrimination Act**

#### *Section 29 complaints*

The area of 'administration of Commonwealth laws and programs' attracts a relatively low number of complaints under the DDA. Although, from 1992 to 2001, the number of section 29 complaints grew, that number has been falling steadily since 2001 (figure E.1). HREOC noted that federal agencies, in general, 'do not appear to have been a particular target for complaints above and beyond other providers of services' (HREOC, sub. 143, p. 79).

**Figure E.1 Complaints made under section 29 of the Disability Discrimination Act, 1992 to 2003**



Data source: HREOC annual reports, 1995 to 2003.

In recent years, the majority of those section 29 complaints that were finalised were either declined or terminated (figure E.2). Reasons for declining or terminating a complaint include HREOC finding the action of the respondent not unlawful, the complainant withdrawing the complaint, or the complaint being deemed vexatious, misconceived or lacking in substance (HREOC, sub. 235).

Closer inspection of the complaints declined/terminated by HREOC reveals that many of these complaints were about the content of laws or the eligibility criteria for programs, rather than about the way in which these laws and programs were administered. Examples of terminated/declined complaints include cases in which the respondent's actions were dictated by law, such as cases where the respondent could not:

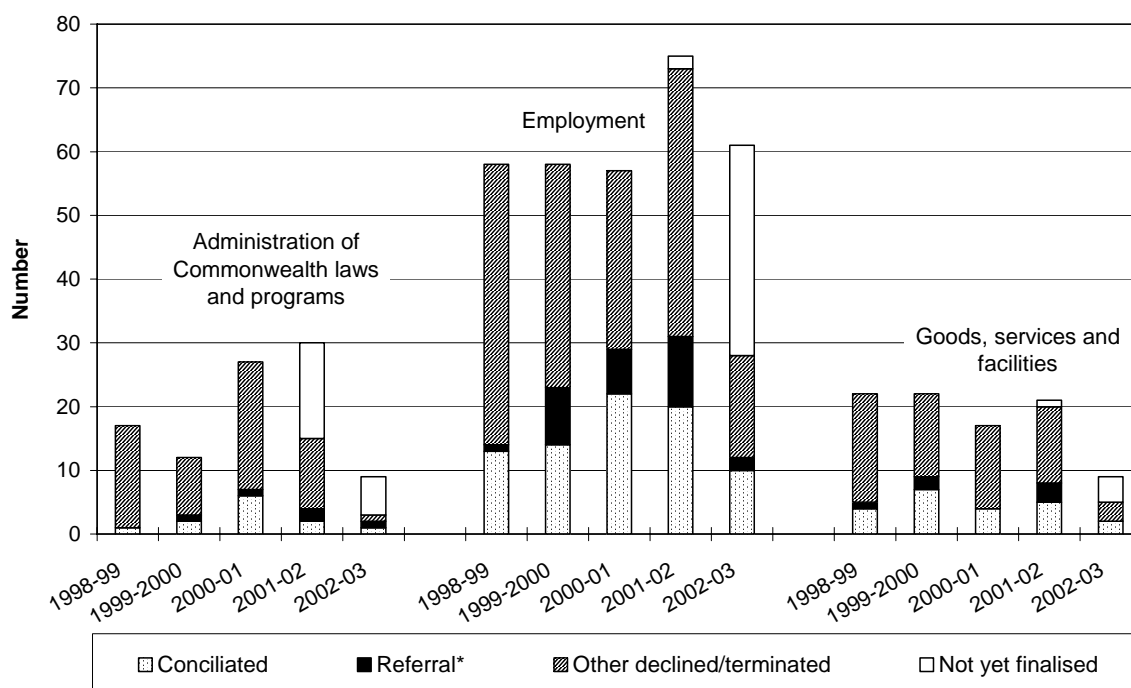
- provide electronic voting for a person who is blind
- provide Medicare refunds for homoeopathic medicines used by a person with multiple chemical sensitivity
- remit a student's HECS debt incurred as a result of his disability.

HREOC also takes the view that discrimination under section 29 of the DDA does not cover eligibility criteria for government programs. Examples of declined complaints in this area include:

- failure to provide services to a person with a hearing impairment because the person was not a recipient of a pension

- failure to exempt from tax the purchase of a motor vehicle because that vehicle was not used to drive to and from work.

Figure E.2 **Disability Discrimination Act complaints against the Australian Government, by area, 1998-99 to 2002-03** <sup>a,b,c</sup>



<sup>a</sup> In the area of 'goods, services and facilities', the category 'other declined/terminated' includes one 'administrative closure' complaint in 2001-02. <sup>b</sup> NRPC = no reasonable prospect of conciliation. <sup>c</sup> In the category 'administration of Commonwealth laws and programs', the total number of complaints received each year is not consistent with that in figure E.1, because not all complaints received in one year are finalised in that year. \* Includes complaints for which there is no reasonable prospect of conciliation.

Data source: Based on HREOC, sub. 235.

HREOC also found some actions not to be unlawful because they were specifically covered by an exemption, such as the exemption of the *Migration Act 1958* (s.52) and of 'special measures' (s.45) from the provisions of the DDA.

The application of the DDA to the content of Commonwealth laws and programs that complainants consider discriminate against people with disabilities was a contentious issue for many inquiry participants. It is discussed elsewhere in the report (see chapters 6, 10 and 12). Ruling out complaints about the content of Commonwealth laws and programs means that most section 29 complaints that HREOC successfully conciliated related to the physical accessibility of resources and the availability of program information in alternative formats. Box E.3 provides details of some of these cases.

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**Box E.3 Conciliated cases under section 29 of the Disability Discrimination Act**

*Employment agency access (2001)*

A person with a mobility impairment was unable to physically access a job placement agency because one entrance had stairs and no handrail, and the other entrance had a door that the person was unable to open. The complaint was settled on the basis that a bell system would be installed, the entrance would be upgraded to provide ramp access, and staffing arrangements would accommodate difficulties with the door.

*Access to tax resources (2001)*

A blind person was unable to access the online version of the Business Activity Statement because it was not accessible to screen reader software. At the time, the Australian Taxation Office acknowledged the lack of accessibility due to technical reasons. It worked with the complainant to develop an e-mail version and web version of the Business Activity Statement that would be compatible with screen reading software, and it also agreed to pay compensation.

*Access to consumer information (2000)*

A person with a vision impairment complained that publicly available information by a federal agency on the implementation of the goods and services tax had not been made available in Braille. Following discussions with HREOC, a Braille version was made available and the complaint was withdrawn.

*Communications access to Commonwealth programs (1998)*

A deaf person complained a department did not make provision for communication with Deaf people. The department agreed to take measures that included instructing all staff on the use of telephone typewriter (TTY) phones, providing information to staff on the National TTY Relay Service and reviewing its stationery so TTY information is included in all contact details.

*Voice tape of a discussion paper (1998)*

A person unable to read or write due to brain damage complained that a department refused to supply its policy discussion paper in voice format. The policy paper was available electronically but the person was unable to use this form. The department apologised, advised that the policy document should have been provided in the form requested in the first instance, and arranged for an audio tape to be made.

*Polling place access (1993)*

A person who uses a wheelchair complained that the town's polling place for the 1993 election was inaccessible. The complaint was conciliated on the basis that the Australian Electoral Commission would investigate accessible venues for the next election.

Source: HREOC 2003I.

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### *Other complaints*

As mentioned earlier, the Australian Government is subject to the same DDA obligations (aside from section 29) as other organisations. This means that the Government has been subject to a number of complaints under sections 15 (employment) and 24 (goods, services and facilities) (figure E.2). Between 1998-99 and 2002-03, employment complaints were the most numerous of all complaints against the Government; they also represented 12 to 21 per cent of all DDA employment complaints received by HREOC.

Blind Citizens Australia criticised the Australian Government's performance as an employer of people with disabilities:

We've got a very interesting case going on at the moment, an employment discrimination case, and for us it's quite distressing to see that these aren't at times cases of just neglect, but there can be quite active, conscious, less favourable treatment of workers with disabilities still going on in the Commonwealth sector ... (Blind Citizens Australia, trans., p. 1682)

Moreover, two inquiry participants claimed that the Government, in defending itself against DDA employment complaints, had at times failed to adhere to its own 'model litigant' policy and had resorted to unethical and vexatious tactics (Terry Humphries, sub. 66; Alexa McLaughlin, trans., p. 664).

Most complaints against the Australian Government as an employer are not treated differently from those brought against any other employer. That is, a job's inherent requirements, the reasonableness of hiring and firing criteria and the unjustifiable hardship defence are taken into account.

Difficulties have arisen, however, in relation to the Australian Government as an employer of defence force personnel. As mentioned, section 53 exempts personnel engaged in combat duties or peacekeeping activities from the protection of the DDA. This provision would appear to give the Australian Government the right, for example, to dismiss a member of the army on the basis of that person having a disability. However, it is not clear that section 53 provides a blanket exemption in relation to military personnel. The courts have chosen in some cases to distinguish between a soldier's 'combat duties' and 'day-to-day duties'. The former are defined in the Disability Discrimination Regulations 1996 as 'duties which require, or which are likely to require, a person to commit, or participate directly in the commission of, an act of violence in the event of armed conflict' (see chapter 4). In *Commonwealth of Australia v Williams* (2002) FMCA 89, the Federal Magistrates Court found that 'day-to-day duties' are covered not by section 53, but by section 15 (employment) of the DDA. It deemed that the defendant, despite his disability, could fulfil the 'inherent requirements' of normal (non-combat) airforce duties,

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discrimination was deemed to have occurred under section 15. However, this decision was overturned on appeal before the Federal Court, based on the view that the inherent requirements of a soldier's job include the possibility of having to participate in combat duties.

## **Performance under the Commonwealth Disability Strategy**

The following discussion assesses the performance of the Australian Government against key result areas of the Commonwealth Disability Strategy. Most of this assessment relies on somewhat obsolete information, generated between 1995 and 1999 by the two progress reports and the mid-term evaluation (section E.1). The Office of Disability has commissioned an independent evaluation of the effectiveness of the revised strategy, to be conducted in 2004.

### *Action plans*

Although action plans are no longer mandatory, thirty-one federal agencies had lodged a plan with HREOC as at August 2003, up from 13 plans lodged in August 1997. However, that number remains low; the Productivity Commission estimates that only about one quarter of all Australian Government departments and agencies (excluding GBEs) have an action plan registered with HREOC. Of the main departments, only about one half have lodged an action plan. Whether the low number of action plans reflects unsatisfactory progress in implementing Equal Employment Opportunity principles will remain unclear until the next evaluation of the Commonwealth Disability Strategy. According to HREOC, 'there may be action without an action plan' (sub. 143, p. 80). The move to make Government disability action plans voluntary in Australia can be contrasted with recent international experience in this area. In New Zealand, the trend has been towards the imposition of greater obligations (box E.4).

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#### Box E.4 **New Zealand Disability Strategy**

In 2001, the New Zealand Minister for Disability Issues launched the New Zealand Disability Strategy. The strategy includes the following objectives, each of which is underpinned by detailed actions.

1. Encourage and educate for a non-disabling society
2. Ensure rights for disabled people
3. Provide the best education for disabled people
4. Provide opportunities in employment and economic development for disabled people
5. Foster leadership by disabled people
6. Foster an aware and responsive public service
7. Create long term support systems centred on the individual
8. Support quality living in the community for disabled people
9. Support lifestyle choices, recreation and culture for disabled people
10. Collect and use relevant information about disabled people and disability issues
11. Promote the participation of disabled Maori
12. Promote participation of disabled Pacific peoples
13. Enable disabled children and youth to lead full and active lives
14. Promote participation of disabled women in order to improve their quality of life
15. Value families, '*whanau*' and people providing ongoing support.

Government departments are required to produce a work plan showing how they are implementing the strategy. The Minister for Disability Issues is required to report annually to Parliament on the progress made. Reviews of the New Zealand Disability Strategy have been scheduled for 2006 and 2011.

*Source:* Office for Disability Issues (New Zealand) 2001.

#### *Citizenship*

Both progress reports in 1995 and 1997 indicated early progress made in increasing the accessibility of polling places and booths, providing greater wheelchair access, and improving the availability of electoral information to include large print and audio tapes. The 1997 report noted that complaints regarding electoral access 'have been few, they have usually been in regard to wheelchair access to polling places' (Department of Health and Family Services 1997, p. 40). However, the Productivity Commission finds that access to polling places for people with disabilities is still a problem (see chapter 9).

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## *Employment*

The 1994 Commonwealth Disability Strategy set a target of 4 per cent employment of people with disabilities in the Australian Public Service (APS), to increase to 5 per cent by 2000. An Australian National Audit Office report in 1997 found that people with disabilities made up 5.3 per cent of the APS in 1992, but that this proportion had fallen to 4.9 per cent in 1995 (ANAO 1997, p. xix).

By 1997, the average employment rate for people with disabilities across the APS had fallen further, down to 4.7 per cent (Department of Health and Family Services 1997, p. 24). In 2002-03, only 3.6 per cent of APS employees reported having a disability. The proportion of employees declaring a disability varies considerably across agencies. Some smaller agencies have representation levels in excess of 7 per cent. However, in agencies with more than 1000 ongoing employees, the average representation is only around 3 per cent (APSC 2003a).

As in other sectors of the economy, the true representation of people with disabilities in the APS is likely to be higher than this figure suggests. This underestimation is due to some persons choosing not to disclose their disability status to their employer. Moreover, not everyone who has a disability may be aware of the fact. However, even if the current prevalence of disability in the APS is higher than the 3.6 per cent recorded by the Australian Public Service Commission, it is highly likely to have fallen in the ten years since the introduction of the DDA. In the same period, APS employment of Indigenous Australians increased, while that of people from a non-English speaking background has remained stable since 1999, following an initial decline (APSC 2003a).

Reports by the Australian National Audit Office in 1997 and 1999 found that the observed decline in the proportion of public servants with disabilities was due to:

- staff reporting disabilities being retrenched at a higher rate than other staff in the APS
- proportionately fewer people with disabilities being appointed to the APS.

The trend toward under-representation has continued in subsequent years, despite the number of engagements exceeding that of separations in 2002-03 (APSC 2003a).<sup>1</sup>

The downsizing and contracting out of lower level administrative positions in the APS over the past decade, and the multiskilling of remaining positions, have often

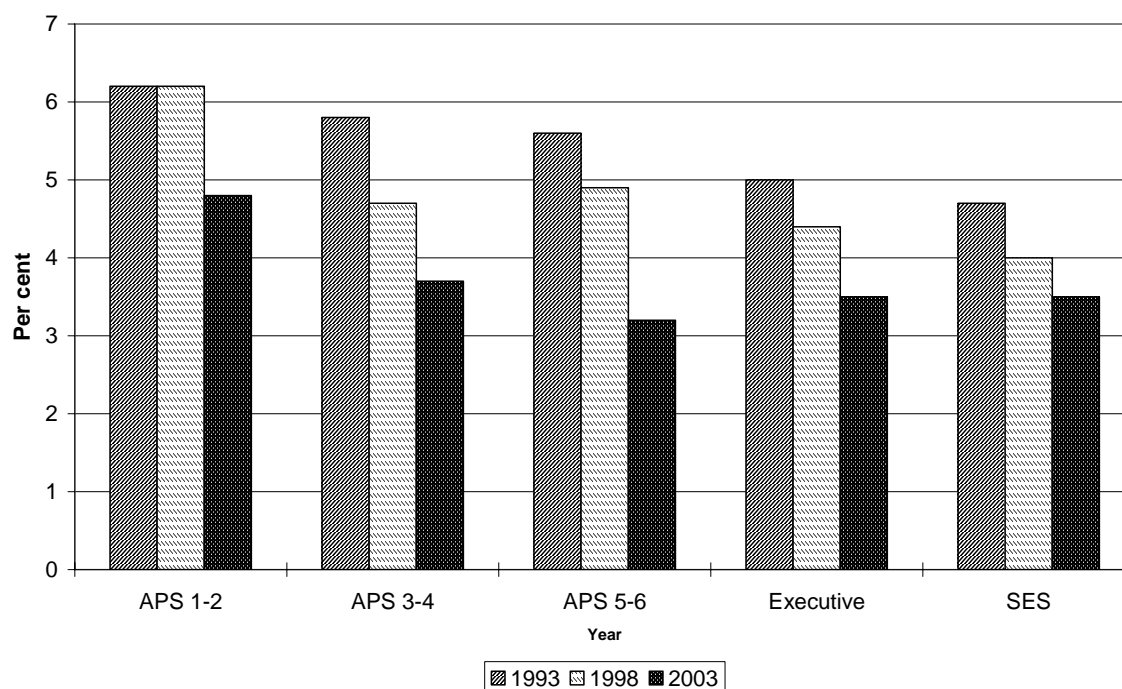
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<sup>1</sup> While the number of APS employees with a disability grew during that year, their share of the overall public servant population fell.



been cited as the reason for the higher rate of retrenchment of people with disabilities (KPMG 1999, p. 33; Val Pawagi, sub. 209; Department of Family and Community Services, DR362). However, the representation of people with disabilities declined at all levels between 1993 and 2002 (figure E.3).

**Figure E.3 Ongoing staff with disabilities by Australian Public Service classification group, 1993, 1998 and 2003**



Data sources: APSC 2002; 2003a.

In 2003, the Australian Public Service Commission (APSC) conducted a survey of all APS agencies employing 20 or more staff under the Public Service Act (and of their employees if the agency employed more than 100 staff) (APSC 2003a, 2003b). A large majority of the agencies surveyed reported using one or more specific strategies to facilitate the recruitment of people with disabilities (for example, ensuring that selection criteria are not discriminatory). Further, most agencies reported the use of one or more strategies to retain staff with a disability (for example, providing access to adaptive technology or other practical support). Notwithstanding these strategies, employees with a disability were generally less satisfied than their counterparts with no disability with the way in which their employer met what the employee regarded as the main job satisfaction factors (for example, flexible working arrangements).

Other possible indicators of Australian Government agency performance in the disability employment area, found in the employee survey, are that:

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- 39 per cent of employees with a disability consider that they have been subjected to bullying, harassment or discrimination at work, compared with 17 per cent of employees without a disability<sup>2</sup>
  - 18 per cent of employees with a disability disagree or strongly disagree that their agency actively supports the employment of people with a disability.

Concluding on the employment representation of people with disabilities in the APS, the APSC stated:

Overall, the picture is not positive. Despite the strategies agencies report having in place, the representation of people with a disability is continuing to decline. ... Agencies ... need to consider more carefully, including in consultation with their employees with a disability, the effectiveness of their strategies. (APSC 2003a, p. 133)

Val Pawagi (sub. 209) argued that there are systemic barriers to the employment of people with disabilities by the APS. She identified reforms of APS recruitment procedures and the devolution of financial responsibility to individual agencies as factors that:

... have created disincentive effects to employ people with disability. This has contributed to a workplace culture within the APS that is reluctant to employ them and reduces the fairness with which they are treated. This practice constitutes discrimination. (sub. 209, p. 3)

The Department of Family and Community Services agreed that financial devolution within public service departments could create barriers to the recruitment of people with disabilities (Department of Family and Community Services, DR362).

The declining representation of people with disabilities in the APS led a number of inquiry participants to call for an increased Government commitment in that area by, for example, adopting an obligations-based approach (Blind Citizens Australia, sub. 72; Peter Simpson, sub. 192; Val Pawagi, sub. 209; Disability Council of NSW, sub. 64; Dennis Denning, sub. 109; Terry Humphries, sub. DR345). At present, no such approach (in the form of quotas or other positive duties) exists in the APS. The revised Commonwealth Disability Strategy no longer contains a target for representation of people with disabilities in the APS; instead, individual agencies are expected to measure success in their role as an employer by determining whether they comply with the DDA, provide recruitment information in accessible formats, abide by 'reasonable adjustment' principles, provide training

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<sup>2</sup> It is not possible to know precisely what proportion of the bullying, harassment or discrimination experienced by employees with a disability was due to their disability or based on some other attribute such as race. However, reported figures imply that this proportion was below 50 per cent.

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and development programs adapted to the needs of people with disabilities, and have appropriate complaints/grievance mechanisms (OoD 2000b).

However, direction 4.2(6)(b) from the Public Service Commissioner allows agency heads to identify particular employment opportunities as open only to people with an intellectual disability. Despite a specific request from the Commissioner for agencies to use this provision to actively recruit people with intellectual disabilities, only two agencies in 2000-01 and four in 2001-02 used this option, from a total of 71 departments and agencies. Most agencies reported that they did not have suitable employment opportunities for people with intellectual disabilities (APSC 2002).

APS policies in employing people with disabilities may be contrasted with the approach adopted in the New South Wales public service. The New South Wales Government has imposed a duty on its agencies to be proactive in employing people with physical disabilities and in providing them with the necessary goods and services with which to fulfil the inherent requirements of their positions. Accordingly, the New South Wales Government has set a benchmark of 12 per cent for the representation of people with disabilities and 7 per cent for the representation of people requiring a work-related adjustment (NSW Office of Employment Equity and Diversity, sub. 172). These benchmarks are based on the representation of these groups in the working-age population of New South Wales (NSW Anti-Discrimination Board, sub. 101). Official New South Wales Government policy notwithstanding, the representation of both groups in the State's public sector is far below these targets (6 per cent and 1.2 per cent respectively in 2000) and has declined in recent years (NSW Anti-Discrimination Board, sub. 101).

APS performance in employing people with disabilities may also be compared to the international experience with employment quotas. In many countries, quotas are in force for the employment of people with disabilities in the public sector (and sometimes in the private sector) (box E.5).

### *Access to premises*

By the time of the 1997 progress report, 90 per cent of federal agencies had reported making progress in meeting the relevant Australian Standard for building accessibility (AS 1428.2: Design for access and mobility). The remaining 10 per cent had already achieved this minimum standard when the Commonwealth Disability Strategy was introduced in 1994 (Department of Health and Family Services 1997).

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### Box E.5 **Public sector employment quotas internationally**

Quotas in OECD countries range from 2 per cent to 7 per cent of the public sector workforce, with some exemptions for small employers. Fulfilment of these quotas is variable, and measurement is affected by multiple counting of employees with profound or severe disabilities.

Some countries have employment quotas that apply uniformly across the public and private sectors: 7 per cent of the workforce in Italy, 6 per cent in France and Poland, 5 per cent in Germany, 4 per cent in Austria, 3 per cent in Turkey and 2 per cent in South Korea and Spain.

In other countries, quotas apply to the public sector only: Belgium has a 2–2.5 per cent quota for the public sector (with high compliance) and Portugal recently introduced a 5 per cent quota for new recruitment in the public sector. In the United Kingdom, a quota introduced during the 1940s was abolished in 1996 following a rapid decline in quota compliance. In The Netherlands, a legal authorisation exists to impose a quota system as an ultimate solution if all other measures prove inadequate.

Experience in quota countries shows that employees who become disabled and are thus eligible for counting towards the quota are more likely to be kept in a job, while quota schemes provide little extra incentive to employ a job applicant with a disability.

The fulfilment of quotas depends on the extent of sanctions on the employer. Without real enforcement, a quota scheme is an incentive to employ registered disabled people, or retain those who acquire a disability, but does not automatically result in any new obligations for employers.

*Source:* OECD 2003.

### *Wider availability of alternative formats*

Quality of communication and the accessibility of information in different formats have improved since the Commonwealth Disability Strategy was introduced. The 1995 progress report found that 44 per cent of agencies did not respond or reported no progress in making information available in alternative formats, but the 1997 progress report found improvement from this low base, with 80 per cent of agencies reporting improvements in the accessibility of information. Freecall 1800 numbers, Braille documents, video and audio tapes, the use of radio and caption transcription services, and the Internet were means by which agencies had improved information delivery. However, the 1997 progress report also found that much of the material available in alternative formats was for internal use only, and that ‘substantially less accessible information was provided to clients with disabilities regarding the programs and services administered by organisations’ (Department of Health and Family Services 1997, p. 22).

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In recent times, the Internet has become a platform for information delivery for a vast number of organisations, including the Australian Government. This trend has led to the development of a Government Online Strategy that has several components, such as privacy, security and web content accessibility. The Government standard for website accessibility is consistent with that devised by the World Wide Web Consortium (W3C 1999). In June 2000, W3C guidelines were adopted as the common best practice standard for all Australian Government websites (box E.6). Each guideline has a series of checkpoints ranging in priority from one to three. Content developers must satisfy priority one or it is not possible to access information on the site. Priority three checkpoints are encouraged, but are not essential to navigate a site.

**Box E.6 Website accessibility guidelines**

The World Wide Web Consortium (W3C) has produced the following guidelines that explain how to make web content accessible to people with disabilities.

1. Provide equivalent alternatives to auditory and visual content.
2. Don't rely on colour alone.
3. Use markup and style sheets and do so properly.
4. Clarify natural language usage.
5. Create tables that transform\* gracefully.
6. Ensure pages featuring new technologies transform gracefully.
7. Ensure user control of time sensitive content changes.
8. Ensure direct accessibility of embedded user interfaces.
9. Design for device independence.
10. Use interim solutions.
11. Use W3C technologies and guidelines.
12. Provide context and orientation information.
13. Provide clear navigation mechanisms.
14. Ensure documents are clear and simple.

\* The term 'transform' describes a page or table remaining fully accessible no matter what the disability of the user.

Source: HREOC 2003j.

HREOC updated its website access advisory notes (version 3.2) in 2002 to assist people and organisations involved in developing or modifying web pages, by clarifying the DDA requirements in this area and explaining how compliance can be

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achieved. The advisory notes do not have direct legal force, and they do not substitute for the DDA provisions. However, by following the advice they provide, an individual or organisation is far less likely to be subject to complaints about website accessibility (HREOC 2002j).

The way in which information is presented, for example, affects its accessibility for people with disabilities. Documents that are provided in an image-based format (such as GIF or TIF) are not accessible to people who are blind or visually impaired, and who rely on Braille or synthetic speech output to read computer screens. PDF also remains a relatively inaccessible format for this group of people, because it can be accessed only by a limited range of software. One inquiry participant cited the example of a recent major product recall by the Therapeutic Goods Administration, for which the list of recalled products was available only in PDF format initially (Tedicore, trans., p. 266). Relying exclusively on this format could leave an organisation open to a DDA complaint, according to HREOC:

The Commission's view is that organisations who distribute content only in PDF format, and who do not also make this content available in another format such as RTF, HTML, or plain text, are liable for complaints under the DDA. (HREOC 2002j, p. x)

### *Consultation and participation*

The 1997 progress report found that 70 per cent of agencies reported consulting with people with disabilities on program design, delivery and the effectiveness of equal opportunity measures (Department of Health and Family Services 1997). However, most of these agencies focused their consultation efforts on improving the work environment and services for employees, and on improving the physical accessibility of facilities, rather than on encouraging input into the broader planning and evaluation processes. In relation to participation of people with disabilities on advisory and review bodies, the 1997 report noted slow progress. It found that few organisations had formal mechanisms in place to consult with people with disabilities in regard to the design of policies and programs or the delivery of services. It concluded that the equitable representation and consultation of people with disabilities was an area requiring urgent attention.

## **E.3 Conclusions**

Given the wide-ranging nature of the activities carried out by the Australian Government, it is not possible to provide a single-line assessment of the performance of the Australian Government in relation to its obligations under the DDA. Although the Australian Government has been the target of many DDA complaints, this is to be expected given the breadth of its responsibilities. There are

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no indications that it is more discriminatory an employer, say, or a provider of goods and services than its private sector counterparts.

Nonetheless, it might be argued that government departments and agencies face a higher duty to not discriminate than private sector organisations and than individuals. This is apparent in, for instance, the lack of an unjustifiable hardship defence with respect to the administration of Commonwealth laws and programs. It is also reflected in the fact that, in the absence of a disability standards that specifically covers government activities, the Australian Government has implemented its own Disability Strategy in response to the DDA.

The Commonwealth Disability Strategy, after eleven years of operation, has not been an unmitigated success. Despite repeated evaluations and reviews, it has failed to effect a durable change in many of the practices of federal departments and agencies. Nowhere is this more in evidence than with respect to public sector employment of people with disabilities. Notwithstanding that the original strategy included specific employment targets for this group, the representation of people with disabilities in the Australian Public Service has fallen steadily since 1993. While this decline is probably due in part to structural changes affecting the employment practices of all organisations including public sector ones, recent evidence suggests that public servants who have a disability may not always enjoy a discrimination- and harassment-free workplace.

In other areas, it appears that the Commonwealth Disability Strategy has met with greater success. With respect to government information, for example, the adoption of a Government Online Strategy has allowed people with disabilities greater access to Internet-based resources, which would have enabled this group to enjoy its rights and entitlements more fully.