THE PRODUCTIVITY COMMISSION'S REVIEW OF THE *DISABILITY DISCRIMINATION ACT 1992*

GOVERNMENT RESPONSE

Introduction

The Australian Government's disability discrimination policy is designed to break down, to the greatest extent possible, the social and economic barriers that prevent participation in mainstream community life by people with disability. The Government's approach is to ensure that measures that prevent discrimination on the ground of disability are based on fair, balanced and effective principles that widen the opportunities for people with disability to gain independence, access to goods and services available to the rest of the community, and to participate in the broader community.

The *Disability Discrimination Act 1992* (DDA) is a part of the package of federal anti-discrimination laws, which also includes the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984, Human Rights and Equal Opportunity Commission Act 1986* and *Age Discrimination Act 2004*.

Under the Competition Principles Agreement signed at the Council of Australian Governments meeting in April 1995, all Australian governments agreed to review and, where appropriate, reform all existing legislation that restricts competition. The Australian Government decided to extend this to legislation that affects business. The guiding principle of legislation review is that legislation should not restrict competition unless it can be shown that the benefits to the community as a whole outweigh the costs of the restriction, and the objectives of the legislation can only be achieved by restricting competition.

The Commonwealth Legislation Review Schedule lists all Commonwealth legislation that is to be reviewed against the Competition Principles Agreement principles. The DDA was included in the Schedule because of its potential to impose costs on business.

On 5 February 2003, the Parliamentary Secretary to the Treasurer, Senator the Hon Ian Campbell, provided the terms of reference for review of the DDA and the *Disability Discrimination Regulations 1996* to the Productivity Commission for Inquiry and report within 12 months.

The terms of reference for the review specified that the Productivity Commission would advertise nationally, consult with State and Territory governments, key interest groups and affected parties (particularly people with disability and their representatives) and invite submissions from the public. The Productivity Commission examined the social impact of the DDA on people with disability and on the community as a whole. It considered whether the objectives of the legislation had been achieved. It also examined the legislation's impact on competition and whether amendments to the legislation were warranted.

The Productivity Commission's final report was received by the Australian Government on 5 May 2004 and was tabled in Parliament on 14 July 2004.

Overall the Productivity Commission is satisfied that the DDA has met the review requirements of the Competition Principles Agreement, and with appropriate amendments, will provide net benefits in the future. The Productivity Commission has agreed that the DDA appears likely to have produced net benefits for the Australian community.

The Productivity Commission found that, although the DDA has the potential to restrict competition in the Australian economy, current restrictions on overall levels of competition appear negligible. The Commission also found that the objectives of the DDA can only be met by legislation. The Government agrees that non-regulatory approaches can complement the operation of the DDA but cannot substitute for it.

The report contains 32 recommendations and the Government response accepts 26 of those recommendations either in full, in part or in principle. The action required to give effect to those recommendations will enhance the benefits of the DDA to ensure that it continues to provide net benefits to the Australian community as a whole.

Chapters 1-7 of the report provide an executive summary, a background to the review, an overview of the operation of the DDA, and a discussion of the competitive effects of the DDA. Recommendations are contained in chapters 8-15.

Chapter 8 Eliminating discrimination

Recommendation 8.1
The *Disability Discrimination Act 1992* should be amended to include a general duty to make reasonable adjustments.
- **Reasonable adjustments should be defined to exclude adjustments that would cause unjustifiable hardship.**
- **The person or persons on whom the duty would fall should be identified.**
- **Examples of how the duty might apply should be included in each area of the Act.**

The Government accepts this recommendation in part.

Recent case law demonstrates that an amendment to the DDA to include a general duty to make reasonable adjustments will clarify uncertainty raised by the High Court case of *Purvis v NSW and HREOC* [2003] HCA 62, which suggested that the DDA may not contain a positive obligation to make adjustments. This amendment would return the DDA to the situation intended by Parliament when the DDA was enacted. Until the *Purvis* decision it was generally accepted that reasonable adjustments were necessary to avoid unlawful discrimination.

The Government agrees that the duty to provide adjustments should not be unlimited, and that 'reasonable adjustments' should be defined to exclude adjustments that would cause 'unjustifiable hardship' (see recommendations 8.2 and 8.3 for a discussion on the concept of 'unjustifiable hardship'). This is a balancing mechanism

intended to ensure that adjustments will produce net benefits for the community, without imposing undue hardship on the organisations required to make them.

The Government agrees in principle that it is desirable to provide guidance about who might be required to make adjustments under the DDA. However, it would be difficult and cumbersome to list in the legislation all those who might be required to make an adjustment in the vast array of circumstances that might arise. It is preferable to include this guidance in the explanatory memorandum produced at the time of amending the DDA as proposed. In addition, the Attorney-General will ask the Human Rights and Equal Opportunity Commission (HREOC) to develop and publish guidelines on this issue.

Similarly, the Government acknowledges the benefit of providing examples of how the duty to make adjustments might apply in each of the areas covered by the DDA, but again this is not something that should be in the legislation. Therefore, the Attorney-General will ask HREOC to include examples in its relevant guidelines.

Further, the Government notes that the draft Disability Standards for Education, which were released for public information ahead of their tabling in Parliament, will provide specific guidance on the provision of reasonable adjustments for people with disability in the field of education and training. To ensure that the Standards are fully supported in this area, the Government has introduced the Disability Discrimination Amendment (Education Standards) Bill 2004 to amend the DDA to provide that disability standards made under section 31 may require reasonable adjustments.

Recommendation 8.2
The *Disability Discrimination Act 1992* should be amended to allow an unjustifiable hardship defence in all areas of the Act that make discrimination on the ground of disability unlawful.

The Government accepts this recommendation in part.

The Government agrees with the Productivity Commission's finding that an unjustifiable hardship defence in the DDA 'helps to promote adjustments for people with disability that produce benefits for the community as a whole, while limiting requirements that would impose excessive costs on persons or organisations'.

The inclusion of an unjustifiable hardship defence in most areas of the DDA would provide an appropriate balance to a general duty in the DDA to make reasonable adjustments. However, Division 3 of Part 2 of the DDA contains provisions relating to 'discrimination involving harassment'. The Government does not consider it appropriate to amend the DDA to provide for an unjustifiable hardship defence in relation to harassment and victimisation on the ground of disability. Harassment and victimisation on the ground of disability cannot be justified under any circumstances.

Recommendation 8.3
The criteria for determining unjustifiable hardship in the *Disability Discrimination Act 1992* (s.11) should be expanded to:

- **require consideration of the costs and benefits to *all* persons and an assessment of the net benefit to the community**
- **include as a relevant circumstance, the availability of financial and other assistance**
- **clarify that any respondent to a complaint (not just 'service providers') can expect to have their action plan considered.**

The Government accepts this recommendation.

The Government notes that the concept of 'unjustifiable hardship' is not defined in the DDA but is to be assessed by taking 'all relevant circumstances' of the particular case into account, including four listed criteria (section 11).

The requirement to take 'all relevant circumstances' into account in determining what constitutes unjustifiable hardship already effectively includes a consideration of costs and benefits to all persons and an assessment of the net benefit to the community. However, the Government accepts that an amendment to section 11 to expressly refer to these factors will be helpful. It is acknowledged that the benefits and costs of making an adjustment are inherently difficult to quantify, and that any assessment relies to a significant extent on subjective, qualitative analysis.

Ultimately, assessing what constitutes unjustifiable hardship requires consideration of a number of complex and interrelated factors. The process is not mechanical and the Government agrees with the Productivity Commission's finding that unjustifiable hardship is best determined through broad criteria that can be applied flexibly to individual cases.

The Government accepts the recommendation to amend the DDA to include the availability of financial and other assistance for a person or organisation required to make adjustments as a relevant circumstance to be considered when determining unjustifiable hardship.

The Government also accepts the Productivity Commission's proposal that paragraph 11(d) of the DDA be amended to provide that any respondent to a complaint of unlawful discrimination (not just 'service providers') should be able to have their action plan considered for the purposes of determining whether unjustifiable hardship has occurred. (See also recommendation 14.7.)

Recommendation 8.4
The defence of inherent requirements should be available to employers in all employment situations.

The Government accepts this recommendation.

For reasons similar to those given for accepting recommendation 8.2 (to extend the defence of unjustifiable hardship to all areas of the DDA in which discrimination on the ground of disability is unlawful), the Government accepts the recommendation

that the 'inherent requirements' defence should apply in all stages of employment (including at hiring and at dismissal, and the stages in between hiring and dismissal).

As suggested in the body of the Productivity Commission's report, it would also be desirable to provide guidelines, to be developed and published by HREOC, about what constitutes an 'inherent requirement' in employment and what are non-essential requirements. The Attorney-General will ask HREOC to develop appropriate guidelines, in close consultation with relevant industry bodies.

Chapter 9 Equality before the law

Recommendation 9.1
The Attorney-General, in consultation with State and Territory governments, should commission an inquiry into access to justice for people with disabilities, with a focus on practical strategies for protecting their rights in the criminal and civil justice systems.

The Government accepts this recommendation in principle.

The Government recognises the important issues relating to the justice system raised by the Productivity Commission.

The Government has undertaken an examination of the Federal Civil Justice System in its Federal Civil Justice System Strategy paper which was publicly released by the Attorney-General on 9 March 2004. This paper builds on earlier research, in particular the comprehensive review of the federal civil justice system undertaken by the Australian Law Reform Commission in its 2000 report *Managing Justice: A review of the federal civil justice system*. This strategy paper includes strategies for improving access to the civil justice system for people with disability.

Many of the issues relating to access to justice for people with disability in the civil and criminal justice systems are matters that fall within the jurisdiction of the States and Territories. Therefore, rather than agreeing to an inquiry, the Attorney-General will write to his State and Territory counterparts to draw their attention to the report and its recommendations.

Recommendation 9.2
The *Commonwealth Electoral Act 1918* should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.

The Government accepts this recommendation in principle.

Amendments have already been made to legislation, policies and procedures to ensure the best possible service to electors with a disability. This has included procedures supported by legislation for polling officials to provide assistance to electors in the completion of their ballot paper, and to enable polling officials to take voting materials and ballot papers outside of a polling place to enable electors who cannot physically enter a polling place to cast their vote. Inspections are made of all likely

polling venues for a forthcoming federal election, and ratings are made of their accessibility to electors with mobility disabilities. Despite the fact that there is often short notice before an election, the Government continues to improve accessibility. At the 1993 federal election 40% of polling places were either fully accessible or provided access with assistance. By 2001 70% of polling places had fully or partial access and in 2004 more than 75% of polling places had full or partial access.

The Government has taken action to address the accessibility of public buildings. In 2001, the Government tasked the Australian Building Codes Board, through its Building Access Policy Committee, to revise the national Building Code of Australia so that it could form the basis of a national disability standard for Access to Premises. The draft Standard was released for public comment in January 2004. Public consultation sessions were held in each capital city in February 2004. The Australian Building Codes Board and its Building Access Policy Committee are considering changes to the proposed Standard in light of the 270 public submissions received.

Other improvements to ensure voting procedures are accessible have been made by providing information in accessible formats, improving technology to assist people with disability and including captions for people who are deaf or hearing impaired on the Australian Electoral Commission's (AEC) national television election advertising campaign. For the 2004 federal election mobile AEC teams visited locations such as nursing homes and hospitals. The AEC has established consultative arrangements with disability group peak bodies to work through issues such as better access to polling places in a collaborative manner.

Recommendation 9.3
The *Disability Discrimination Act 1992* should apply to actions done in compliance with laws that have not been prescribed under section 47 of the Act.

The Government accepts this recommendation.

The DDA already applies to acts done in compliance with the laws of a State or Territory that have not been prescribed under section 47 of the DDA. However, some confusion has arisen about the practical application of section 47 in certain cases. Therefore, the Attorney-General will write to HREOC to clarify the operation of section 47.

Chapter 10 Promoting community recognition and acceptance

Recommendation 10.1
The Human Rights and Equal Opportunity Commission should work with employers and employer groups to develop and deliver targeted education campaigns.

The Government accepts this recommendation in principle.

The Government considers that education is the most powerful way of producing systemic change while not detracting from the operation of the DDA or its co-regulatory arrangements. Human rights education aims to promote a respect for diversity, and the dignity and worth of each human being.

Promoting the benefits of employing people with disability among employers is an important method of encouraging the acceptance of people with disability as productive workers in the open labour market. As the Productivity Commission notes in its report, employer groups themselves are more supportive of education campaigns than further regulation, and many of them already collaborate with relevant agencies to educate their members on the benefits of employing people with disability.

While already working with employer organisations, the Government considers further targeted education of employers to be an effective way of improving participation in the labour market of people with disability and increasing the understanding and awareness of people in the employment sector.

Recommendation 10.2
The cooperative arrangements between the Human Rights and Equal Opportunity Commission and State and Territory anti-discrimination bodies should be formalised and extended. This would be facilitated by:

- **including HREOC in the membership of the Australian Council of Human Rights Agencies**
- **broadening the Council's focus to cover disability issues, especially the development of education programs, information provision, research priorities and programs, and a shop-front presence in each jurisdiction.**

The Government accepts this recommendation in principle.

The Government accepts the desirability of cooperative arrangements between HREOC and its State and Territory counterparts. The Government notes that cooperation already takes place and includes:

- arrangements regarding the use of premises for conducting conciliation conferences, training and various launches;
- arrangements regarding the distribution of materials;
- informal arrangements regarding referral of complaints;
- joint conciliation training; and
- joint policy work and presentations.

Whether HREOC becomes a member of the Australian Council of Human Rights Agencies is a matter for HREOC. Similarly, whether the Council broadens its focus to cover disability issues (including the establishment of shopfronts) is a matter for the Council.

Chapter 11 Definitions

Recommendation 11.1
The definition of disability in the *Disability Discrimination Act 1992* (s.4) should be amended to ensure that it is clear that it includes:

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

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

The Government accepts this recommendation in part.

Medically recognised symptoms
The Government does not accept the recommendation to amend the definition of disability to expressly include medically recognised symptoms where the underlying cause is unknown. The Government considers that the current definition is broad enough to cover all medical conditions, whether or not readily diagnosed or recognised. This includes where the underlying cause is unknown, including chronic fatigue syndrome and other new conditions without a medically recognised underlying organism, disease or illness.

Genetic predisposition to a disability
The Government supports the Productivity Commission's underlying objective of clarifying the scope of the definition of disability to make it clear that it includes genetic predisposition to a disability and accepts the recommendation in part.

It is appropriate to consider here the recommendations about anti-discrimination law and genetic status made in Chapter 9 of the 2003 joint Australian Law Reform Commission – Australian Health Ethics Committee of the National Health & Medical Research Council Inquiry, *Essentially Yours: The Protection of Human Genetic Information in Australia* (the Inquiry). The Inquiry makes several recommendations about discrimination on the grounds of 'genetic status' in various federal anti-discrimination legislation and the *Workplace Relations Act 1996*. Recommendations include amending the definitions of 'disability' and 'impairment' to clarify their application to discrimination on the basis of 'genetic status'. In its particular discussion of the DDA, the Inquiry notes that, in developing wording the definition should be limited to those aspects of genetic status that are associated with a past, present, future or imputed disability. The Government agrees with the view that, for the purposes of the DDA, the relevant genetic condition, predisposition or status should be clearly linked to a disability as defined in the DDA.

The Government accepts the concerns raised by the Productivity Commission and the Inquiry that the definition of disability needs to be clarified so that it includes a genetic predisposition to a disability. The current definition of disability includes disabilities that may exist in the future or are imputed to a person. The Government considers that this includes a genetic predisposition to disability. However, clarification is desirable to the extent that there is any doubt. The Government considers it would be more appropriate to provide an advisory note in the DDA, rather than amend the definition itself.

The Government also accepts the Inquiry recommendations to amend the definition of 'impairment' in the regulations made under the *Human Rights and Equal Opportunity Commission Act 1986* (HREOCA) to clarify the application of the legislation to an impairment which may exist in the future and association with a person with an impairment. These amendments are consistent with the DDA. The Government considers that this will include a genetic predisposition to an impairment as defined by the HREOCA regulations. However, to avoid doubt, an advisory note will also be included in the definition to clarify this.

The Government agrees with the Productivity Commission's finding 7.4 that the objects of the DDA are appropriate and do not require amendment (as proposed by the Inquiry).

The Government does not consider it appropriate to accept the Inquiry recommendation to define disability in the *Workplace Relations Act 1996* by reference to the DDA. This would be inconsistent with the structure of that Act which does not define any of the relevant grounds of discrimination but requires the Australian Industrial Relations Commission to have regard to the anti-discrimination legislation including the DDA in performing its functions.

Behaviour that is a manifestation of a disability
The Productivity Commission further recommended adding a note to the definition to clarify that behaviour that is a symptom or manifestation of a disability is part of the definition of disability for the purposes of the DDA. The Government considers that the current definition of disability includes such behaviour. The High Court's decision in *Purvis v State of NSW (Department of Education and Training)* 2003 HCA 62 clarified this.

However, the Government accepts the Productivity Commission's observation that it may be valuable to remove any remaining confusion and accepts its recommendation that an advisory note be added to the definition to clarify the issue in line with the High Court's decision.

Recommendation 11.2
The definition of direct discrimination in the *Disability Discrimination Act 1992* (s.5(1)) should be supplemented with examples (either included in the Act or guidelines) to clarify the 'circumstances that are the same or not materially different' for the purposes of making a comparison.

The Government accepts this recommendation.

The Government agrees with the observation of the Productivity Commission that, in most cases of direct discrimination, identifying a suitable comparator is not difficult. The circumstances of each case must be separately considered. It is not practicable to provide legislative guidance to cover all circumstances. Case law, and in particular the recent High Court case of *Purvis v State of NSW (Department of Education and Training)* 2003 HCA 62 has set out a variety of guiding principles. The Attorney-General will ask HREOC to develop guidelines with examples of 'circumstances that are the same or not materially different' drawn from case law.

Recommendation 11.3
The definition of indirect discrimination in the *Disability Discrimination Act 1992* (s.6) should be amended to:
- **remove the proportionality test**
- **include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances'**
- **require the respondent to prove that a requirement or condition is reasonable**
- **cover incidences of proposed indirect discrimination.**

The Government accepts this recommendation in part.

Proportionality test
The Government accepts the Productivity Commission's reasoning that the proportionality test in section 6 of the DDA has little apparent benefit and imposes an undue burden of proof on complainants. There is no similar test in other federal anti-discrimination legislation. In implementing this recommendation, the Government will ensure that the notion of any disadvantage being a result of disability would be retained.

Guidance for determining whether a requirement is reasonable
The Government supports the Productivity Commission's underlying objective of providing guidance for determining whether a requirement is reasonable having regard to the circumstances.

The Government notes that the Productivity Commission's reasoning states that non-exclusive, flexible guidance criteria for reasonableness in the circumstances could be inserted in the DDA or described in guidelines. The Government does not accept the recommendation that the definition of indirect discrimination should be amended in the DDA itself but considers it would be more appropriate for HREOC to develop guidelines providing such guidance and examples. The Attorney-General will write to HREOC regarding this issue.

Demonstrating reasonableness
The Government accepts the Productivity Commission's recommendation to amend section 6 of the DDA to require the respondent to have the onus of showing that the requirement or condition is reasonable. This is consistent with the approach taken in the *Sex Discrimination Act 1984* and the *Age Discrimination Act 2004*. As set out in the explanatory memorandum to the Age Discrimination Act, it is reasonable to expect that the person imposing the requirement or condition would have better access to information to explain or justify the reason for it.

Incidences of proposed discrimination
The Government accepts the Productivity Commission's recommendation to amend section 6 of the DDA to cover incidences of proposed discrimination in the definition of indirect discrimination. This is consistent with the approach taken in the *Sex Discrimination Act 1984,* the *Age Discrimination Act 2004* and the definition of direct discrimination in section 5 of the DDA.

Chapter 12 Exemptions

Recommendation 12.1
The *Disability Discrimination Act 1992* should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:

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

The Government accepts this recommendation in principle.

The Government agrees that it is inappropriate for the purpose of interpreting 'other relevant factors' in section 46 of the DDA to include 'assumptions' whether they be stereotypical assumptions about disability that are not supported by reasonable evidence or unfounded assumptions about risks related to disability. These assumptions have never been, and should never be, regarded as 'other relevant factors' for the purpose of interpreting the section.

The Government agrees it would be useful to clarify 'other relevant factors' for the purpose of section 46. However, in this situation the Government considers the inclusion of the material in industry codes is preferable to legislation. The Attorney-General and the Treasurer will ask the Insurance Council of Australia, Investment and Financial Services Association Limited and HREOC to develop material appropriate for inclusion in industry codes and guidelines.

Recommendation 12.2
The *Disability Discrimination Act 1992* should be amended to limit the application of the insurance and superannuation exemption (s.46). It should only apply if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied).
Applicants should be advised of their entitlement to request these reasons.

The Government does not accept this recommendation.

The Government does not believe that it is desirable or appropriate to regulate directly in this area. The Government believes it would be more appropriate to use industry codes and agreements to provide adequate reasons to consumers.

The Government agrees that it is appropriate for industry to disclose reasons to persons subject to unfavourable underwriting decisions. The Government will encourage the industry to implement this recommendation. Industry policies should ensure that the reasons given are clear and meaningful and they explain the actuarial, statistical or other basis for the decision, where relevant data is available.

The Government will raise this issue with the Insurance Council of Australia (ICA) so that it is included in its Draft Code of Practice. Section 3.3 of the ICA Draft Code of Practice relates to reasons for decisions. The Draft Code outlines that if an insurer declines cover, refuses to issue a contract of insurance, or cancels the contract of insurance, they will provide reasons.

If it were demonstrated that an ICA Draft Code of Practice including reasons for unfavourable underwriting decisions (including an explanation of information on which they have relied) was not being adequately implemented by insurers, the Government will give further consideration to whether legislative amendment is appropriate.

Recommendation 12.3
The exemption of the *Migration Act 1958* and its regulations in the *Disability Discrimination Act 1992* (s.52) should be reviewed and amended to ensure it:

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

The Government does not accept this recommendation.

The Government believes that the existing exemption set out in section 52 of the DDA is necessary and appropriate.

While Australia's immigration laws do not exclude persons with disabilities from visiting or migrating to Australia, they do contain health requirements that must be satisfied. The health requirements include that the person does not have a disease or condition that would be likely to result in a significant cost to the Australian community in health care or community services; or prejudice the access of Australian citizens or permanent residents to such services. The requirements may be waived in compassionate or compelling circumstances.

In assessing whether a visa applicant satisfies the health requirements, it may be necessary to request the applicant undertake various health examinations and assessments. Such requests are made on a case by case basis, dependent on the specific condition and circumstances of the applicant.

The health requirements and their administration ensure that Australians, including Australians with a disability, continue to receive essential appropriate health and community services.

Recommendation 12.4
The exemption in the *Disability Discrimination Act 1992* for 'special measures' that are reasonably intended to benefit people with disabilities (s.45) should be amended to clarify that it:

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

The Government accepts this recommendation.

The Productivity Commission argues that the reason for introducing the special measures exemption is to protect 'special needs' services and facilities for people with disability from being challenged by people who do not have disability. It would be inconsistent with the intent of the DDA that once a service is characterised as a 'special needs' service then nothing done by the service provider in the course of that can constitute discrimination on the basis of disability.

The Government agrees with the Productivity Commission that it is appropriate that the DDA should be amended to ensure that the DDA does not apply to the establishment, funding or eligibility criteria for disability special measures but that people with disability cannot be discriminated against in the general administration of those services (eg access to premises and availability of information in accessible formats).

Recommendation 12.5
The *Disability Discrimination Act 1992* should be amended to clarify that the general exemption for 'special measures' (s.45) does not apply to wages paid to people with disabilities. Wages should be subject to the specific provisions for capacity-based wages in the Act (s47(1)(c)).

The Government does not accept this recommendation.

The Government does not consider that there is significant evidence of uncertainty about the interaction between provisions dealing with capacity-based wages and the exemption for 'special measures' that warrant amending the DDA.

Recommendation 12.6
The laws prescribed under section 47 of the *Disability Discrimination Act 1992* should be reviewed every five years to ensure that the reasons for their prescription remain current. The laws that are currently prescribed should be reviewed as soon as possible and delisted if necessary.

The Government accepts this recommendation in principle.

The Government agrees that the prescribed laws should be regularly reviewed and notes that regulations formulated under the DDA are subject to the review and consultation provisions of the *Legislative Instruments Act 2003*. The Attorney-General will write to his State and Territory counterparts to ask them to review laws currently prescribed under this section.

Chapter 13 Complaints

Recommendation 13.1
The Human Rights and Equal Opportunity Commission should enter into formal arrangements with State and Territory anti-discrimination bodies to establish a 'shop front' presence in each jurisdiction but retain responsibility for managing complaints under the *Disability Discrimination Act 1992*.

The Government does not accept this recommendation.

The Government believes that HREOC's provision of virtual shopfronts via its website provides the Australian public with far greater access to information than would be provided by the physical presence in each jurisdiction. The information on its website includes an information sheet on the "Election of Federal Jurisdiction" to assist potential complainants determine the appropriate jurisdiction for their complaint.

Recommendation 13.2
The *Human Rights and Equal Opportunity Commission Act 1986* (s.46PO) should be amended to allow complainants up to 60 days to lodge an application relating to unlawful disability discrimination with the Federal Court or Federal Magistrates Court.

The Government accepts this recommendation.

In litigation generally, there is a need to weigh the interests of the applicant and the respondent before changes are made to the way in which cases are conducted. Any extension of time within which to commence an application must therefore be balanced against the interests of a respondent in, for example, being able to properly answer the allegations. However, under the *Human Rights and Equal Opportunity Commission Act 1986*, an applicant may not commence an application in the courts unless he or she has first lodged a complaint with HREOC and HREOC has terminated the complaint. This means that respondents are already on notice and would be aware of HREOC's decision. It is not unreasonable in this situation for applicants to have an extra 32 days in which to lodge their application with the courts.

Recommendation 13.3
The Australian Government should legislate to ensure that, where it is the clear intent of the parties, conciliation agreements should become legally binding agreements. The legislation should grant Federal Court or Federal Magistrates Court jurisdiction over such agreements. The legislation should also set out the remedies that may be granted by those courts in respect of a breach of such an agreement.

The Government accepts this recommendation in part.

A party to a conciliation agreement may seek to enforce such an agreement in the court of a State or Territory. The amendment would give the same jurisdiction to the Federal Court and Federal Magistrates' Court. However, the remedies that may be granted are a matter for the courts and would depend on the nature of the agreement that is being enforced. The Government therefore does not accept the second limb of this recommendation.

Recommendation 13.4
The *Human Rights and Equal Opportunity Commission Act 1986* should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the *Family Law Act 1975.*

The Government does not accept this recommendation.

As the Productivity Commission notes, the "cost neutral" principle is not without its own shortcomings. Even if a complainant of discrimination ultimately wins he or she would not recover their own costs and this would be a disincentive to a complainant pursuing his or her claim. Additionally there would be little disincentive to complainants from lodging a vexatious and/or unmeritorious claim. The Courts are sensitive to the public interest issue in this area and have been exercising their discretion appropriately when applying considering the appropriate costs order.

The issue of costs was reviewed by HREOC in 2002 in its discussion paper *Review of Changes to the Administration of Federal Anti-Discrimination* Law. HREOC did not recommend any changes to the way costs are awarded.

Recommendation 13.5
The *Human Rights and Equal Opportunity Commission Act 1986* should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required.

The Government does not accept this recommendation.

The Government does not consider that the report provides a sufficient basis to implement this recommendation without further consideration and consultation in relation to the issues raised. The recommendation that disability organisations be able to initiate complaints with HREOC or applications with the Federal Courts' system *in their own right* raises complex policy and legal issues wider than those canvassed by the Productivity Commission.

In particular, the report does not assess the broader interrelationship between *representative* actions (currently provided for in the Federal Court for groups of persons with sufficient interest to bring an action in their own right – sections 33C-33D of the *Federal Court of Australia Act 1976*) and the recommendation which is directed to the *standing* of representative organisations to bring an action *in their own capacity*, or the impact of adopting the recommendation. For example, while noting the current Federal Court provisions for representative actions, the report does not address wider issues of how the proposed scheme would interact with the broader Federal Court regime for representative actions in its general jurisdiction.

The recommendation also raises questions about the impact on the courts – for example, if an organisation which was not itself, or did not bring an action on behalf of an individual, aggrieved by the alleged discrimination, the question arises as to what (and in what manner) evidence would be put before a court to consider the matter. Without actual evidence, courts may in effect be asked to give advisory opinions or hypothetical judgments, which are not justiciable issues and which the courts have traditionally resisted.

Recommendation 13.6
The Attorney-General's Department should investigate the implications of this inquiry's recommendations about the disability discrimination complaints process for other federal anti-discrimination legislation.

The Government accepts this recommendation.

In formulating its response, the Government has considered the implication for all federal anti-discrimination legislation and will amend the *Human Rights and Equal Opportunity Commission Act 1986* to give effect to this recommendation. This means that the increased time limit for lodging an application with the Federal Court or Federal Magistrates' Court will apply to all claims of unlawful discrimination (recommendation 13.2). In addition, all conciliated agreements will be able to be enforced in the Federal Court or Federal Magistrates' Court where it is clear that the parties intend the agreement to be legally binding (recommendation 13.3).

Chapter 14 Regulation

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.

The Government accepts this recommendation in principle.

The Government agrees that it is not appropriate for legislative instruments to alter, in a fundamental way, the underlying scope of a principal Act except where Parliament has otherwise allowed. However, as the report accepts, the purpose of disability standards is to translate general limitations and obligations into terms which are more specific and provide certainty.

The Productivity Commission's major objective is to ensure that disability standards maintain the process of balancing the costs and benefits arising under the DDA. For this purpose, the scheme of the DDA includes the concepts of unjustifiable hardship and exemptions. Disability standards are also subject to a regulation impact statement process which balances costs and benefits.

The Government has introduced amendments to the DDA to ensure that the draft Disability Standards for Education reflect the scope of the Act. The provisions of the draft Disability Standards for Access to Premises will also be reviewed in light of the Productivity Commission's comments to ensure they reflect the checks and balances within the DDA.

However, the Government does not believe that an amendment to the DDA will achieve the objective, as including the concept of the fundamental scope of the Act would give rise to difficulties in interpretation.

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.

The Government accepts this recommendation.

The Government agrees that it is desirable to clarify this area. The Government agrees with the principle of ensuring that disability standards, which are developed with the involvement of a wide range of stakeholders including State and Territory Governments, provide the highest degree of certainty possible to industry, business and the disability sector. The Government is of the view that it would be desirable for State and Territories to incorporate disability standards directly into their own anti-discrimination legislation. This proposal has been put to States and Territories through the Standing Committee of Attorneys-General. However, the Government agrees that an amendment to the DDA would help to provide certainty in this area.

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.

The Government accepts this recommendation.

This recommendation is one of a number of recommendations which aim to provide more options for facilitating the administration of the DDA. The Government agrees that allowing the formulation of disability standards in all areas of the DDA would assist in administering the Act. The Government notes that the Productivity Commission has explicitly not recommended that standards be made in all areas of the DDA. Any formulation of new disability standards involves a rigorous cost-benefit analysis and thorough consultation process. Other forms of regulation, such as guidelines and action plans which are also supported in this Chapter, will be more appropriate in many cases.

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.

The Government accepts this recommendation.

For example, the Government is revising the Building Code of Australia so that it forms the basis of a national disability standard for Access to Premises. As the Standard is linked to the Code it will effectively be enforced by existing State and Territory building approval processes. There are no comparable existing regulatory processes in the fields of public transport or education. Consideration will be given to incorporating existing regulatory processes in the development of any future disability standards.

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.

The Government accepts this recommendation.

The Government is supportive of flexible approaches which encourage industry and service providers to take proactive steps to eliminate disability discrimination. Privacy Codes, a form of co-regulation, have proven successful under the *Privacy Act 1988.* In addition, the Government notes that HREOC already actively engages with industry through processes such as issuing guidelines, and considering action plans and temporary exemption applications.

The Attorney-General will ask HREOC to put forward proposals for implementing this recommendation.

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.

The Government accepts this recommendation in principle.

The Attorney-General will ask HREOC to proceed with developing the guidelines, undertaking appropriate consultation with employer groups.

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.

The Government accepts this recommendation.

The Government is supportive of flexible approaches which encourage industry and service providers to take proactive steps to eliminate disability discrimination. Action plans have proven to be an effective method of encouraging service providers to take steps to achieve compliance with the DDA. Extending the ability to make action plans to all areas covered by the DDA, including the area of employment, provides another option to facilitate administration of the Act.

Paragraph 11(d) of the DDA will be amended to ensure that all action plans (not just those developed by service-providers) can be considered in determining whether unjustifiable hardship will occur (see recommendation 8.3).

Chapter 15 Other issues

Recommendation 15.1
The Australian Government should review the effectiveness of the various schemes it uses to subsidise the costs to organisations of adjustments needed by people with disabilities. This review should consider the merits of portable access grants that would contribute to the costs of adjustments required for participation in employment and education.

The Government accepts this recommendation.

Programs which subsidise costs to employers of employing people with disability, either by subsidising wages or offsetting the costs of modifying the workplace or providing equipment, provide important incentives for employers to consider employing people with disability. The Government agrees that the effectiveness of existing schemes, which subsidise the costs of making adjustments, should be reviewed. Further, the Government supports the consideration of the merits of portable access grants. Portable access grants, which limit or obviate any costs on the

employer to make adjustments, would be a significant incentive to employers to engage people with disability.

The review of existing schemes will need to take into account a number of factors such as the reform of income support and employment support available through mainstream and disability employment services. The review will also need to take into account the recent review of employment incentive strategies undertaken by the Department of Family and Community Services.

The Government notes that the scope of the review should recognise that primary responsibility for the provision of education and training rests with the provider. The Government provides substantial assistance to State and Territory and non-government education and training authorities, including for students with disabilities. In the schooling sector, this funding will be significantly increased for the 2005 to 2008 quadrennium. In the vocational education and training sector, the Government provides financial assistance for New Apprentices with disabilities and for their employers. There is potential for these adjustments to be portable. In addition to the significant funding provided to universities, in 2002 the Government introduced the Additional Support for Students with Disabilities Programme to assist higher education providers to meet the costs of providing students with disabilities with special educational support services and equipment. The higher education reform package, *Our Universities: Backing Australia's Future*, also provides considerable additional funding for disability support. The Government has developed Disability Standards for Education to operate across all education sectors. The standards clarify providers' obligations under the DDA in the area of education and training.

The Departments of Education, Science and Training, Employment and Workplace Relations and Family and Community Services will conduct the review.