HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

DISABILITY AND HUMAN RIGHTS:
NEEDS AND OPTIONS FOR FURTHER PROTECTION

DRAFT POSITION PAPER FROM THE HUMAN RIGHTS COMMISSIONER

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This report draws on research and consultations undertaken over a four year period by, or on behalf of, the Human Rights and Equal Opportunity Commission under its "Program of Action on Disability".

In particular, the Commission would like to acknowledge the substantial research and evidence gathered by the National Council on Intellectual Disability, with the assistance of the Australian Council for the Rehabilitation of the Disabled and Disabled People's International in the preparation of the discussion paper "The Rights of People with Disabilities".

DISABILITY AND HUMAN RIGHTS: NEEDS AND OPTIONS FOR INCREASED PROTECTION

PART 1 : BACKGROUND

1: INTRODUCTION

Human rights standards to which Australia is committed require that people with disabilities should enjoy the same basic human rights as all other human beings. However, in many respects for people with disabilities in Australia, this is simply not the case. Research and consultations undertaken by the Commission have indicated that people with disabilities experience discrimination in many aspects of their lives and that the rights of people with disabilities are regularly infringed and abused.

1.1: AIMS AND OBJECTIVES OF THIS PAPER

This paper is part of a continuing series of activities by the Human Rights and Equal Opportunity Commission (HREOC) under its "Program of Action on Disability". One of our major purposes in this paper is to assist in the consideration of options for national legislation against discrimination on the grounds of disability. In addition to addressing the need for Federal legislation, however, this paper examines a variety of other issues in a broader context, to promote consideration of the need for further legislative and programmatic reform to ensure that the rights of people with disabilities are appropriately protected.

This paper does not attempt to give comprehensive details of all the possible intricacies that disability anti-discrimination legislation could contain, nor is it an exhaustive study of all aspects of discrimination faced by people with disabilities. The emphasis is rather on the broader issues that must be considered in the context of developing appropriate legislation, drawing on the concerns that have been raised in consultations with people with disabilities and in submissions we have received.

1.2: WHAT IS DISABILITY?

Definitions and terminology relating to disability have altered over the years, along with changes in our understanding of the type and nature of conditions which lie within its scope. These alterations are in turn, linked to changes in societal attitudes towards people with a disability. While legislative definitions of disability are discussed in detail later in this paper, the following definitions are provided.

The **World Health Organisation** (WHO) has provided definitions of impairment, disability and handicap as follows:

Impairment - A generic term which embraces any disturbance in normal structure and functioning of the body including systems of function.

Disability - Disability is the loss or reduction of functional ability and activity that is consequent upon impairment. It is the mediating term of impairment and handicap. It covers incapacity in walking and other body movements and in manual activity, and behaviour disorders.

Handicap - Handicap is the disadvantage that is consequent upon impairment and disability. Handicap represents the social and environmental consequences to the individual stemming from the presence of impairment and disability.

In 1978 the South Australian Committee on the Rights of Persons with Handicaps summarised these definitions as follows:

> *An impairment is an anatomic or functional abnormality or loss which may or may not result in a disability. A disability is a loss or reduction of functional ability which results from an impairment. Handicap is the disadvantage caused by disability. Thus, impairment is a medical condition, disability is its functional consequence and handicap the social consequence.*

This approach to definition has been valuable in focussing attention on the fact that for many people with disabilities, restrictions on their ability to participate equally in different aspects of life are not the inevitable, medical consequence of a particular impairment. Rather, in many cases restrictions on equality for people with disabilities result from features of the social or physical environment - features which can be altered, and which in some cases the law can help to change.

The United Nations Declaration on the Rights of Disabled Persons similarly, emphasises the social context of disability. This Declaration, however, defines "disability", rather than "handicap" as the term referring to the social consequences of impairment. This Declaration defines "disabled person" to mean:

> *any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.*

This Declaration forms part of the definition of "human rights" under the Human Rights and Equal Opportunity Commission Act and therefore shapes some of the work of the Commission. At the same time, the Commission recognises that there are problems with this definition (which this paper will discuss in section 10 of this report).

A wide variety of more detailed legal definitions of disability have been adopted for the purposes of anti-discrimination and related legislation, in other countries as well as in Australia. The variety of definitions reflect changing social theories about disability. In part, they represent different attempts to get the language of the law to reflect medical and social theories and knowledge.

An important point to recognise in any discussion of improved legal protection of the rights of people with disabilities is that defining disability for the purposes of the law, including for the purposes of protection against discrimination, is difficult and complex. The situations, problems and needs of people with disabilities vary widely: including in the origin, nature and degree of disability, and in the social responses to different disabilities.

1.3: DEMOGRAPHIC PROFILE OF PEOPLE WITH DISABILITIES IN AUSTRALIA

In order to place this paper in context, it is necessary to examine the recent data on the profile of people with disabilities in Australia.

In 1988, the Australian Bureau of Statistics (ABS) conducted a survey on disability and ageing. The ABS survey defined a "handicapped person" as a "disabled person" aged 5 years or over who was identified as being limited to some degree in his/her ability to perform certain tasks in one or more of the following areas:

* self care
* mobility
* verbal communication
* schooling; and
* employment.

A "disabled person" was defined as a person who has one or more of the following disabilities or impairments which has lasted or is more likely to last for 6 months or more:

* loss of sight (even when wearing glasses or contact lens);
* loss of hearing;
* speech difficulties in native language;
* blackouts, fits or loss of consciousness;
* slowness at learning or understanding;
* incomplete use of arms or fingers;
* incomplete use of feet or legs;
* long-term treatment for nerves or an emotional condition;
* restrictions in physical activities or in doing physical work;
* disfigurement or deformity;
* need for help or supervision because of mental disability; and
* long-term treatment or medication.

From the survey, it was estimated that there were 2,543,000 Australians with some degree of disability (15.6% of the population).

The survey further found that 13% of the Australian population (2,124,100) were "handicapped", and that this represented 84% of the disabled population. When analysing the data on the level or degree of "handicap", it was found that:-

* 4% of the Australian population (657,000) were classified as having a severe handicap, that is that they needed help from another person to perform some or more of a group of selected tasks;

* A further 3.4% of the Australian population (550,000) were classified as having a moderate handicap, that is they needed no help but had difficulty performing one or more of a group of selected tasks;

* A further 3.8% of the Australian population (613,000) were classified as having a mild handicap; and

* 1.9% of the Australian population (302,800) were people whose severity of handicap could not be determined.

The survey found that for 2,254,000 or 88.2% of people with disabilities their primary disability was a physical disorder while for 302,400 or 11.8% their primary disability was a "mental" disorder (includes both intellectual and psychiatric disabilities). There was a similar pattern of disability for women and men.

According to the ABS survey almost 520,000 people with handicaps or 20.4% of all people with disabilities in Australia were in the labour force. Of these, 456,400

or 87.8% were at the time of the survey employed and 63,300 or 12.2% were unemployed. It was also estimated that there were approximately 21,500 people with disabilities in Activity Therapy Centres and sheltered workshops.

2: PROGRAM OF ACTION ON DISABILITY

2.1: HREOC's WORK SO FAR

In 1989, based on the Human Rights and Equal Opportunity Commission's mandate, Australia's international commitments, and evidence of substantial areas of need for increased protection, the Federal Human Rights Commissioner, Mr Brian Burdekin, announced a range of activities to be undertaken by the Commission as a "Program of Action on Disability". One aim of this Program was to enable the Commission to identify further legislative steps required to ensure compliance with international human rights standards to which Australia is committed.

As part of the Program of Action, in 1989 HREOC released a major discussion paper, "The Rights of People with Disabilities: Areas of Need for Increased Protection", based on research commissioned in 1988 from the National Council on Intellectual Disability in consultation with Disabled People's International and the Australian Council for the Rehabilitation of the Disabled (ACROD).

HREOC has conducted consultations nationally (on the basis of this Discussion Paper and more generally) for the last two years. A large number of formal submissions have been received from people with disabilities, organisations representing them and State governments.

These consultations, and many of the submissions, have indicated strong support for further Federal legislation to provide effective protection against discrimination in a range of areas; these include: employment and occupation; education and training; accommodation; the provision of goods and services (in particular, transport and communications); and access to premises and facilities.

The Federal Human Rights Commissioner has strongly supported the development of adequate legislative protection for the rights of people with disabilities on a number of occasions, including in addresses to the Second National Human Rights Congress in Melbourne and the 1989 Kenneth Jenkins Oration (delivered at the national ACROD Convention).

HREOC has made repeated submissions supporting improved protection for the rights of people with disabilities to a range of inquiries conducted by Federal Parliamentary Committees. These have included:

* the Inquiry into Employment of people with disabilities by the Senate Standing Committee on Community Affairs;

* the Inquiry into Accommodation for people with disabilities by the Senate Standing Committee on Community Affairs;

* the Inquiry by the Industry Commission on aids and appliances for people with disabilities;

* the Inquiry into Conditional Migrant Entry by the House of Representatives Standing Committee on Community Affairs;

* the Inquiry into the migration regulations by the Joint Select Standing Committee on Migration Regulations.

Other approaches have also been made directly to the Federal Government on major issues affecting rights of people with disabilities. These have included:

* representations leading to the inclusion of physical, intellectual, mental and psychiatric disability, impairment and related grounds of discrimination within the jurisdiction of the Commission on discrimination in employment (from January 1990 onwards);

* submissions concerning revised medical standards for appointment to the Australian Public Service;

* Representations on the proposed devolution from the Commonwealth to State and Territory Governments of certain responsibilities for disability services.

Although most of HREOC's functions and powers with respect to the rights of people with disabilities relate to actions by the Commonwealth Government or (in the area of employment) to private sector employers, HREOC has also contributed to review of legislation and programs in a number of States. These have included:

* the development of accommodation models for people with severe physical disabilities in Queensland; and

* advice on the introduction or extension of anti-discrimination legislation, including in relation to disability, in Tasmania, Queensland, the A.C.T. and the Northern Territory.

The Commission has also continued to investigate and conciliate complaints by people with disabilities in relation to Commonwealth acts and practices (and since January 1990, in relation to employment more generally).

HREOC has intervened (including, on a number of occasions, at the request of the Family Court of Australia) in court proceedings relating to the rights of people with disabilities.

Based on all these activities and interventions, the Commissioner has concluded that there are still a number of important areas where additional protection is required. There is also, clearly, a need for certain uniform standards across our nation.

2.2: NATIONAL INQUIRY INTO THE HUMAN RIGHTS OF PEOPLE WITH MENTAL ILLNESS

For a number of reasons (related both to the rights and needs of the mentally ill and their carers) the Commission decided that the area of mental illness and psychiatric disability, while addressed to a limited extent in the consultation process outlined above, should principally be addressed through a National Inquiry into the Human Rights of People with Mental Illness.

This Inquiry (chaired by the Human Rights Commissioner and assisted by Dame Margaret Guilfoyle and Mr David Hall) has now received well over 400 written submissions and has taken evidence from nearly 200 witnesses in hearings conducted to date in Victoria and New South Wales, both in capital cities and in regional centres.

Hearings of this Inquiry will continue into 1992, with a comprehensive Report including recommendations planned for 1993. It is likely that this Report will make findings and recommendations specifically dealing with discrimination against people affected by mental illness. It is clear, however, that there is no justification for delay until that time in making more general recommendations on need and options for further legislation for the protection of the rights of people with disabilities, particularly in the context of the consideration of national legislation in relation to discrimination and disability which is to occur during 1991.

2.3: LABOUR AND DISABILITY WORKFORCE CONSULTANCY

HREOC welcomed the release in late 1990 of the Labour and Disability Workforce Consultancy report commissioned by the Minister for Community Services and Health on National Employment Initiatives for People with Disabilities.

As emphasised by the Federal Human Rights Commissioner in his response to this Report, the consultations conducted by HREOC, and the Commission's own research, have highlighted the importance of addressing barriers to equal enjoyment of human rights in a co-ordinated manner. The Commissioner emphasised, for example, that equal opportunity in employment is dependent on access to transportation and to premises and facilities - as well as to equal opportunity in education and training.

Commissioner Burdekin's response to this Report also strongly advocated the development of comprehensive national legislation, proposing the Americans with Disabilities Act as a possible model, and suggested the early establishment of a working party to examine options for legislation.

2.4: DISABILITY ANTI-DISCRIMINATION LEGISLATION COMMITTEE

The Commissioner was subsequently pleased to accept an invitation from the (then) Minister for Community Services and Health to participate in a Disability Anti-Discrimination Legislation Committee. This committee includes representatives of the Disability Advisory Council of Australia (DACA), the Federal Attorney-General's Department and the Department of Health, Housing and Community Services. Its task is to conduct further consultations and make recommendations concerning national legislation against discrimination on the grounds of disability.

The terms of reference for that Committee call for consultation with people with disabilities and with relevant organisations, and for a report to the Minister for Health, Housing and Community Services and the Attorney-General on needs and options for national anti-discrimination legislation in the area of disability.

Anti-discrimination legislation promotes equal opportunity and equality of rights by making discrimination on the grounds specified unlawful, and by providing redress for persons subjected to such discrimination. In general, such legislation provides for civil remedies (for example damages, or an order to take or refrain from certain actions) rather than criminal penalties.

This paper (in section 3) examines a number of international human rights instruments to which Australia has committed itself. Some legislative effect has been given to these commitments in relation to the rights of people with disabilities in the Human Rights and Equal Opportunity Commission Act 1986. However, the protection afforded by this Act is limited in a number of respects (as outlined below).

The Commonwealth has legislated to provide specific protection against, and enforceable remedies for, discrimination on certain other grounds, in the Racial Discrimination Act 1975 and the Sex Discrimination Act 1984.

The Racial Discrimination Act 1975 deals with discrimination on the basis of race, colour, national or ethnic origin. It makes such discrimination unlawful in relation to employment; trade union membership; provision of goods and services; land, housing and accommodation; and access to places and facilities open to the public. The Act, which also applies to State Governments, contains a general provision making discrimination on the grounds specified which affects equal enjoyment of human rights, unlawful. It also contains a provision designed to invalidate any racially discriminatory provisions in the law.

The Sex Discrimination Act 1984 deals with discrimination on the grounds of sex, marital status or pregnancy. It makes such discrimination unlawful in relation to employment (including in partnerships, contract work and a number of other occupational situations where the technical legal relationship of "employment" does not exist, as well as employment agencies, qualifying bodies and trade unions); education; goods, services and facilities; accommodation and land; membership of clubs or services provided to members; and in the administration of Commonwealth laws and programs. It does not, however, apply to employment by State Government instrumentalities. This Act also specifically provides that sexual harassment is unlawful in employment and education (although most cases of sexual harassment would constitute sex discrimination under the Act independently of these provisions).

2.5: ANTI-DISCRIMINATION LEGISLATION AND EQUALITY FOR PEOPLE WITH DISABILITIES: USES AND LIMITATIONS

Consultations and research by the Commission over the past four years have identified substantial barriers to equal enjoyment of human rights by people with disabilities in a range of areas. They indicate that anti-discrimination legislation, which the Committee established by the Federal Government has been asked to report on, is an essential element in removing these barriers.

They also indicate, however, that other legislative and programmatic strategies and measures, in addition to anti-discrimination legislation, are required to effectively address these barriers. These include not only review of barriers under existing legislation, but also "affirmative action" strategies in relation to employment and related areas, and pro-active measures in other areas.

Consultations have also identified concerns and a need for further legislative protection in areas not traditionally within the scope of anti-discrimination legislation in Australia (including, for example, in the operation of the criminal justice system).

This paper has two primary objectives:

- to further assist in consideration of options for national legislation in the context of the consultation processes to be conducted by the Disability Anti-Discrimination Legislation Committee and to provide a resource to individuals and organisations contributing to these consultations (including by summarising the research and consultations conducted by HREOC over a period of more than three years, and our experience in individual complaint handling since 1986); and
- to promote discussion and consideration of legislative and programmatic needs by Federal, State, Territory and Local Government in a broader context (i.e. going beyond the specific task assigned to the Disability Anti-Discrimination Legislation Committee).

3: INTERNATIONAL STANDARDS AND COMMONWEALTH POWERS

This section examines issues concerning the development and application of international human rights standards and the Commonwealth's constitutional powers in relation to the development of national disability anti-discrimination legislation.

3.1: HISTORY AND LEGAL BASIS

Australia, through the Federal Government, has committed itself to a range of international standards on human rights developed through the United Nations system since 1945.

These standards fulfil part of the mandate of the United Nations under its Charter (which Australia helped to draft) to promote universal respect for and observance of human rights. The Charter was, in large part, adopted in response to the atrocities committed by the Nazi regime and others leading up to and during the second World War. It is appropriate to recall that the groups subjected to these atrocities included people with disabilities.

In 1948 the United Nations adopted the Universal Declaration of Human Rights, which proclaimed fundamental rights to which "everyone" should be entitled without discrimination. Australia actively supported and was centrally involved in the development of the "Universal Declaration" (Australia's Foreign Minister and Attorney General, Dr Evatt, was President of the U.N. General Assembly when the Declaration was adopted).

The Declaration was intended as a common standard of attainment for all nations. It was not, however, seen at the time as imposing binding legal obligations on governments (although many international lawyers have concluded that the Declaration now has substantial legal force). Moreover, it proclaimed rights only in general terms, rather than setting out in detail how those rights should be translated into law and practice.

In the last forty years development of more detailed instruments has therefore continued. Standards have been developed concerning the human rights of particularly vulnerable groups. These standards are involved in a series of Declarations, Covenants, Treaties, Principles and Rules. Some of these instruments are binding on Australia as a matter of international law.

However, these international obligations and commitments entered into by Australia do not automatically become part of Australian law. While courts can refer to these standards as part of the common law process of interpreting existing laws, legislation by Parliament is generally required in order to give binding legal effect to international commitments on human rights.

The High Court has confirmed (most notably in the "Dams Case", Commonwealth v. Tasmania (1983) 158 Commonwealth Law Reports 1) that the Federal Parliament has power under the Federal Constitution to legislate to implement international treaty obligations.

The Federal Government is also, importantly, the level of government internationally accountable for how well Australia (including State and Territory Governments) complies with its human rights obligations.

This section, discussing constitutional powers in relation to human rights obligations deals therefore with Federal constitutional powers. There is, however, no reason why State legislation on human rights matters should not also refer to international standards. As emphasised later in this paper there are clearly areas where complementary Federal and State legislation is necessary. The aim of this paper is not to promote action by one level of government at the expense of another, but to promote the most comprehensive and effective protection of human rights for people with disabilities.[1]

3.2: HUMAN RIGHTS INSTRUMENTS INCORPORATED IN FEDERAL LEGISLATION

A number of international human rights instruments have been incorporated in Federal legislation (the effect of which is discussed in more detail in Part III of this paper) in the Human Rights and Equal Opportunity Commission Act.

3.2.1: International Covenant on Civil and Political Rights

[1] Under s.51(xxix) of the Australian Constitution, the Federal Parliament may legislate with respect to "external affairs". In addition to power to legislate to implement international treaties, the High Court has indicated that there is power to legislate to some extent on matters of "international concern" even where there is no treaty obligation. The extent of this power, however, remains uncertain.

The **International Covenant on Civil and Political Rights** (ICCPR) was adopted by the United Nations General Assembly in 1966. Australia ratified (that is, became a Party to) the ICCPR on 13 August 1980. The ICCPR requires that all Parties "respect and ensure to all individuals within their territory and subject to their jurisdiction" the rights which the Covenant recognises. These rights include:

- the right to life (Article 6);

- the right to freedom from cruel, inhuman or degrading treatment or punishment (Article 7);

- the right to liberty and security of the person (Article 9);

- the right to be treated with respect for dignity and with humanity, if deprived of liberty (Article 10);

- the right to freedom of movement and choice of residence (Article 12);

- the right to equality before the courts and tribunals, and to a fair hearing in any criminal case or law suit; to be presumed innocent until proved guilty if charged with a criminal offence; and in determination of any criminal charge to guarantees including the right of every person:

    * to be informed promptly, in detail and in a language the person understands of the nature and cause of the charge;

    * to be tried without undue delay;

    * to be tried in his or her presence, and defend him or herself in person or through counsel of his or her own choosing;

    * to have legal assistance assigned where required by the interests of justice, free of charge where the person has insufficient means to pay;

    * to examine witnesses;

    * to have the free assistance of an interpreter if he or she cannot speak the language used in court (Article 14);

- the right to recognition as a person before the law (Article 16);

- the right to freedom from arbitrary interference with privacy or family life (Article 17);

- the right to freedom of conscience and religion (Article 18);

- the right to freedom of opinion, expression and information (Article 19);

- the right to freedom of association including the right to form and join trade unions (Article 22);

- the right to marry and found a family (Article 23);

- the right of children to special protection (Article 24);

- the right to take part in public affairs, to vote and to be elected, and to have access on equal terms to public service (Article 25);

- and the right of people belonging to ethnic, religious or linguistic minorities to enjoy their own culture, practice their religion or use their own language, in community with other members of their group (Article 27).

Effective protection of these rights obviously involves many areas of Commonwealth, State, and Territory legislation and practice. Clearly, not all these rights can be effectively addressed by national anti-discrimination legislation alone. Equally clearly, however, national legislation is important if these rights are to be actually implemented.

The Commonwealth clearly has Constitutional power to legislate to guarantee these rights generally.

It is probable, although less clearly established, that the Commonwealth also has power to legislate to guarantee these rights for groups in particular need of protection, such as people with disabilities.

The ICCPR contains a number of provisions relevant to discrimination.

ICCPR Article 2.1

The ICCPR requires each Party

> to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status (Article 2.1).

The terms of this Article indicate that discrimination "of any kind" (including, by definition, discrimination relating to disability) which affects the exercise or enjoyment of rights recognised elsewhere in the ICCPR is covered.

This is in fact implicit in the requirement to ensure these rights to "all individuals". Essentially the same point was made by Australia's representative participating in the drafting of the Universal Declaration of Human Rights:

> … logically, discrimination was prohibited by the use in each Article of the phrase "every person" or "everyone". (U.N.Doc E/CN.4/AC.1/SR.24 at 4; cited in J.Morsink, "Women's Rights in the Universal Declaration", (1991) 13 Human Rights Quarterly 229-256 at 230.)

On this basis, disability related discrimination affecting these rights would fall within the obligations under Article 2.2 to "adopt such legislative or other measures as may be necessary to give effect to the rights recognised" and under Article 2.3 "to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy".

It has been suggested, nonetheless, that there is only a sufficiently clear obligation (to serve as the basis for Commonwealth legislation or as a basis for existing HREOC jurisdiction) with respect to the particular grounds of discrimination enumerated in Article 2.1 itself. HREOC rejects any such argument. If accepted it would mean that people with disabilities (and others, such as people facing discrimination on the basis of age) would not be covered by the words "all individuals" and that discrimination against them would not be recognised as discrimination "of any kind".

In addition "disability" would also appear to be covered by the concluding phrase "or other status" in Article 2.1.

There is no general consensus among legal writers as to the breadth of the obligation imposed by the term "or other status" or whether disability constitutes a "status". As originally used in the Universal Declaration of Human Rights, the term appears to have been intended to refer to distinctions analogous to the term "property status" originally proposed (see U.N. Doc. A/2929). However, when the phrase "or other status" was subsequently discussed in the drafting of the ICCPR, it was regarded as an all inclusive term (see M.Bossuyt, Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights, 1987, p.486). On accepted rules of interpretation in international law, the view held by the drafters of the Covenants should be applied.

ICCPR Article 26

Article 26 of the ICCPR provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

There is debate, similar to that relating to Article 2.1, concerning the ambit of the second sentence of this Article and whether it is limited to the specified list of grounds (including "other status"). A separate and significant issue, which is also the subject of debate, is whether there is any obligation imposed by this Article to prohibit discrimination in the private sector (in addition to discrimination by governments).

This is a separate question from that discussed above concerning the effect of Article 2, in conjunction with substantive Articles 6 to 25 and 27, in requiring protection against discrimination affecting the rights recognised in these Articles, including in the private sector.

The scope of Article 26 is important primarily because, unlike Article 2, it deals with discrimination not only with respect to those rights recognised in the ICCPR itself but with discrimination in any area of law or government action. In Australia this would include actions of State and Territory governments in addition to the Federal Government. (The extent to which the Federal Government may exercise its legislative powers to restrict the actions of State governments, in particular in their internal workings, is a separate question.)

Decisions of the Human Rights Committee (the United Nations body responsible for monitoring compliance with the ICCPR) indicate that the obligation embodied in the first sentence of Article 26 to respect and ensure the "equal protection of the law" constitutes an obligation to prevent discrimination in the law, in the application of the law or in any action under the authority of law. [See e.g. Broeks v. Netherlands (Communication no.172/1984) U.N. Doc A/42/40 (1987), a case concerning social security legislation]. It is also clear from the text of Article 26 that the obligation imposed by the first sentence of this Article is not limited to the particular grounds specified in the second sentence.

In summary, therefore, the international treaty obligations which we have undertaken to honour by ratifying the ICCPR require Australia to afford protection against discrimination:

- affecting the rights set out in the ICCPR, whether such discrimination occurs in the public or private sector; and

- by public authorities, or in the law or the administration of the law, whether or not in areas not specifically addressed by rights enumerated in the ICCPR;

This includes discrimination on the basis of disability.

There are two United Nations Declarations which deal more specifically with the rights of people with disabilities. These Declarations are incorporated in the Human Rights and Equal Opportunity Commission Act, and the rights recognised in them form part of the definition of "human rights" under this Act.

3.2.2: The Declaration on the Rights of Disabled Persons

The Declaration on the Rights of Disabled Persons was adopted by the General Assembly of the United Nations in 1975. It recognises that people with disabilities are entitled to:

- the inherent right to respect for their human dignity;

- the same fundamental human rights, *whatever the origin, nature and seriousness of their handicaps and disabilities,* as their fellow citizens, including the right to a decent life, as normal and full as possible (Principle 2);

- the right to legal safeguards against abuse of any limitation of rights made necessary by the severity of a person's handicap, including regular review and the right of appeal (Principle 4);

- the right to any necessary treatment, rehabilitation, education, training and other services to develop their skills and capabilities to the maximum (Principle 6);

- the right to economic and social security and the right, according to their capabilities, to secure and retain productive employment and to join trade unions (Principle 7);

- the right to have their needs considered in economic and social planning (Principle 8);

- the right to family life, the right to participate in all social, recreational and creative activities, and the right not to be subjected to more restrictive conditions of residence than necessary (Principle 9);

- the right to protection against exploitation or discriminatory, abusive or degrading treatment (Principle 10);

- the right to qualified legal assistance to protect their rights, and for legal procedures to take their condition fully into account (Principle 11).

3.2.3: The Declaration on the Rights of Mentally Retarded Persons

The Declaration on the Rights of Mentally Retarded Persons was adopted by the United Nations General Assembly in 1971, before it was accepted in many countries that the term "mentally retarded" could be offensive and inappropriate. It was also some years before the Declaration on the Rights of Disabled Persons. The existence of a separate Declaration in this area does not, therefore, imply that the Declaration on the Rights of Disabled Persons does not apply equally to people with intellectual disabilities.

The Declaration on the Rights of Mentally Retarded Persons provides that a person with an intellectual disability has:

- the same rights "to the maximum degree of feasibility" as other human beings (Principle 1);

- the right to medical care, therapy, and such education, training, rehabilitation and guidance as will enable him or her to develop his or her ability and maximum potential (Principle 2);

- the right to economic security, a decent standard of living and to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his or her capabilities (Principle 3);

- the right to live with his or her own family wherever possible, and for the family to receive assistance, or, if institutional care is necessary, for the circumstances and surroundings to be as close as possible to normal life (Principle 4);

- the right to a qualified guardian when necessary to protect his or her well-being and interests (Principle 5);

- the right to protection from exploitation, abuse and degrading treatment;

- the right, if prosecuted for any offence, to due process of law with full recognition being given to his or her degree of mental responsibility (Principle 6); and

- the right that any procedure for restriction of rights due to the severity of a person's handicap must include proper legal safeguards against abuse, including periodic review and a right of appeal.

3.2.4: The Declaration of the Rights of the Chid

Another United Nations Declaration, the **Declaration of the Rights of the Child** adopted by the General Assembly in 1959, is also incorporated in the Human Rights and Equal Opportunity Commission Act. This Declaration specifically provides that 'the child who is physically, mentally or socially handicapped shall be given the special treatment, education and care required by his [or her] particular condition" (Principle 5). The Declaration of the Rights of the Child also provides that every child should have the right, without discrimination, to:

- opportunities and facilities, by law and by other means, to enable him or her to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity (Principle 2);

- a name and nationality from birth (Principle 3);

- enjoy the benefits of social security;

- grow and develop in health, and for this purpose is entitled to special care and protection;

- adequate nutrition, housing, recreation and medical services (Principle 4);

- where possible, to grow up in the care and protection of his or her family (Principle 6);

- receive education which will enable the child, on the basis of equal opportunity, to develop his or her abilities, judgment and sense of responsibilities and to become a useful member of society;

- opportunities for play and recreation (Principle 7);

- protection from neglect, cruelty and exploitation, from child trafficking, and from any occupation or employment which would prejudice his or her health or education or interfere with his or her physical, mental or moral development.

Although these Declarations do not create international legal obligations in the same way as a treaty, such as the ICCPR, they represent accepted international standards. They do not add substantially to Commonwealth power to legislate, but they do provide guidance as to how the Commonwealth should exercise such powers as it has, in related areas.

3.2.5: Discrimination (Employment and Occupation) Convention 1958

The **Discrimination (Employment and Occupation) Convention 1958** (International Labour Organisation Convention no.111)[2], is also incorporated in the Human Rights and Equal Opportunity Commission Act. The definition of "discrimination" for the purposes of the Act is derived from this Convention.

The Discrimination (Employment and Occupation) Convention [Article 1] indicates that "discrimination" means:

> any distinction, exclusion or preference" [made on any of the grounds specified in the Convention itself or specified by the State concerned] "which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

Distinctions in respect of any particular job, based on the inherent requirements of the job, do not constitute discrimination (Article 1; HREOC Act s.3(1).).

The Convention itself does not specify disability, impairment or medical record as prohibited grounds of discrimination. However, it does provide for Parties to the Convention (such as Australia) to specify additional grounds of discrimination.

Following recommendations from the Human Rights Commissioner, regulations under the Human Rights and Equal Opportunity Commission Act were made to add a number of grounds (including physical, mental, intellectual and psychiatric disability; impairment and medical record) to the Commission's jurisdiction in relation to this Convention as from January 1990.

By ratifying this Convention, Australia has undertaken to pursue a national policy designed to "promote equality of opportunity or treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof" (Article 2). More specifically, Australia is obliged:

> (a) to seek the co-operation of employers' and workers' organisations and other appropriate bodies in promoting the acceptance and observance of this policy;
>
> (b) to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy;
>
> (c) to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the policy;
>
> (d) to pursue the policy in respect of employment under the direct control of a national authority;
>
> (e) to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority…

The Convention also specifies, in Article 5, that special measures, including

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[2] Ratified by Australia in 1973

affirmative action, for people with disabilities may be introduced without being prohibited as discrimination against other workers:

> 1. Special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination.
>
> 2. Any Member may, after consultation with representative employers' and workers' organisations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognised to require special protection or assistance, shall not be deemed to be discrimination.

The Convention is a binding international treaty. Pursuant to its provisions the Commonwealth clearly has power (by reference to the external affairs power) to introduce legislation giving greater effect to the Convention than it has to date.

This Convention, and other relevant instruments and determinations of the International Labour Organisation (ILO), support the view that conciliation, together with the present educational and promotional functions of the Human Rights and Equal Opportunity Commission, should be retained by further legislation providing for enforceable remedies. The Convention, while explicitly referring to legislation, also clearly requires Parties to seek co-operation from employers, unions and other relevant bodies.

ILO Recommendation no.111 (Article 4) - which (as indicated by the term Recommendation) is not a treaty but gives further guidance on measures which should be taken in this area - expressly endorses conciliation as a feature of mechanisms for resolution of disputes relating to discrimination in employment and occupation. It does not, however, specify conciliation as the only or final permissible mechanism for dispute resolution. Rather, it clearly requires that additional measures be available where conciliation is not successful in resolving complaints.

Article 4 of ILO Recommendation 111 requires that "appropriate agencies" be established, assisted where practicable by advisory committees composed of employers' and workers' representatives and other interested bodies, to promote the policy required by Article 2 of the Recommendation (and by the Convention). These bodies are, in particular, to have the function of receiving, examining and investigating complaints that the policy is not being observed, and "if necessary by conciliation to secure the correction of any practices regarded as in conflict with the policy". However, Article 4 goes on to specify that these bodies should be able "to consider further any complaints which cannot be effectively settled by conciliation and to render opinions or issue decisions" concerning the manner in which discriminatory practices revealed should be corrected [emphasis added].

Consistent with the tripartite (government, worker, employer) structure of ILO institutions and with Australia's obligations in this respect under the Convention,

examination of further legislation to provide for enforceable remedies for disability related discrimination in employment or occupation should involve employer, employee and other relevant organisations. This would appropriately involve the National Advisory Committee provided for under the Human Rights and Equal Opportunity Commission Act, when the Commonwealth completes the steps required to establish that Committee. It is essential that any consultations and any mechanisms or procedures subsequently established effectively involve organisations representing people with disabilities.

Constitutional power to legislate on the basis of this Convention would include power to legislate for further protection against discrimination on the grounds of disability and related grounds which were included in HREOC jurisdiction from 1990 onwards. Article 1(b) of the Convention clearly provides for further grounds to be specified, notwithstanding that these are not expressly included in the Convention itself.

In the Commission's view, the decision of the High Court in Richardson v. Forestry Commission (1988) 164 Commonwealth Law Reports 261, confirms that the same constitutional power attaches to these additional grounds as attaches to the grounds specified in the Convention itself.

In the Richardson case the High Court decided that the external affairs power covered legislative measures which were not positively required by the international instrument in question (the World Heritage Convention) but which were preconditions for its application and were left to the judgment of States Parties (in that case the protection of potential heritage areas pending identification and an inquiry to facilitate identification).

Clearly, there is no explicit obligation under the Discrimination (Employment and Occupation) Convention to specify additional grounds of discrimination. But equally clearly, to do so would be to implement Article 1(b) of the Convention and further its objects in the same way that the law at issue in Richardson was found to further the objects of the World Heritage Convention.

3.3: OTHER INTERNATIONAL INSTRUMENTS

In addition to the international instruments presently incorporated in the Human Rights and Equal Opportunity Commission Act, there are a number of other instruments which are particularly relevant to the effective protection of human rights of people with disabilities.

3.3.1: Convention on the Rights of the Child

Australia has now ratified the **Convention on the Rights of the Child** (CROC),

adopted by the United Nations General Assembly in 1989[3].

The Convention applies to all human beings under the age of 18[4] and requires Parties to the Convention to:

> respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parents' or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.[5]

There is absolutely no doubt, therefore, that the non-discrimination provisions of this Convention apply to children with disabilities.

The Convention deals with a much wider range of rights than the Declaration on the Rights of the Child. These include:

- rights to life, survival and development (Article 6);

- rights concerning identity (Article 8);

- rights against interference with family life (Articles 9 and 16);
- rights to support services for families (Article 18);

- rights to freedom of expression, association and information (Articles 13 and 15);

- rights to protection from abuse, neglect or exploitation (Article 19 and Articles 32 - 36);

- rights concerning health care (Article 24);

- rights concerning education, including that primary and secondary education be available and accessible to all (Article 29);

- rights to social security and adequate living standards (Articles 26 and 27);

- rights of refugee children (Article 22);

- rights of children in substitute care or alternative family care (Articles 3 and 25);

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[3] Australia signed the Convention on 22 August 1990 and ratified on 17 December 1990.

[4] Article 1

[5] Article 2

- rights of children of minority communities or indigenous peoples (Article 30); and

- rights in the administration of justice and for children deprived of liberty (Articles 37 and 40).

The rights in each of these areas are therefore required (Article 2.1) to be guaranteed without discrimination, including to children with disabilities.

The Convention also makes specific provision relating to children with disabilities in Article 23, which includes requirements that parties take steps to:

> ensure that the disabled child has effective access to and receives education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities in a manner conducive to the child's achieving the fullest possible social integration and individual development, including his or her cultural and spiritual development.

Parties to the Convention are obliged, under Article 4, to:

> undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention.

Although the measures required by the Convention are therefore not limited to legislation, the Convention provides an additional source of relevant legislative power for the Commonwealth Parliament.

3.3.2: The International Covenant on Economic, Social and Cultural Rights

The **International Covenant on Economic, Social and Cultural Rights** (ICESCR)[6] was adopted by the United Nations General Assembly together with the ICCPR in 1966. In addition to recognising rights concerning employment[7], the ICESCR recognises rights in a range of other areas, including housing[8], health[9], and education[10].

Article 2.1 of the ICESCR requires States Parties to "take steps … by all appropriate means, including particularly the adoption of legislation …" with a view to the progressive realisation of the rights which the Covenant recognises.

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6 Ratified by Australia on 10 December 1975.

7 Articles 5 and 6

8 Article 11

9 Article 12

10 Article 13

This provision allows for progressive rather than immediate implementation in recognition that many of the rights set out require significant resource allocation. To whatever extent enjoyment of these rights is achieved in a particular nation, however, the ICESCR requires that they be guaranteed on a non-discriminatory basis.

Article 2.2 provides that States Parties must:

> guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.

On a similar basis to that discussed with reference to the ICCPR, this provision appears to give the Commonwealth power to legislate to provide protection against discrimination affecting people with disabilities in areas including employment, housing, health and education - although since this legislative power is yet to be exercised it is also yet to be tested definitively in the courts.

3.3.3: Mental Illness Principles

Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care were adopted by the United Nations Commission on Human Rights earlier this year and will now go before the United Nations General Assembly for final approval. HREOC played a substantial role in their preparation.

These principles offer important guidelines for standard setting in Australia. They are also important in applying the human rights standards already within the jurisdiction of the Human Rights and Equal Opportunity Commission.

The Principles focus primarily on human rights in relation to the mental health system. However, they also confirm:

- that every person with a mental illness has the same basic rights as every other person, specifically including the rights set out in the International Covenant on Civil and Political Rights and the rights recognised in the Declaration on the Rights of Disabled Persons [Principle 1.5];

- that discrimination on the basis of mental illness is not permitted [Principle 1.4];

- that every person with a mental illness has the right to live and work, as far as possible, in the community [Principle 3]; and

- that people being treated for a mental illness must be accorded the right to recognition as a person before the law [Principle 13].

The Principles re-affirm that individuals who have a mental illness or who have experienced mental illness have the right to protection from:

- exploitation - whether economic, sexual or in other forms;

- abuse - whether physical or in other forms; and

- degrading treatment [Principle 1.3].

In relation to mental health care, the Principles are not restricted to a remedial approach (dealing only with abuses and the means to prevent them). Rather, they recognise the positive contribution which mental health care should make to the enjoyment of human rights, and the right of everyone in the community to such care when necessary.

The Principles lay down that:

> All persons have the right to the best available health care, which shall be part of the health and social care system [Principle 1.1];

and

> every patient shall have the right to receive such health and social care as is appropriate according to his or health needs, and is entitled to care and treatment in accordance with the same standards as other ill persons [Principle 8].

This emphasises, first, that people with mental illness or people who have experienced mental illness should not be stigmatised, or disadvantaged in the care available, simply because of the nature of their illness.

The Principles also provide that it is not acceptable to have lower standards for mental health care, in terms of either standards or resources, than for the rest of the health system.

They specifically require that every mental health facility be inspected by competent authorities with sufficient frequency to ensure that the conditions, treatment and care of patients comply with the principles.

The principles also give important emphasis to the principle of the "least restrictive alternative" in relation to treatment.

They require an individualised plan for treatment, to be discussed with the patient and reviewed regularly.

They recognise the right to be treated and cared for as far as possible in the community, and the right to treatment suitable to each person's cultural background.

At the same time, treatment in the community is clearly required to provide adequate care and adequate resources.

Treatment is required to be directed towards enhancing personal autonomy. Accordingly, patients in mental health facilities are to have their rights respected, including privacy and freedom of communication. Such facilities are to include opportunities for education and vocational training, in additional to appropriate professional care and treatment.

The Principles embody detailed requirements for informed consent to treatment. Importantly, they provide a rigorous definition of what constitutes informed consent - which Australian law generally lacks at present - and require safeguards, including review by an independent authority, for the limited number of cases where informed consent cannot be obtained.

Special protection is required for children in these circumstances and in relation to mental health care generally.

The principles make provision in relation to medication, including that it is never to be administered for the convenience of others.

They also require that patients in mental health facilities be fully informed of their rights, and have access to their own health records except in exceptional circumstances. They require that confidentiality of information must be respected.

Statements of rights without effective monitoring of their implementation, or remedies for their violation, are of little effect - as experience in this area has demonstrated.

The Principles therefore require that [Principle 22]:

> States shall ensure that appropriate mechanisms are in force to promote compliance with these principles, for the inspection of mental health facilities, for the submission, investigation, and resolution of complaints and for the institution of appropriate disciplinary or judicial proceedings for professional misconduct or violation of the rights of a patient.

They also require appropriate legislative, judicial, administrative, educational and other measures of implementation [Principle 23].

Clearly, not all the rights recognised in these Principles can be addressed by anti-discrimination legislation alone. (Further recommendations in this area will be made by HREOC's National Inquiry into Human Rights of Persons with Mental Illness). The Principles clearly indicate, however, that discrimination on the basis or mental disorder or psychiatric disability must be addressed in any national disability discrimination legislation.

3.3.4: Other relevant ILO standards

The Australian Government announced on 10 August 1990 that it had ratified ILO Convention 159, the Vocational Rehabilitation and Employment (Disabled Persons) Convention of 1983. Ratification obliges Australia to develop and implement a national policy to assist the vocational rehabilitation and employment of people with disabilities. Article 6 of that Convention states:

> Each member state shall by laws or regulations, or by any other method consistent with national conditions and practice, take such steps as may be necessary to give effect to Articles 2,3,4 and 5 of this Convention.

3.4: INTERNATIONAL CONCERN & THE DEVELOPMENT OF FURTHER INTERNATIONAL STANDARDS

It should be apparent from the previous sections that there are international standards applicable to a wide range of the human rights problems faced by people with disabilities.

Implementation of these standards and application to particular situations, however, clearly remains incomplete.

In 1982 the United Nations General Assembly adopted a World Programme of Action Concerning Disabled Persons, outlining measures required to equalise opportunities open to people with disabilities.

The Programme represented a significant advance in international consideration of disability:

- in identifying full and equal participation in society as the primary goal;

- in emphasising that the major barriers to achieving this goal in most cases relate to the way in which society responds or fails to respond to disability - rather than to the inherent nature of a person's disability.

To encourage implementation of this Programme, the General Assembly proclaimed the period 1983 to 1992 as the United Nations Decade of Disability.

As the Decade nears its end, it has become clear that - despite some progress - the goals of the World Programme have only been partially achieved. Substantial barriers remain to equal participation by people with disabilities in all areas of social life, and equal enjoyment of the human rights to which all people are entitled.

Insufficient attention to existing human rights standards has been a major limitation of a number of initiatives aimed at improving the position of people with disabilities.

In 1990, the United Nations Commission for Social Development was authorised to prepare a set of "standard rules" on the equalisation of opportunities for disabled people, to be submitted to the General Assembly in 1993. Work on drafting of these rules was formally authorised in May 1991 and is to commence in September 1991. The drafting is to be undertaken by government experts, "in close collaboration with" United Nations agencies, other relevant intergovernmental bodies and non-government organisations, "especially organisations of disabled persons themselves" (UN Doc.E/CN.5/1991/1 p.6).

It is not yet established what status the proposed Standard Rules will have. It appears, however, that they are not intended to take the form of an international Convention, such as the Convention on the Rights of the Child. Rather, they may be similar in effect to the United Nations Standard Minimum Rules on the Treatment of Prisoners which - apart from having considerable moral authority - assist in the promotion, application and interpretation of relevant instruments which are binding (such as the ICCPR).

Such an instrument can be developed considerably more quickly than a full international Convention which is intended to create additional international legal obligations for nations which ratify it. (The drafting of the Convention on the Rights of the Child took ten years; the drafting of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights took almost twenty years.) Its status as a supplementary instrument also avoids any impression that existing international standards are not applicable, as a matter of international law, to people with disabilities.

The Human Rights and Equal Opportunity Commission will be consulting with relevant organisations regarding development of these Standard Rules. The Commission has already been instrumental in ensuring the Australian government's participation in the drafting process.

A further indication of international concern in this area is provided by Resolution 45/91, adopted by the General Assembly in 1990, which stressed the need for programmes on disability to focus on action rather than only on awareness-raising, and for a sustained political commitment from all nations to the objectives of the World Programme on Disability.

Important as these international developments are, there is clearly no need or justification for action in Australia to await their conclusion. Existing international standards already clearly establish that there is both the power and the responsibility for the Commonwealth to act.

3.5: COMMONWEALTH POWERS OTHER THAN THE EXTERNAL AFFAIRS POWER

It should now be clear that international treaties to which Australia is a party create obligations regarding a wide range of rights, which may serve as the basis for effective legislative protection of human rights - including the rights of people with disabilities. In view of gaps or uncertainties which nonetheless may exist, or may be thought to exist, concerning Commonwealth legislative power premised on the external affairs power, it is also useful to refer to other relevant legislative powers.

The Human Rights Commissioner is strongly of the view that if the Federal Government agrees that further national legislation to protect the rights of people with disabilities is necessary (as indicated by our consultations with the community and our own research and experience), this legislation should be introduced without further delays attributed to any need to clarify the ambit of the external affairs power. There are several reasons for this.

First, the extent of this power can only be authoritatively determined by the High Court of Australia. In general, this requires that legislation be passed and then challenged. If no legislative action is taken because the power to legislate is thought to be unclear, no clarification may ever occur.
Second, recognising that, nonetheless, Governments generally require assurance that legislation will be constitutionally valid before committing public resources to its development and introduction, there are, in addition to the external affairs power, a number of heads of Commonwealth legislative power on which wide ranging legislation dealing with discrimination related to disability could be based.

A scheme would be possible comparable (but not necessarily identical) to that adopted in the case of the Sex Discrimination Act. In that instance, although comprehensive coverage was aimed for in reliance on the external affairs power (by reference to the International Convention on the Elimination of All Forms of Discrimination Against Women), a number of other heads of power were also relied on:

- the power to legislate with respect to Territories [Constitution s. 122; Sex Discrimination Act s.9(3)];

- the power to legislate with respect to the Commonwealth public service [Constitution s. 52; Sex Discrimination Act s.9(5)];

- the power to legislate with respect to trading and financial corporations and foreign corporations [Constitution s.51(xx); Sex Discrimination Act s.9(11),(12),(13) and (14)];

- the power to legislate with respect to banking and insurance [Constitution

s.51(xiii) and (xiv); Sex Discrimination Act s.9(15) and (16)];

- the power to legislate with respect to interstate or overseas trade and commerce [Constitution s.51(i); Sex Discrimination Act s.9(17) and (18)].

Acts done by or on behalf of the Commonwealth (or a Territory) or by a body established for a public purpose by a law of the Commonwealth (or of a Territory) and exercising power conferred by a law of the Commonwealth or of a Territory are also regulated [Sex Discrimination Act s.9(6),(7),(8) and (9)]. These provisions rely on power implicit in the legislative and executive power to establish the body or confer the power concerned. Clearly it is within Commonwealth power to legislate regarding discrimination by bodies established by the Commonwealth and exercising powers under Commonwealth law - irrespective of the existence of international concern on the subject sufficient to justify reliance on the external affairs power. This would include Government business enterprises (which in many cases would also be covered by the corporations power).

This range of powers clearly allows legislation extending well beyond the areas of employment and the activities of the Commonwealth itself which are already covered (see above).

In the United States, the Americans With Disabilities Act of 1990 (ADA) not only provides wide ranging protection against discrimination, but also requires measures to promote equality, in both the public and private sectors. This Act is clearly wider in its reach than the Australian Sex Discrimination Act model, notwithstanding the fact that the United States Congress has a similarly limited range of legislative powers to those of the Australian Federal Parliament. Apart from extensive use of Congress' power to regulate interstate trade and commerce, U.S. civil rights legislation, including the ADA, relies heavily on "contract compliance" rules.

This means in practice that as a condition of securing Federal Government contracts, any business or other organisation can be required to comply with the provisions of anti-discrimination and equal opportunity legislation. Human rights standards can therefore be applied by force of contract, whether or not the Congress has power to apply these standards directly by legislation. No constitutional reason appears why the Australian Federal Parliament could not adopt a similar approach.

4: HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

4.1: GENERAL

The Human Rights and Equal Opportunity Commission (HREOC) was established by the Australian Federal Parliament under the Human Rights and Equal Opportunity Commission Act on 10 December 1986. The present Commission replaced the former the Human Rights Commission, which was based in Canberra, when that Commission came to an end in accordance with the five year "sunset clause" contained in the Human Rights Commission Act 1981.

HREOC's primary responsibility under Federal law is to promote compliance in Australia with a number of the international human rights instruments which Australia has committed itself to honour.

The Commission is a permanent independent statutory body and is responsible for the administration of four Commonwealth Acts:

* the Human Rights and Equal Opportunity Commission Act 1986;

* the Sex Discrimination Act 1984;

* the Racial Discrimination Act 1975; and

* the Privacy Act 1988.

As noted in part III, the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration of the Rights of Mentally Retarded Persons, the Declaration on the Rights of Disabled Persons, and the Discrimination (Employment and Occupation) Convention 1958 (International Labour Organisation Convention no. 111) are incorporated in, and given some effect by, the Human Rights and Equal Opportunity Commission Act.

The Racial Discrimination Act gives force to certain provisions of the International Convention on the Elimination of All Forms of Racial Discrimination. The Sex Discrimination Act gives force to certain provisions of the Convention on the Elimination of all Forms of Discrimination Against Women.

The Privacy Act does not deal directly with discrimination, but gives force to part of Article 17 of the International Covenant on Civil and Political Rights.

4.2: DISCRIMINATION IN EMPLOYMENT AND OCCUPATION

Under Article 2 of the Discrimination (Employment and Occupation) Convention, discussed in Part II of this Paper, Australia has undertaken to promote equality of opportunity in respect of employment and occupation with a view to eliminating

discrimination. This Convention forms Schedule 1 to the Human Rights and Equal Opportunity Commission Act. The Act (section 31) gives the Commission responsibility for promoting and protecting equal opportunity in employment and occupation, including power:

- to inquire into any act or practice that may constitute discrimination and, where appropriate, to attempt to settle the matter by conciliation;

- where the Commission considers that an act or practice constitutes discrimination, and it is not appropriate to attempt, or not possible, to settle the matter by conciliation, to report to the Federal Attorney-General;

- to promote public discussion and understanding and acceptance, of equality of opportunity and treatment in employment and occupation;

- to report on laws that should be made, or action taken, by the Commonwealth on matters relating to equality of opportunity and treatment in employment and occupation.

Discrimination is defined by the Act to mean:

> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
>
> (b) any other distinction, exclusion or preference that
>
> (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
>
> (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act,

but does not include any distinction, exclusion or preference:

> (c) in respect of the particular job based on the inherent requirements of the job; or
>
> (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

This definition (apart from the second exception) closely reflects the definition adopted by the Convention.

Until January 1990 the Commission's jurisdiction to investigate complaints under ILO 111 was restricted to the seven grounds specified in the Convention itself.

However, from 1 January 1990 regulations made by the Federal Government added a further ten grounds of discrimination, as provided for by the Convention.

Consequently, the Commission now has jurisdiction in relation to discrimination in employment on a number of grounds relevant to people with disabilities, including:

- impairment (defined to mean total or partial loss of a bodily function; or the presence in the body of organisms causing disease; or total or partial loss of a part of the body; or malfunction of a part of the body; or malformation or disfigurement of a part of the body);

- mental, intellectual or psychiatric disability;

- physical disability;

- medical record; or

- the former or imputed existence of these grounds.

As called for in the Convention, a National Advisory Committee on Discrimination in Employment is now being established, comprising representatives of employer, employee, and other relevant organisations. It is envisaged that the Committee will undertake major studies of policy issues arising from the Convention. The Convention requires that consultations with employer, employee and other appropriate organisations be conducted before legislative proposals are finally determined for anti-discrimination legislation in relation to employment, including in relation to disability.

4.3: HUMAN RIGHTS AND COMMONWEALTH ACTS AND PRACTICES

As already indicated the Commission also has jurisdiction in relation to human rights as recognised in the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Disabled Persons, the Declaration on the Rights of Mentally Retarded Persons and the Declaration of the Rights of the Child.

The powers and functions of the Commission with respect to those instruments include:

- investigating acts and practices of Commonwealth authorities, or under Commonwealth law, which may be inconsistent with human rights and endeavouring to reach a conciliated settlement or, if conciliation is not possible, submitting a report to the Attorney-General containing findings and recommendations;

- promoting understanding and acceptance and public discussion of human rights (including through national inquiries);

- reporting as to laws that should be made or action taken by Australia in relation to human rights.

4.4: FEATURES AND LIMITATIONS OF THE HREOC ACT

The Human Rights and Equal Opportunity Commission Act does not make discrimination on the ground of disability or on related grounds unlawful; nor does it give the Commission power to make enforceable orders to provide remedies, even against Commonwealth authorities.

4.4.1: Conciliation

This Act, and the other legislation administered by the Commission, emphasises settlement of complaints by conciliation. The aim of conciliation is to settle disputes by bringing the parties together to reach a mutually satisfactory agreement.

The process of conciliation is initiated when a complaint is lodged or the Commission otherwise determines that an investigation is needed. The matter is then investigated to establish the facts and to identify the areas of agreement and disagreement between the parties. This is followed by discussion and negotiation facilitated by HREOC conciliation staff and may involve conferences with the parties.

The process of conciliation is confidential, so that the parties can speak freely (without fear that what they say may be used against them in any subsequent proceedings).

In the Commission's experience conciliation is a highly effective process in achieving a settlement in many cases. It has a number of advantages over a system relying purely on the courts. These advantages include:

* increased accessibility;

* reduced costs (to parties and to public funds); and

* flexibility in the process and in the remedies available.

The processes presently available to the Commission also allow issues to be approached on a number of different levels. Conciliated settlements often involve changes in policy or practice which produce benefits considerably beyond the particular complainant. Related processes of education and consultation may lead to practices being revised to prevent discrimination.

The conciliation process, and the wider policy functions which the Commission

has, should in HREOC's view be retained in the interest of people with disabilities in any further Federal legislation to render disability-related discrimination unlawful.

Another feature of procedures under existing Federal human rights and anti-discrimination law is that an individual complaint is not required from a person who is themselves the subject of the act of discrimination or infringement of human rights in question. This is of particular relevance for the rights of people with disabilities. As noted in the Labour and Disability Workforce Consultancy report[11], formal requirements in relation to complaints under some State anti-discrimination legislation constitute barriers to many people with disabilities.

Complaints under the HREOC Act, by contrast (as was pointed out by the Federal Human Rights Commissioner in response to the Labour and Disability Workforce Consultancy Report[12]), are not restricted to individual complaints lodged by the person aggrieved, but may be made by any person or organisation (subject to a provision permitting the Commission to discontinue consideration if the person aggrieved does not wish the complaint to proceed).

Moreover, under the HREOC Act, the Sex Discrimination Act and the Racial Discrimination Act, the relevant Commissioner may initiate consideration of a matter without any formal complaint having been received.

The Human Rights Commissioner is strongly of the view that further legislation in this area should expressly provide for "representative complaints" and complaints by advocacy groups, and for continued powers for HREOC to initiate an investigation at its own initiative. State legislation should contain equivalent provisions.

It is also clear, however, that the effectiveness of conciliation and the other processes available under the Sex Discrimination Act and the Racial Discrimination Act results in part from the fact that enforceable remedies are available. In some cases the lack of enforcement provisions under the Human Rights and Equal Opportunity Commission Act limits the effectiveness of the present provisions in protecting the rights of people with disabilities.

Protection provided by the Human Rights and Equal Opportunity Commission Act is also limited by the fact that at present the Commission only has jurisdiction to inquire into actions only of Commonwealth authorities or under Commonwealth law, or in relation to employment and occupation.

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11 National Employment Initiatives for People with Disabilities: a Discussion Paper (AGPS, Canberra 1990), commissioned by the Minister for Community Services and Health.

12 Copies of this response are available from HREOC.

4.5: EXISTING STATE LEGISLATION ON DISABILITY

Only four States have to date legislated to provide some protection against discrimination on the basis of disability: New South Wales (Anti-Discrimination Act 1977), Victoria (Equal Opportunity Act 1984), South Australia (Equal Opportunity Act 1984) and Western Australia (Equal Opportunity Act 1984, which covers discrimination on grounds of disability following the Equal Opportunity Amendment Act 1988). The A.C.T., Tasmania, Queensland, and the Northern Territory have, as yet, no anti-discrimination legislation in place.

There is, however, considerable variation between the four States in the scope and nature of the provisions. Each of the four provides for individuals aggrieved by discrimination in certain specified areas to make a complaint. Each State which has anti-discrimination legislation also provides for conciliation of the complaint. Each of these States cover discrimination on the ground of physical disability and intellectual disability. However, only Victoria and Western Australia specifically address impairments related to mental illness or disorder.

In each of these four States discrimination in relation to employment, education, the provision of goods and services and accommodation is proscribed. Other areas, such as discrimination by clubs and in sport, are included by some States: (New South Wales, discrimination by registered clubs; Victoria, discrimination by clubs and members of municipal or shire councils; South Australia, discrimination in the disposition of interests of land; and Western Australia, discrimination in access to places and vehicles, by clubs and in sport).

The operation of existing State legislation has revealed significant flaws.

In particular, considerable difficulties have arisen from definitional problems in the New South Wales Anti-Discrimination Act 1977. The NSW Act defines a "physically handicapped" person as a person who:

> as a result of having a physical impairment to his body, and having regard to any community attitudes relating to a person having the same physical impairment as that person and to the physical environment, is limited in his opportunities to enjoy a full and active life.

A physical impairment is defined as:

> … any defect or disturbance in the normal structure and functioning of the person's body, whether arising from a condition at birth or from illness or injury, but does not include an intellectual impairment.

An intellectual impairment is defined as:

> … any defect or disturbance in the normal structure and functioning of a person's brain … .

The separate and exclusive definitions of physical and intellectual impairment, and the focus on causes of impairment rather than effects in the NSW Act have created

significant problems [discussed by Dr Hilary Astor, "Anti-Discrimination Legislation and Physical Disability: the Lessons of Experience", (1990) 64:3 Australian Law Journal 113, and considered by the NSW Equal Opportunity Tribunal in Kitt v. Tourism Commission (1987) Equal Opportunity Cases 92-196]. The requirement of a defect or disturbance in the structure and functioning in the brain in the definition of intellectual impairment (and the consequent exclusion of the brain from the definition of physical impairment) has meant that a person with any condition which, although affecting the functions of the body, has its origins in the brain (for example epilepsy and a number of types of visual impairment), may find that, in order to be able to successfully pursue a claim of discrimination, their disability will need to be presented as "intellectual impairment" for the purposes of the NSW Act. As pointed out by Justice Mathews in Kitt's case, it is "demeaning … as well as being quite contrary to the normal usage of the phrase" to describe such a person as being "intellectually handicapped".

It has been pointed out [Graham Innes, "Equal Opportunity in the NSW Public Service: The Rhetoric-Reality Gap", (1987) 12 Legal Service Bulletin 163; and see Astor, supra] that:

> The practical result of this will be that people with disabilities … will regard the discrimination legislation as uninformed and insulting towards them, and will not use it.

Alternatively, if they do seek to assert their rights, it may be found that as a matter of law a person with a disability which is not accurately categorised within the definition of either physical or intellectual disability is not protected against discrimination on either ground. Even where tribunals, and courts, interpret such legislation so as to give the widest possible protection against discrimination (as Mathews J did in Kitt's case), there may be two sets of adverse consequences:

- people, rightly, object to having to accept a label, and particularly an inaccurate label, in order to be able to secure legal protection; and

- the uncertainty and artificiality of anti-discrimination authorities and tribunals defining epilepsy, for example, as an intellectual disability in order to give a remedy is likely to encourage respondents and their legal advisers to litigate, in hope of winning the case on points of definition, (with the consequent expense and delay) rather than settling complaints by conciliation on the merits of the case.

A further problem is that the definitions of both physical and intellectual impairment require that there be a " … defect or disturbance in the normal structure and functioning … " of the person's body or brain respectively. The need to identify a defect or disturbance in structure or functioning appears to require complainants to establish the cause of their condition in order to identify the defect or disturbance. Astor (supra) has pointed out that since, for instance, as

many as 65-70 per cent of people with intellectual disabilities cannot identify the cause of their disability, they may technically be argued to be excluded from the application of the Act.

Despite strong recommendations by the Equal Opportunity Tribunal in 1987 for amendment, the NSW legislation continues to contain this seriously defective definition.

The definition of disability adopted in the West Australian legislation avoids some, but not all, of the difficulties inherent in the NSW definition. The problems of the separate and exclusive definitions of physical and intellectual impairment are avoided by having a single definition of "impairment" which incorporates physical disability, intellectual disability and mental disorder. The WA Act still requires, however, that a complainant identify a defect or disturbance in the normal structure or functioning of their body or brain. Consequently, the problems already referred to for 65-70 per cent of people with an intellectual disability remain.

These definitional issues regarding disability illustrate some of the problems with existing State legislation. There are others - such as the difficulties involved in the definitions of discrimination where comparability requirements exist and problems involved in the assessment of "reasonable accommodation" and "unjustifiable hardship".

Alternative approaches to definitional issues are discusses further in Section 10, Issues for Legislation.

4.6: REASONS FOR A NATIONAL APPROACH

Variation between provisions from State to State might not, in itself, be a cause for major concern or a justification for national legislation. One benefit of a Federal system, at least in theory, is that it is possible for each jurisdiction to learn and benefit from experiments in others. Particularly in some other Federal systems where there is considerable regional diversity (along lines of ethnicity, language or levels of economic development, for example) different models might also be a necessary response to different needs.

It is clear, however, that the present situation in Australia in relation to effective protection against disability-related discrimination is not one where each jurisdiction has adequate legislative protection offered by a range of models. Rather, legislation is either absent, or contains serious inadequacies.

Many of the deficiencies in existing anti-discrimination legislation have been well known to people with disabilities, their advocates, bodies administering such legislation and other participants and commentators for a considerable time and have been reported on in a variety of official settings and public fora. While

some of these deficiencies have been avoided in more recent legislation, and amendments have removed some gaps in existing legislation, serious problems remain.

The Human Rights Commissioner believes it is now necessary for the Federal Government to take a lead in ensuring effective protection throughout Australia, because of its national and international responsibilities with respect to human rights.

State legislation alone cannot give comprehensive coverage, for a number of reasons - including the limited ability of the States to regulate discriminatory practices by Commonwealth authorities.

Such an approach does clearly not exclude the need for appropriate legislation at a State level. Commonwealth legislation should specify that it does not "cover the field" so as to invalidate appropriate State legislation.

A co-ordinated national approach is particularly important in view of recent proposals for devolution of responsibility for major areas of service provision affecting people with disabilities from the Commonwealth to State and Territory Governments.

One important basis on which improved legislative protection at the Federal level is clearly required involves the approach embodied in the Disability Services Act 1986, and more recent changes to income support and related programs, of encouraging increased participation by people with disabilities in mainstream employment and related programs and services. For this approach to be workable, protection against discrimination, and other measures to ensure equal treatment, are clearly needed.

In submissions (referred to in Part 2 of this paper) in relation to proposed devolution of responsibilities, the Human Rights Commissioner has emphasised to the Federal Government that adequate standards, and mechanisms for monitoring, review and complaints, including advocacy, need to be in place before any transfer of responsibilities occurs.

Most discussion to date regarding this issue has concerned adoption by the States and Territories of legislation complementary to the Federal Disability Services Act to apply to services funded by them. It is, equally, important to ensure that:

- adequate standards and mechanisms, including advocacy services, apply to services provided directly by these Governments;

- anti-discrimination legislation is introduced or amended by each State and Territory to provide at least the same level of protection as the national model.

PART TWO : DENIAL OF RIGHTS/DISCRIMINATION

The human rights that Australians with disabilities seek today are simple. The right to education. The right to work. The right to adequate accommodation. The right to family life. The right to participate in social, recreational and creative activities. The right to treatment. The right, that is, to respect for their human dignity and the same fundamental human rights as their fellow citizens. For Australians with disabilities, however, these fundamental human rights are often not respected.

This section of the paper documents areas and instances of discrimination as perceived by people with disabilities, their parents and/or those working with them. Four major areas are addressed:

* Employment;
* Accommodation;
* Education; and
* The Provision of Goods and Services.

There are other areas in which people with disabilities experience discrimination. This paper has concentrated on these four areas because they play a central role in the operation of our society and, accordingly, in each individual's life. In addition, because this paper is focussed on the potential development and ramifications of national disability anti-discrimination legislation, we have chosen those areas where such legislation should have the greatest impact. National disability anti-discrimination legislation cannot and will not guarantee that the rights of people with disabilities are always protected. Recognising that this is the case, we also briefly outline other areas in need of legislative and programmatic reform.

5: EMPLOYMENT

5.1: GENERAL

In Australian society, employment plays a central role in the development of individuals. Apart from providing economic independence, employment helps define the way an individual relates to themselves and others and is an important aspect of an individual's identity in society.

Research indicates that for many people with disabilities, fully integrated employment in the open labour market has a number of beneficial effects. The establishment of economic independence widens the choices and opportunities to fully participate in society. Employment can enhance personal satisfaction and feelings of self-worth, daily stimulation and challenge, monetary compensation, social interaction, the opportunity to produce and create, recreation and enjoyment, and a constant impetus to further personal and professional growth.

Clearly, however, paid employment is not the only source of these benefits. Australia's human rights commitments require that people with disabilities have equal access to a much wider range of areas of society and cultural life. Specifically, they recognise that paid employment is not the only possible and appropriate occupation. However, both the nature of our society and government policies give particular emphasis to employment.

For people with disabilities, being excluded from or discriminated against in the labour market can therefore cause a number of substantial problems. Unemployment is a major source of inequality and poverty. Constrained economic independence reduces the choices individuals can make about their lives. For many people, having a disability is accompanied by financial hardship. In addition to economic concerns, the social and interpersonal gains that employment can bring are denied to those who do not participate. Unemployment may deny feelings of self-worth and reduce opportunities for human growth through exposure to new experiences. Underemployment combines both of these extremes, imparting some positive rewards while presenting numerous frustrations. The Federal Department of Community Services 1985 report, **New Directions: Report of the Handicapped Program Review** commented that:

> *Society places a high value on vocational activity and income in determining an individual's status. This was reflected in the constant call for paid employment which was seen as a highly desired consumer outcome during the Review. People who have disabilities are just as interested in being employed as people who are not disabled but their employment rate is much lower than that for non-disabled people*.

The "New Directions" report stated that the following major employment related issues were raised in their consultation process:

* the importance of paid employment for people with disabilities;

* the unchallenging and inappropriate work frequently found in sheltered workshops and the low level of wages;

* the need for greater access to work opportunities, particularly competitive employment;

* the absence of real incentives to employers to encourage the employment of disabled people;

* the need for a range of flexible employment options, particularly in integrated settings;

* the lack of ongoing support for those in competitive employment;

* the lack of access to work opportunities for those currently excluded;

* the lack of training for employment service providers.

A number of these issues are now being addressed in the reform of disability services. However, employment statistics and submissions to the Commission indicate that many people with disabilities still confront these difficulties.

Architectural, transportation, educational, attitudinal, and a variety of other barriers combine to deny a majority of disabled adults the opportunity to obtain work commensurate with their abilities and interests. According to statistics produced by the ABS in 1988, only 520,000 people with "handicaps" or 20.4% of all people with disabilities in Australia were in the labour force. Of these, 456,400 or 87.8% were, at the time of the survey, employed and 63,300 or 12.2% were unemployed. It has been estimated that there are approximately 21,500 people with disabilities in Activity Therapy Centres and sheltered workshops.

5.2 RIGHTS

These low labour force and employment participation rates strongly suggest that Commonwealth and State Government programs have not been sufficient to protect and promote the rights of Australians with disabilities (as required by our international obligations) to employment and employment related activities (such as employment directed rehabilitation, vocational training, placements etc).

Principle 7 of **The Declaration on the Rights of Disabled Persons** states that:

> *Disabled persons have the right to economic and social security and to a decent level of living. They have the right, according to their capabilities,*

to secure and retain employment or to engage in a useful, productive and remunerative occupation and to join trade unions.

Principle 3 of the **Declaration on the Rights of Mentally Retarded Persons** states that:

The mentally retarded person has a right to economic security and to a decent standard of living. He has the right to perform productive work or to engage in any other meaningful occupation to the fullest possible extent of his capabilities.

5.3: BARRIERS TO EMPLOYMENT

There are a number of barriers which may prevent people with disabilities from entering the open labour market. Research commissioned and consultations undertaken by HREOC have identified the following:-

5.3.1: Employer Attitudes

The attitudes of employers towards people with disabilities has often been considered a major barrier to employment. A number of surveys have noted the general unwillingness of employers to employ individuals with disabilities, an attitude based largely on ignorance (NSW Anti-Discrimination Board 1981; WA Working Party on Equal Opportunity Legislation for People with Disabilities 1986). Inappropriate prejudicial attitudes underpin the key barriers to participation and opportunities in employment. The problem has been that employers tend to see, and judge, a person with a disability more on the basis of their disability rather than their ability.

The Labour and Disability Workforce Consultancy report "National Employment Initiatives for People with Disabilities" argues that a clear distinction should be made between employer attitudes and employer behaviour:-

"While behaviour may reflect attitudes, it is possible to alter behavioural patterns to eliminate particular forms of conduct. Usually, attitude change will follow".

Attitudinal studies have shown that employers tend to perceive people with a disability as more expensive to hire, train, place, and provide supportive services for than other workers. Other factors involve a perceived lack of flexibility and ability to adapt to changed conditions and new responsibilities. In addition to recruitment, negative attitudes among employers also affect the level of the job in which the person is placed, the compensation awarded, the opportunities for advancement, and the likelihood of being among the first fired in an economic downturn. Available research suggests that when people with disabilities are hired it is usually at minimal compensation in low-level jobs that are subject to abrupt

termination.

Evidence available also indicates that the best and most effective agent of attitudinal change for employers is the experience of employing people with disabilities. By hiring, orienting, placing, supervising, and interacting with people with disabilities, employers come to see them as individuals with strengths and weaknesses rather than simply focusing on their disabilities.

The Commission has dealt with a number of complaints concerning disability and employment. 115 new complaints were lodged under the HREOC Act during the period July 1, 1989 to June 30, 1990. (This represented a 113 percent increase on the preceding year's complaints.) Of these, 74 were received following the introduction in January 1990 of additional grounds for discrimination under ILO 111. A large percentage of these complaints related to discrimination in employment on disability related grounds. In addition, there was an increase of 30 percent in the number of complaints lodged under the Declaration on the Rights of Disabled Persons during the preceding year.

The highest proportion of all complaints lodged with HREOC during 1989-1990 (82.6%) involved employment issues. In these complaints, disability issues figured prominently (as they did in 1988-89).

5.3.2: Physical Environment

Another major barrier to participation in employment is the physical environment. Architectural barriers in places of employment may deny a person with a disability entrance, render that person unable to perform an activity, or serve as an excuse for an employer unwilling to hire a person with a disability. It is important that people with disabilities have access to, and the ability to move freely within, premises. Many Australian workplaces lack disabled access. Even where there is access a workplace may be 'unfriendly' to people with disabilities in a number of ways. Office or factory layout may inhibit movement, or may fail to facilitate communication; and toilet and washroom facilities may be unsuitable.

Information the Commission has received through consultations, submissions and individual complaints, indicates that in all States (with the exception of South Australia) building codes are barely adequate or inadequate to ensure access. There are problems both of substance and of implementation in the building code legislation in each State. There is no general requirement for access to existing buildings to be provided for people with disabilities. Varying requirements exist for access to be provided when existing buildings are altered, but these are not comprehensive. In many cases, discretionary power at local government level can operate to deny or to limit access for people with disabilities.

A related problem is that there is no provision integrating various separate access requirements into a requirement for continuous access. For example, a building

providing employment may be required to be accessible on the ground floor, but there is no requirement for access to be provided from the car park (which could be in the basement) to that floor.

The perception of many people consulted by the Commission was that architects, planners, builders, and inspectors are unaware of or are insensitive to the access needs of people with disabilities. In addition, few local council officers have expertise in the area of disabled access. This can, and apparently often does, lead to the approval of inappropriate facilities.

Effective measures to ensure access would include a requirement to consider access issues from the initial stages of building and urban planning. Access is an issue often dealt with after the building has been designed and the plans laid out. Consequently, access is often imperfect, inconvenient or inadequate.

At present, the Commonwealth is exempt from adhering to provisions contained in most local government ordinances, with the effect that facilities built by the Commonwealth are not necessarily required by law to provide effective access to people with disabilities. The Commonwealth has its own standards for disabled access but these may be inconsistent with prevailing local standards and, in any event, they are not subject to external enforcement.

These problems are exacerbated by the current lack of uniformity more generally among the States and in local government jurisdictions regarding access requirements. Builders and manufacturers may have to meet one standard in one State or municipality and a different standard somewhere else. There is, therefore, little incentive for manufacturers to produce standardised and better quality equipment. The progressive adoption of the Building Code of Australia by all States will begin to address the problem of lack of uniformity between jurisdictions. Clearly, adherence to and enforcement of regulations would be facilitated if they were uniform and easy to understand.

An additional problem to be addressed, however, is the need to increase awareness at the local government level - since enforcement of standards for access provision almost always rests with local councils. Consumer representatives consulted by the Commission recommend that there be a mandatory component of access education and a general overview of the implementation of access features in every college, university and training course for builders, inspectors, architects, engineers and associated building trades. One approach adopted by several councils is the creation of "access committees". These committees are usually comprised of local people with disabilities who work with the councils in assessing building applications. The role of these committees is an educational and advisory one.

In addition to being a barrier to employment, physical access continues to be a constant and pervasive barrier for people with disabilities in many aspects of their life. Australians with disabilities are still being excluded, for example, from

education and goods and services (such as recreational facilities) because of the lack of certain basics: safe entry and access to buildings and public places, access to toilets, transport and communication facilities.

5.3.3: Type of Job and Job Design

The nature of available work obviously limits the opportunities for all workers and for people with disabilities in particular. Clearly, it has become increasingly difficult to place people in open employment due to the current economic downturn and structural changes in the Australian economy. For example, consultations with people with disabilities indicate that the introduction of "multi-skilling" in award restructuring has eroded employment opportunities for those people who cannot perform the entire range of tasks expected.

It also appears from the information available to the Commission that the availability of employment programs is very much dependent upon geographic location - and that moderately and severely disabled people in more isolated areas are seriously disadvantaged due to the lack of proximity to employment services.

While funding for supported and competitive employment schemes through the operation of the Disability Services Act has been welcomed, there is concern that the allocation will be insufficient to meet the needs of all people with disabilities leaving activity therapy centres and sheltered workshops for jobs in the open market, and that this could lead to a rise in the number of people with disabilities unemployed due to the limited number and type of jobs available.

The type of jobs which people with disabilities can secure in the competitive market will also be determined by their level of knowledge about existing options, levels of support available and the extent to which modifications to equipment, structures and job design will be undertaken.

5.3.4: Financial Disincentives

The Handicapped Persons Review and the Social Security Review[13] drew attention to structural disincentives to workforce participation by people with disabilities as a result of income tests, the loss of fringe benefits (especially the pensioner health card) and the higher marginal tax rate.

The Disability Services Act was intended (in part) to enable more people with disabilities to achieve award wages through participation in competitive employment and supported employment service types. The introduction of the disability support pension aims to reduce the financial disincentives for people

[13] Social Security Review, Issues Paper No. 5, *"Towards enabling policies: income support for people with disabilities"* AGPS, 1988.

with disabilities to participate in the labour market. The introduction of a skills based wage determination system, which would enable people with disabilities to earn incomes commensurate with non disabled workers, may be a positive step towards eliminating the financial disincentives that people with disabilities have traditionally faced.

5.3.5: Severe and Multiple Disabilities

The degree of disability will often be a major factor in people with disabilities securing employment in an open, competitive workforce. It has been submitted to the Commission that a substantial proportion of people with severe or multiple disabilities may not be suited to open employment options, but rather that their rights would be better protected and they would achieve a better quality of life if provided with other opportunities - in some cases as a long-term replacement for such options.

The Human Rights Commissioner is strongly of the view that any serious attempt to frame policies ensuring meaningful employment for Australians with disabilities must include a range of options.

In addition to the above, there are a number of further barriers to employment - including education, accommodation and transportation which are dealt with in greater detail later in this paper.

5.4: COMMONWEALTH INVOLVEMENT

The Federal Government has a large and complex role in the provision of employment for people with disabilities. This paper addresses the following areas in particular:

* direct Federal Government involvement through employment in the Australian Public Service;

* the Disability Services Act 1986

5.4.1: Commonwealth Public Sector Employment

The Commonwealth Government has a number of responsibilities in relation to the employment of people with disabilities in to the Australian Public Service (APS). Under the provisions of the Public Service Act 1922, federal government departments are responsible for the elimination of discrimination in employment against people with disabilities.

In 1983, the Government issued a policy paper 'Reforming the Australian Public Service' (which built on the reforms to the APS in the 1970's) in which it committed itself to "equality of employment opportunity that gives all Australian

citizens the chance to compete equally, on merit, for entry to the Public Service and assists those within it to compete equally, on merit, for advancement". In this document, people with disabilities were identified as being one of four groups traditionally under-represented in the APS (the others were women, Aborigines and people of non-English speaking backgrounds).

By 1983 when the Reform Paper was issued, formalised recruitment and placement programs for people with disabilities had been in place for some time. In the period from 1983 to the abolition of the Public Service Board in 1987, the focus on employing people with disabilities began to shift from simply "quantity" to a review of the quality of their employment with the APS. In this period, the Board set out a series of "outcomes" for its Equal Employment Opportunity (EEO) programs for people with disabilities. These were:

* an increase in the proportion of recruits who were people with disabilities;

* a more even proportional distribution of disabled recruits in different departments and designations;

* an increase in the proportion of people with disabilities promoted to positions above the base grade;

* an increase in the proportions of men and women with disabilities promoted to supervisory, middle management and senior positions;

* an increase in the proportion of people with disabilities in public contact positions;

* an increase in the occupational distribution, and hence the variety of jobs performed, by men and women with disabilities.

As a result of the Public Service Reform Policy and as a reflection of the increased need to focus on the qualitative aspects of employment of the disadvantaged groups, the Public Service Act was amended in 1984 to include a section on equal opportunity. Section 22B of the Public Service Act 1922 and the Equal Employment Opportunity (Commonwealth Authorities) Act require the adoption of equal opportunity programs in relation to Commonwealth public sector employment.

Section 22B of the Public Service Act relates to Departments of the Australian Public Service (specified in schedule 2 of the Act). Regulations may also provide that these sections are to apply to a Commonwealth Authority or to certain specified types of Commonwealth employees. The Equal Employment Opportunity (Commonwealth Authorities) Act 1987 affects a number of Commonwealth statutory authorities, including Telecom, Australia Post and the Commonwealth Banking Corporation. Relevant authorities are defined as

authorities that employ 40 or more staff.

5.4.2: Public Service Act Requirements

The Public Service Reform Act 1984 amended the Public Service Act to make provision for departments to prepare EEO programs for the following groups:

* women
* Aborigines and Torres Strait Islanders
* people of non-English speaking backgrounds
* **people with mental or physical disabilities**

No definition or elaboration is provided in the Act as to the meaning of the phrase "people with mental or physical disabilities".

The Secretary of each Commonwealth Government Department is responsible for developing an EEO program for that department. A statement setting out the program must be prepared and a copy of the statement given to the Public Service Commission (the body which succeeded the Public Service Board).

EEO programs in relation to departments are programs designed to ensure that:

* action is taken to eliminate discrimination against people in a designated group in relation to any matter related to the employment of officers and employees, including selection, promotion and transfer, training, staff development, and conditions of service;

* measures are taken to enable such people to compete for promotion and transfer and pursue careers in each Department, and the Service generally, as effectively as other persons.

Each program should state:

* the objectives to be achieved;

* the policies to be adopted and the procedures to be followed;

* how its effectiveness is to be assessed; and

* the allocation of staff and resources to give effect to the program.

More specifically, section 22B(2) requires a program to provide for action to be taken to:

* examine employment practices and identify any patterns that unjustifiably discriminate against women and other designated groups;

* eliminate and ameliorate any practices or patterns thereby identified;
* inform officers, employees and relevant staff organisations of the contents of the program and the results of any review of the program;

* collect and record statistical and other information relevant to the operation of the program;

* assess the effectiveness of the program by comparing information collected in relation to the results of the program with the indicators against which the effectiveness of the program is to be assessed;

* give effect to any guidelines issued under subsection (10).

The Secretary of a Department must review the EEO program from time to time. A statement setting out the results of such a review must be prepared and a copy supplied to the PSC.

The PSC can make recommendations on action to be taken to improve the plan. If the Secretary does not comply with these, he or she must give a statement of their reasons to the PSC.

The PSC can also require the Secretary of a Department to provide a report relating to the development, implementation or review of the EEO program. Again the Commission may make recommendations in relation to the report.

As well as providing for programs in relation to the employment of people in designated groups, 1984 amendments to the Public Service Act introduced a prohibition on discrimination in employment under the Act on a range of specified grounds - including physical or mental disability [section 33(3)]. Discrimination was deemed not to include an action to encourage appointment to the service by virtue of an approved EEO program.

5.4.3: Equal Employment (Commonwealth Authorities) Act 1987:Requirements

This Act requires relevant Commonwealth authorities to implement an equal opportunity program in respect of the same ` groups' as required under section 22B of the Public Service Act, that is, it includes people with mental or physical disabilities.

Examples of elements to be incorporated in such plans under section 6 of the Act include provision for action to be taken to:

* inform employees of the contents of the program and the results of any evaluations of it;

* consult with employees in designated groups and with trade unions who have members who will be effected by the program;

* collect and record relevant employment statistics;
* review policies and practices to identify those which discriminate against persons in designated groups and any patterns of lack of equality of opportunity for them;

* set program objectives and measures of effectiveness;

* monitor and evaluate the program and assess the achievements of its objectives and its effectiveness.

An authority must prepare an annual report on the implementation of its EEO program, to be lodged with either the responsible Minister or the PSC, either of whom may also request a `special report' in relation to the development, implementation or review of the authority's program.

5.4.4: Role of the Public Service Commission

Until 1987, each agency was required to report to the Public Service Board in relation to the development, implementation and review of its EEO program. This function was taken over by the Public Service Commission when the Board was abolished. The Board had been particularly active in a number of areas including the development of modified selection tests, technical equipment libraries, disability awareness training and workplace accessibility. With the abolition of the Board in July 1987, this central agency role ceased. Departments were advised they had sole responsibility for the provision of alternative or additional technology or devices to take account of, and reduce any incapacitating effect of an employee's disability.
Since its creation, the EEO Unit within the PSC has focussed on:

* An Intellectual Disability Access Program;

* Merit Protection - on development of information for Merit Protection Review Agency (MPRA) staff to raise awareness of issues in the interviewing and selection of people with disabilities;

* Travel Guidelines for APS staff with disabilities;

* Updating of guidelines to assist departments and authorities to develop, implement and review equal employment opportunity programs.

By the late 1980s a Public Service wide EEO survey showed that between 5% and 6% of APS staff had a disability. The majority of staff with disabilities were employed as clerical assistants, the lowest number being found in the old Clerical

Administrative structure and the Senior Executive Service. On average, staff with disabilities earned lower salaries than other people in the same occupational group with similar qualifications and length of service. This difference in earnings was much more marked for people with major disabilities.

Central to the Board's EEO Policy had been the principle of reasonable adjustment - a policy which recognised that adjustments can be made to a work environment to reduce or eliminate the effects of disabilities and enable people with disabilities to compete, on their merits, for recruitment and career advancement opportunities.

Commonwealth Government departments were expected to recognise the principle of reasonable adjustment and take whatever steps were required to achieve it in their workplaces. These steps could include:

* the provision of work-related aids or special equipment, or modification of existing material;

* structural modifications to the workplace;

* rearranging the physical layout of the workplace;

* providing essential information in formats suitable for people with sight or hearing impairments;

* providing appropriate forms of assistance, such as reader assistance for a blind person;

* accepting that there may be alternative ways of accomplishing a given task or objective which were not taken into account in the duty statement or selection criteria;

* exchanging some duties between a person with a disability and other staff.

On the basis of complaints received by this Commission it is clear that the principle of reasonable adjustment in the workplace is now frequently not observed within the APS.

In practice, it is sometimes difficult to ascertain from an employee with a disability what problems he or she is facing and how they can be accommodated. APS organisations with disability contact officers need to ensure that they are sensitive to the needs expressed and avoid the stereotyped view that the employee is merely complaining. Where disability contact officers are not employed, it must be the responsibility of the personnel officer to respond to the needs of employees with a disability.

Once the nature of a problem is established, the costs for modification and

refurbishment have to be considered by the organisation. Commitment to equal employment opportunity for people with disabilities requires not just a willingness to make reasonable adjustments, but the allocation of resources to do so. There is also some confusion across the APS as to what reasonable adjustment actually entails and how it may operate. Dissemination of appropriate information is crucial.

Given the Commonwealth's responsibilities for human rights instruments - and its own legislation - it is completely unacceptable that there has been a fall in the percentage of people with disabilities recruited at the base-grade in APS employment from 5.2% in 1986 to 3% in 1990[14].

While federal agencies are theoretically required to identify equal opportunity strategies in their annual reports, since the abolition of the Public Service Board and its central co-ordinating function, it is clearly questionable that reporting alone provides sufficient monitoring of the observance of EEO requirements.

5.4.5: Disability Services Act 1986

With regard to employment, the Disability Services Act 1986 (DSA) sets out two major objects:

> (c) to ensure that services provided to persons with disabilities:
>
> > (ii) enable persons with disabilities to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community;
>
> (f) to achieve positive outcomes, such as increased independence, employment opportunities and integration in the community, for people with disabilities who are of working age by provision of comprehensive rehabilitation services.

These objects are developed further in the Principles and Objectives of the Act (released June 1987).

The Act provides the basis for funding services to people with disabilities which further the objects and the Principles and Objectives of the DSA. The passage of the DSA introduced a five year transition period for services funded under the repealed legislation to meet the requirements of the new Act. There are nine types of services which have been approved as meeting the needs of people with disabilities. These include two 'employment service types' which the Federal Government is prepared to fund - 'competitive employment training & placement

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[14] Public Service Commission EEO survey statistics 1990.

services' and 'supported employment services':

5.4.6: Competitive Employment Training and Placement Services

Competitive employment training and placement services are defined as services to assist persons with disabilities to obtain and retain paid employment in the workforce and include:

(a) services to increase the independence, productivity and integration of persons with disabilities in the workplace;

(b) employment preparation, and employment and vocational training services; and

(c) services to assist the transition of persons with disabilities from special education, or employment in supported work settings, to paid employment in the workforce;

The then Department of Community Services and Health, in its submission to the Senate Standing Committee on Community Affairs - Inquiry into the Employment of the Disabled in 1989, stated that competitive employment training and placement services:

> *assist people, who, because of their disability, may require access to training, placement and time limited support to obtain and retain award wage paying work in the general labour market. In this service type, service providers will provide training and support for a limited period. Support and training may be intensive initially, then diminish as the employee becomes proficient in the job. When the person can perform the job without ongoing support or assistance, agency involvement is reduced to ongoing monitoring or contact with the employee. Training and support can be re-introduced if necessary, for example if the nature of the job changes.*

The Report of the Labour and Disability Workforce Consultancy states that in 1990 there were 83 competitive employment and training placement services receiving funding, including 50 new services, 14 demonstration projects and 19 transition projects.

5.4.7: Supported Employment Services

Supported employment services are defined as services to support the paid employment of persons with disabilities, being persons:

(a) for whom competitive employment at or above the relevant award wage is unlikely; and

(b) who, because of their disabilities, need substantial ongoing support to obtain or retain paid employment.

The then Department of Community services and Health, in its submission to the same Senate Standing Committee in 1989, stated:

> *Supported employment services … are intended to provide meaningful, paid employment for people with disabilities who would not be able to perform paid work in open employment unless they had ongoing support … Such services should promote independence and integration into the community.*

The 1990 Report of the Labour and Disability Workforce Consultancy states that some typical models of supported employment include: *"enclaves, specialised businesses, mobile work crews and individual supported jobs. There are 131 supported employment projects currently receiving funding, including 33 new services, 13 demonstration projects and 85 transition projects"*.

5.4.8: Sheltered Workshops and Activity Therapy Centres

The 1990 Report of the Labour and Disability Workforce Consultancy stated that there were 269 sheltered workshops funded under the DSA where approximately 11,000 people with disabilities were employed. Sheltered workshops and Activity Therapy Centres (ATCs) which were originally funded under the repealed legislation are currently involved in the transition process to meet the principles and objectives of the DSA.

Sheltered workshops and ATCs have been criticised in the past for:

* paying 'allowances' at a very low rate and not paying wages;

* deducting an excessive amount from each worker's pension for board;

* failing to respect the common law rights of employees;

* failing to enhance the skills and self-reliance of workers and providing only boring, repetitious work;

* improperly restricting the freedom of workers; and

* denying workers the right to organise industrially or discouraging them from exercising that right.

These problems stem, in the main, from the traditional perception of workshops and ATCs as services to people with disabilities rather than as employers.

The traditional format of sheltered workshops and ATCs often breaches the rights of people with disabilities to develop their skills to the maximum, to engage in a useful, productive and remunerative occupation, to economic security, and to protection against treatment that is discriminatory. However, it is clear that basic principles of human rights law demands that improved alternatives be introduced and adequately funded before these more traditional responses are closed or abandoned.

6: ACCOMMODATION

6.1: GENERAL

If people with disabilities can live independently in the community then they have, theoretically, three major options - home ownership, private rental or public housing. Currently, however, a large number of Australians cannot choose their source of housing. They are forced to rent privately. Due to economic constraints, people with disabilities are often forced to compete against other low income people for accommodation. They share the problems of other low income groups but they frequently face additional obstacles to securing appropriate housing such as physical access, support service needs, lack of transport, negative community attitudes and so on.

For people with disabilities, access to suitable accommodation is generally limited. Many people are still inappropriately accommodated in institutions, often because of the lack of other options. Access to private sector housing is often limited by cost. Access to public housing is becoming more difficult, and taking longer to obtain, for all applicants. In some instances, the policies of the relevant State or Territory Housing Authority, or the attitudes of landlords or agents, directly discriminate against people with disabilities.

For some people with a disability, their accommodation has been in an institutional setting hidden away from the rest of the community and sometimes isolated from friends and family. Institutional living could never be considered 'normal'. As the discussion paper "The Rights of People with Disabilities: Areas of Need for Increased Protection"[15] states, people who have spent a lifetime in a large hospital may not know what a kitchen looks like, let alone what it is used for, or what uncooked food looks like; they may never have had a place to be alone, always having had to share a room with several other people. In some instances private possessions might have been disallowed, extending even to there having been a communal stock of clothing. Even more worrying is the fact that isolation from the general community may leave such people vulnerable to exploitation and abuse in an environment from which there will be no escape.

With regard to the relationship between employment and accommodation, as long as people with disabilities do not have access to suitable, affordable accommodation, the transition from being unemployed or from working in a sheltered environment to the general labour market will be seriously impeded.

The nature of available accommodation may also affect the ability of a person with

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[15] The Rights of People with Disabilities : Areas of Need for Increased Protection, a Discussion Paper prepared on behalf of HREOC by the NCID (with the assistance of ACROD and DPI), 1989. Copies are available from HREOC.

a disability to participate in a whole range of activities. People with severe disabilities may have little or no choice but to reside in a nursing home or other institution. Most such institutions do not encourage residents to participate in a range of activities including community/leisure activities, education, vocational training or employment. The routines adopted may actually prevent such participation and the sheltered nature of the environment engenders a lack of self-confidence, which creates a substantial psychological barrier. The isolation of people in institutions also results in a serious lack of information about life options including employment and training opportunities.

Residential arrangements which inhibit or prevent the participation of people with disabilities in training and employment are not consistent with the basic human rights which Australia has undertaken to respect and to promote. These include:

* the right to social rehabilitation, to education and vocational training, and to employment placement services (Article 6, Declaration on the Rights of Disabled Persons 1975); (Human Rights and Equal Opportunity Commission Act 1986, Schedule 5);

* the right to secure and retain employment (Article 7, Declaration on the Rights of Disabled Persons); and

* the right to enjoy a decent life, as normal and full as possible (Article 3, Declaration on the Rights of Disabled Persons).

6.2: RIGHTS

In relation to accommodation needs, Article 9 of the **Declaration on the Rights of Disabled Persons** states:

> *"No disabled person shall be subjected as far as his or her residence is concerned to differential treatment other than that required by his or her condition or by the improvement which he or she may derive therefrom"*

Principle 4 of the **Declaration on the Rights of Mentally Retarded Persons** states that:

> *"Whenever possible, the mentally retarded person should live with his own family or with foster parents and participate in different forms of community life. The family with which he lives should receive assistance. If care in an institution becomes necessary, it should be provided in surroundings and other circumstances as close as possible to those of normal life"*

The Commission's own research indicates clearly that discrimination in, or lack of effective access to, home ownership, the private rental market, and inadequate

provision of public housing are relatively common phenomena.

6.3: HOME OWNERSHIP

Home ownership offers security of tenure, control over one's environment and financial benefits that other accommodation options do not provide. For many Australians, however, home ownership is rapidly becoming an aspiration that may never be attained.

For many people with disabilities, the situation is bleaker - due to often very limited financial resources and daily economic constraints that mean they will never have the opportunity to purchase their own home.

6.3: PUBLIC HOUSING

A basic principle embodied in the Commonwealth/State Housing Agreement is that every person in Australia should have access to secure adequate housing irrespective of age, sex, disability, marital status, race, religion or life situation. Most States, however, still have a long way to go to achieve adequate public housing for people with disabilities.

There are long waiting lists for group homes and supported accommodation units administered by all State governments.

The mainstream public housing system has not adequately adapted to the needs of people with disabilities. All States claim to modify dwellings for tenants with physical difficulties when requested to do so, but few States have actively modified their policies to facilitate access for people with other forms of disability. Given that many people with intellectual or psychiatric disabilities are on low incomes and hence eligible for public housing, the State/Territory Housing Authorities have, at least potentially, a major role as housing providers.

6.4: PRIVATE RENTAL MARKET

The private rental market presents a number of problems for people with disabilities:

* Cost of accommodation

* Accessibility of premises

* Possible denial of permission to modify premises

* Transportation difficulties (including problems in searching for accommodation and its location).

* Discrimination by agents or landlords

The **New Directions** report[16] stated that the major problems associated with the provision of accommodation and related services for people with disabilities include:

* the lack of community based accommodation, especially for people with intellectual disabilities;

* the unduly fragmented organisational arrangements for the Federal and State Governments' accommodation and related support service programs;

* the significant variation in funding provisions across Commonwealth programs providing accommodation assistance to people with disabilities. (This has two adverse effects: it creates incentives for the establishment and operation of institutionalised rather than community based accommodation and it results in inequitable access to Commonwealth financial resources provided for accommodation programs);

* the poorly developed capacity for strategic service planning;

* the extremely limited involvement by disabled people in the design, management and review of accommodation facilities and related support programs; and

* the lack of measures such as bond and establishment loans to assist people moving from institutions into the community.

Since **New Directions** was published, some of these problems have been addressed. Other problems remain. The lack of community based accommodation is a major problem.

16 Department of Community Services and Health, "New Directions: report of the Handicapped program review", AGPS, Canberra, 1985.

7: EDUCATION

7.1: GENERAL

The inaccessibility of most schools and universities deprives large numbers of people with disabilities of participation in educational programs. As stated in the UNESCO report "Economic Aspects of Special Education" (Paris 1978):

> *"… the handicapped are often left out of account when educational planning is undertaken, sometimes because of a lack of know-how in as far as educational facilities have to be specially adapted to students with different kinds of learning difficulties, sometimes because of economic considerations since planners may believe that education of the handicapped is more expensive than ordinary education and hence a waste of money."*

7.2: PRE-SCHOOL, PRIMARY AND SECONDARY EDUCATION

With regard to Australian children with a disability, some of the most important educational problems that are encountered are:

* Inadequate or delayed detection of children with disabilities and, therefore, inadequate or delayed intervention implementing rehabilitation and special education measures;

* Lack of efficient counselling systems with regard both to prevention of disabilities and to family and social integration of children with disabilities;

* Lack of services for children with disabilities of pre-school age;

* A range of problems in securing education for children with disabilities in regular schools, such as lack of specially trained teachers and support, problems with transportation to and from schools, accessibility of classrooms and playgrounds etc;

* Inadequate educational opportunities for children confined in hospitals or special institutions.

* "Mainstreaming" children with disabilities with the general education system without providing adequate professional or material resources to effectively address their educational needs.

7.3: RIGHTS

Principle 6 of the **Declaration on the Rights of Disabled Persons** states in part that:

> *"Disabled persons have the right to … education, vocational training and rehabilitation … which will enable them to develop their capabilities and skills to the maximum and will hasten the process of their social integration or reintegration"*

Principle 2 of the **Declaration on the Rights of Mentally Retarded Persons** states that:

> *"The mentally retarded person has a right to proper medical care and physical therapy and to such education, training, rehabilitation and guidance as will enable him to develop his ability and maximum potential"*

7.4: TERTIARY EDUCATION

The Federal Department of Employment, Education and Training is attempting to address the problems of access to higher education by disadvantaged groups (including people with disabilities) through the development of a national overview of equity problems. It is the responsibility of each institution to develop its own equity plans in response to the national plan.

Most institutions of higher education have developed equity plans which detail strategies to be implemented to meet the needs of disadvantaged students - but some have not. The Department's initiative may therefore provide the catalyst for change in these organisations.

A number of submissions to this Commission have identified lack of resources as the greatest problem affecting the integration of people with disabilities in the higher education system. Resources for equity programs are already committed to current students and funds to support new students are very limited. Integrated education, where possible, reduces the need for building special institutions, but requires certain improvements in community services and environmental conditions (such as adaptions of regular school programs) and significant expenditure on specialist training and support.

7.5: ACCESS AND EQUITY : NATIONAL STANDARDS

The development of national standards ensuring access to primary, secondary and tertiary education and the allocation of sufficient resources to enable implementation should be a national priority.

While the costs involved are significant, it must be realised that failure to allocate adequate resources has had, and will have, a much higher price. Evidence collected and analysed over 3.5 years by this Commission's Inquiry into Homeless Children clearly established that children with learning disabilities and intellectual disabilities were more likely than others to end up on the streets in the absence of effective early identification, intervention and treatment. Because of the prevalence of family disintegration, our schools are often a critical point in the process of identification.

7.6: VOCATIONAL TRAINING

Employment opportunities can be expanded by education and training, both on and off the job. People with disabilities may be further disadvantaged in obtaining employment and/or in advancing in employment, by their lack of adequate educational qualifications or vocational training. The Social Security Review (1988)[17] noted that a high proportion (62%) of people with disabilities (invalid pensioners) had no post-school qualifications.

The 1990 Labour and Disability Workforce Consultancy report noted that:

> *"On the job training is essential for people with intellectual disabilities to obtain and maintain a job, while off the job training has limited value for that group. Both types of training can provide opportunities for people with physical disabilities. The provision of ongoing support can increase the possibilities for maintaining a job and performing at the anticipated level"*

The Commission has received a number of submissions identifying the difficulties faced by people with disabilities in pursuing higher education and vocational training. It has been suggested that people with disabilities have been pushed into manual employment because of the inaccessibility of higher education, the insufficient number and variety of programs, physical inaccessibility, and inadequate funding for support services. These submissions, together with our own research, indicate the importance of an increased focus on the gap between education and employment.

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[17] Social Security Review, Issues Paper No. 5, "Towards enabling policies:income support for people with disabilities", AGPS, 1988.

8: GOODS AND SERVICES

8.1: GENERAL

Submissions to and research by the Commission suggests not only that goods and services are sometimes provided to people with disabilities on terms different from those offered to non-disabled people, but that people with disabilities are frequently confronted by disabling circumstances before they even attempt to obtain certain goods and services. Banks are often inaccessible; insurance and finance companies openly deny people insurance coverage and credit based on the perception of increased risk; cinemas and theatres are often inaccessible; other forms of entertainment may be prohibitively expensive for a person in receipt of an Invalid Pension; and in most States, public transport is particularly inaccessible for people with disabilities.

8.2: BANKING AND FINANCE

Research conducted for the Commission and presented in the Discussion Paper "The Rights of People with Disabilities: Areas of Need for Increased Protection"[18] found that some providers of financial and insurance services equate disability with irresponsibility or inability to manage money or property. This has the effect of increasing the likelihood of a person with a disability being refused credit, financial services, or insurance - or being offered the service on less favourable terms. For example:

* Counter banking is extremely difficult for people in wheelchairs. Most automatic teller machines are set too high up in the wall to be reached from a sitting position. If there are steps into the bank, this makes wheelchair entry virtually impossible. Once inside the bank, a person in a wheelchair may find that all the queuing guides of poles and rope are too narrow and that the counters are too high. Often there are no low tables available for paperwork to be processed.

* People with intellectual disabilities have sometimes found it difficult to convince bank managers that they could operate a bank account; people in institutions have found it even more difficult to do so, since they have often had no previous record of banking. A related problem concerning account identification requirements exists for those who do not have the required type or amount of identification needed to open a bank account.

[18] Human Rights and Equal Opportunity Commission, op. cit.

8.3: HEALTH SERVICES

Discrimination in the provision of health services occurs where there is denial of an available service, or provision of a lesser service, or the lack of an appropriate service at all. "The Rights of People with Disabilities" report found that this seems to stem from an attitude that people with disabilities are in some way less deserving of medical treatment, or that it would be of less value to them than to a non-disabled person.

Many disability groups argue that disability health services are often starved of properly trained staff, particularly specialists, and that this results in a lowered standard of health care for people with disabilities. A lack of trained staff has an impact both on the quality and quantity of services available to the people in need. In addition, necessary services are not readily accessible in many parts of Australia due to the location and distribution of existing facilities.[19]

Outright denial of medical services also occurs due to simple prejudice. The question of denial of life saving procedures to newly born children with severe disabilities is a critical issue which has not yet received the attention it demands. Denial of such treatment involves a medical officer making a value judgment about the value of a life spent with a disability.

A further issue is that of inappropriate treatment of people with disabilities. The practice of giving hysterectomies or tubal ligations to women with an intellectual disability in place of a more usual form of contraception or menstrual management, without that person's informed consent, or without some form of 'substitute' consent sanctioned by society (e.g. via guardianship or court proceedings), is contrary to the human rights standards Australia has undertaken to observe.

Such problems raise several important issues. Any surgical procedure always carries an element of risk to the patient, and where the procedure is not medically necessary the risk is also incurred unnecessarily. Issues such as the denial of the rights of the woman involved to normal development, to maintain her own physical integrity and to have children must be addressed by our society.

8.4: TRANSPORT

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[19] For Australians with a psychiatric disability, this has been clearly established in evidence presented (in Victoria and N.S.W.) to the National Inquiry Concerning Human Rights of Persons with Mental Illness being chaired by the Human Rights Commissioner

A significant number of people with disabilities are denied any access at all to public transport and are therefore unable to use the services provided at low cost to the general community. Few issues are more important to people with disabilities than accessible transportation services. Transportation can make the difference between meaningful work and mere subsistence, between sharing the community or being isolated, between enjoyment of the world of art, sport, and public affairs or being deprived of those dimensions of existence. The availability of accessible transportation directly and fundamentally affects the quality of life.

The following extract from **Amicus** (National Center for Law and the Handicapped, January 1976) best summarises the central role transportation can play:

> *"… Nothing symbolizes more vividly this nation's ostracism of disabled people than the inaccessibility of buses, subways, trains, and airplanes. While the non-handicapped can whiz away to the mainstream life, the disabled are excluded from that society as if signs had been posted on the outskirts of civilization proclaiming, 'Handicapped may not enter.' The disabled are thus effectively banished from sight, and the non-handicapped are relieved from dealing with the discomforting aspects of physical and mental disability - its slowness, its labored moving about, its fundamental unattractiveness. Accessible transit systems would mean that our society has taken a step toward integrating the disabled into one phase of our collective life and thereby overcome at least some of its fear."*

Consultations conducted by and on behalf of this Commission have indicated a number of areas of concern. These include:

* major transport infrastructure developments not taking account of the needs of people with disabilities;

* inadequate provision of parking spaces for disabled drivers;

* the efficiency and cost of taxi services;

Transport to and from work is an integral element in securing employment. People with disabilities, however, do not generally have adequate or effective access to public transport. The high cost of the taxi subsidy scheme (where it exists), the delays and limited trips provided, the low mobility allowance and the high costs of parking all contribute to make transport to and from work prohibitive for many people with disabilities.

8.5: SUPERANNUATION AND INSURANCE

People with disabilities who cannot work are ineligible for superannuation. Even if

the rules were changed to permit eligibility, the existing system makes superannuation a questionable investment for a great many disabled people.
In the case of employed persons, there are reports that disability can lead to unreasonable exclusion from, or onerous conditions of membership in, employer-sponsored superannuation schemes.

In life insurance and related products, people with disabilities report difficulty obtaining the cover they seek; and, where insurance is offered, the imposition of significant loadings of uncertain actuarial basis.

9: SPECIAL NEEDS GROUPS

Some people with disabilities may be doubly disadvantaged - as a consequence of their gender, non-English speaking background, Aboriginality - or because they are affected by dual or multiple disabilities.

9.1: GENDER

Women with disabilities experience lower labour force participation rates than men with disabilities. The ABS released figures in January 1990 which indicated that only 40% of "handicapped females" were participating in the labour force compared to 61% of "handicapped men".

The number of men and women with disabilities in Australia is roughly equal, yet in 1985-86 women received only 27% of invalid pensions, 32.4% of rehabilitation allowances and 34.9% of sheltered employment allowances. These figures indicate that women with disabilities are less well served than their male counterparts and are more likely to be denied their rights to vocational training and to services which will enable them to develop their capabilities and skills to the maximum and to secure and retain employment.

Women with disabilities face additional barriers to gaining employment. It is the responsibility of the Federal and Sate Governments to remove these as far as possible. Article 3 of the **Convention on the Elimination of All Forms of Discrimination Against Women** provides:

> *"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men".*

Article 11.1 of the Convention expands upon the responsibility of States Parties to ensure the rights of women to employment.

The non discriminatory enjoyment of the rights of people with disabilities is further established in Article 2 of the **Declaration on the Rights of Disabled Persons** which states:

> *"Disabled persons shall enjoy all the rights set forth in this Declaration. These rights shall be granted to all disabled persons without exception whatsoever and without distinction or discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, state of wealth, birth, or any other situation*

applying to the disabled person himself or herself or to his family".

Measures including the following therefore need to be urgently considered:

* outreach programs to inform women about the availability of rehabilitation services and income support and to encourage and facilitate access by women;

* adoption of a standard equal opportunity policy both for government rehabilitation, training and placement services and for non-government agencies in receipt of government funds.

* additional efforts in States which have no anti-discrimination legislation in force.

9.2: ETHNICITY

People of non-English speaking backgrounds (NESBs) are over-represented in the most dangerous of our industries - manufacturing and construction. There is a need for further research into the extent of injuries leading to disabilities for those from ethnic minorities. In addition, the incidence of disability in the ethnic communities needs further research and attention.

Confronted by a person of NESB with a disability, a mainstream rehabilitation or training service may be unable to assist adequately due to language difficulties and cultural differences. The person may even be referred to an 'ethnic' agency which does not have a rehabilitation function, but on the basis that the person's primary problem is his or her ethnicity.

Article 2 of the **Declaration on the Rights of Disabled Persons** (discussed above) specifies the non-discriminatory basis on which rights of people with disabilities should be enjoyed. Article 2 of the **International Convention on the Elimination of All Forms of Racial Discrimination** obliges States parties to undertake a policy of diminishing racial discrimination in all its forms and promoting understanding among all races.

Cultural stereotyping, language and cultural barriers, discrimination and lack of information operate to exclude many people of NESB with disabilities from appropriate rehabilitation, vocational training and employment. Many such people are denied their rights to rehabilitation, vocational training, placement services and secure employment as a result of lack of information about services, the lack of services in community languages and in culturally appropriate terms, and the failure of existing services to facilitate access.

There is a need for outreach programs to inform people of NESB about their rights and options with respect to rehabilitation, vocational training and employment

programs and to encourage and facilitate access. Specialised placement programs may be necessary to ensure equality of access. Existing staff of the Commonwealth Rehabilitation Service, the Commonwealth Employment Service and other relevant departments and agencies must be adequately trained on issues relating to ethnicity and disability.

9.3: ABORIGINALITY

There is also inadequate information available about the extent of disability among Aborigines. It is abundantly clear, however, that the health status of the Aboriginal community is generally far inferior to that of the remainder of the Australian community. This is likely to, and in some instances does, result in patterns of disabilities affecting the Aboriginal community which are somewhat different from those which predominate among non-Aborigines.

The present location of rehabilitation, training and employment placement services is unlikely to be of great benefit to Aborigines who live on reserves and outstations. Australia is bound to ensure to Aborigines equal enjoyment of rights to employment, education and training (Article 5 (e) (i) and Article 5a (e) (v) of the **International Convention on the Elimination of All Forms of Racial Discrimination**).

Article 5 (e) (iv) of the Convention also requires non-discriminatory access to health care. Medical services, however, are not adequately funded to provide the quality of care required by this Convention or by the **Declaration on the Rights of Disabled Persons**.

Article 5 (e) of the **International Convention on the Elimination of All Forms of Racial Discrimination** obliges States parties to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone without distinction as to race, colour or national or ethnic origin, to equality before the law and to the enjoyment of rights related to employment.

The **Convention on the Rights of the Child** recognises the right for all children to enjoy the highest attainable standard of health and facilities for treatment and rehabilitation[20] and for children with disabilities to have effective access to "education, training, health care services, rehabilitation services, preparation for employment and recreation opportunities"[21]. These rights are required by Article 2 to be guaranteed without distinction on any ground, including race.

There is a clear need for basic research in relation to the incidence and nature of

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[20] Article 24

[21] Article 23

disabilities among Aboriginal communities. Services which are subsequently developed in light of the situation revealed should respect the right of Aboriginal communities to self-determination and cultural integrity. This Commission's research indicates that such services are likely to be most successful if administered by Aborigines themselves. Any 'outcome standards' set for such services must also take into account the right of Aborigines to determine their own future as a group and to retain their culture and their community ties. In particular, Aborigines with disabilities should have their rights and needs addressed in this context.

9.4: YOUTH

For children with a disability, measures related to disability prevention, family care, education and early rehabilitation assessment are of special importance, as outlined in the United Nations publication entitled "Obstacles limiting the access of disabled children to rehabilitation services and education" (U.N. Publication, No. E.76.IV.8.). According to the findings of this study, 5 per cent of all children have serious forms of disabilities, while up to 15 per cent of all children may need some special rehabilitation or educational measures.

Disabilities of children can result from pre-natal and natal causes (congenital) or from post-natal injuries and diseases. It is particularly important not only to apply medical prevention measures to reduce the incidence of disability among children, but also to apply early basic rehabilitation measures (detection, assessment of disability, rehabilitation-education) in order to prevent eventual serious social handicaps. It is also necessary to secure counselling services for families with children with disabilities.

Some of the problems mentioned in relation to children with disabilities apply also to youth. There are, however, specific problems facing youth with serious disabilities:

* Inadequate opportunities for continuing education in higher school levels or for proper professional orientation for youth with serious disabilities.

* Unfulfilled needs for recreational and sporting activities, often due to mobility problems, inaccessibility of recreational facilities, and lack of properly trained instructors;

* Lack of organised attention to such problems as sex education, participation in social activities of youth, holidays etc.

9.5: AGED

Aged persons are often affected by particular forms of disabilities, such as crippling arthritis, various heart ailments and increasingly, various forms of

dementia. There is a need for domiciliary services to help those who with increasing age, and decreasing mobility, become progressively less able to manage their household.

It is obvious that a number of people with a disability and, in particular, aging persons may need domiciliary services in order to remain in a community setting. These would include, help with housework, a laundry service, dental, chiropody, optical, medical and nursing services. Moreover, measures which are aimed at improving the accessibility of public buildings and means of transportation are beneficial to aging persons too. The same is true for various adjustments needed in aging persons' homes, in order to improve conditions for their independent living.

9.6: PEOPLE WITH DUAL OR MULTIPLE DISABILITIES

Research and National Inquiries by HREOC clearly indicate that there are very few, if any services for Australians with dual or multiple disabilities in most States and Territories. This is a serious violation of the basic human rights of thousands of Australians - more particularly because many such people are among the most vulnerable in our community.

According to evidence to the National Inquiry concerning the Human Rights of People with Mental Illness the deficiency of services that cater for the specialised problems of people with psychiatric illness coupled with other disabilities results, results in serious treatment errors of both omission and commission. The later include widespread over-prescription of major tranquillisers which can cause further problems through side effects. Errors of omission begin with the failure to adequately diagnose psychiatric problems or other disabilities for those already labelled as having intellectual or some other form of disability. This problem is then compounded by the lack of health professionals trained to deal with dual or multiple disabilities and gaps in services that all too often result in a person being refused treatment for either disability because of criteria that exclude those with psychiatric problems from the jurisdiction of one agency and also exclude those with an intellectual or physical disability from psychiatric or other specialist services.

These deficiencies are all the more alarming in view of the number of people affected by dual or multiple disabilities. Research shows that the incidence of psychiatric problems among people with intellectual disabilities is anywhere from double to four times as high as for the general population. Studies have estimated that between 30% to 50% of people with intellectual disabilities also have psychiatric illness. The extent of other dual and multiple disabilities is hard to estimate. There is, however, no reason to believe, for example, that the rate of psychiatric illness would be any lower among people with physical disabilities than among the general population. This would mean that at least 15% of such people would experience psychiatric problems.

9.7: RURAL

Geographic isolation from major urban centres creates addition problems for people with disabilities. In many remote rural areas people with disabilities and their families not only do not have the same access to services provided in an urban setting - evidence available to this Commission suggests many have no access at all.

PART THREE: LEGISLATIVE OPTIONS

10: ISSUES FOR ANTI-DISCRIMINATION LEGISLATION

Development of effective national anti-discrimination legislation in relation to disability will necessarily involve further consultation and analysis. The following discussion of issues for anti-discrimination legislation is not, therefore, intended either as a definitive or comprehensive statement. It is primarily intended to assist in consultations and discussion of options. In the light of such consultations, the Human Rights and Equal Opportunity Commission will make further recommendations to the Federal Government.

10.1: LEGISLATIVE DEFINITIONS OF DISABILITY

It is important to ensure that Australians needing protection against discrimination on the basis of disability are not excluded by technical problems of definition. At the same time, it is important that the definition be as clear as possible so that all interested parties can interpret the legislation with reasonable certainty and ascertain what their rights and obligations are.

Discussion of existing approaches in Part 4 of this paper indicates uncertainty and problems of coverage in relation to a number of definitions in current Australian legislation. The following discussion examines in more detail features of existing legislation which should be avoided, and those which might serve as models, in development of national anti-discrimination legislation.

10.1.1: Disability Services Act

The present definition of disability in the Disability Services Act (as set out above) is not, in the view of the Human Rights Commissioner, suitable for adoption as the basis for anti-discrimination legislation in at least one respect. The requirement that disability be "permanent or likely to be permanent" would exclude substantial numbers of people with psychiatric disabilities, among others, from protection. In addition to this issue, the definition of disability in the Disability Services Act may be seen as performing substantially different functions (that is, defining the categories of persons eligible for the services funded under the Act) to a definition embodied in anti-discrimination legislation. In particular, the category "people with disabilities who use services under the Disability Services Act" is only part of the wider category of "people with disabilities" which anti-discrimination legislation should cover.

Definitions in these two types of legislation need not, therefore, be identical. While it would be desirable for anti-discrimination legislation in all jurisdictions to adopt a consistent and comprehensive definition of disability, it clearly does not follow that it would be beneficial to have a single "definition of disability" for all other legislation.

10.1.2: Declaration on the Rights of Disabled Persons

The Declaration provides a definition of disability which, as noted in Part 1, has the advantage of focussing on the social consequences of impairment. However it does not indicate as clearly as some other definitions (including the WHO definition of "handicap") that the social environment must also be considered among the functional causes of disability and its effects. While this definition, for the purposes of the Human Rights and Equal Opportunity Commission Act, is interpreted by the Commission as including a wide range of cases, it is not in the Human Rights Commissioner's view an adequate definition for use in enforceable legislation.

The definition refers to a person being unable to secure "the necessities of a normal individual and or social life" by him or herself as a result of "deficiency in his or her physical or mental capabilities".

Clearly, however, significant numbers of people with disabilities are, or would be, able to secure for themselves the necessities of individual and social life, so long as they are not hindered by discrimination, unnecessary barriers, or lack of appropriate facilities.

A definition which emphasises respects in which a person cannot participate equally in social life may also be thought to be inappropriate for legislation intended to recognise and acknowledge their ability, and promote and protect their rights, to participate.

It should not be necessary, in order for a person with a disability to receive protection against discrimination, to be categorised as a "disabled person" incapable of securing the necessities of life.

In some cases, particularly where the disabling effects of a medical condition are not continuous (for example epilepsy and a number of mental illnesses), disabilities may also not be accurately categorised as deficiencies in physical or mental "capabilities".

10.2: DEFINITIONS IN EXISTING ANTI-DISCRIMINATION LEGISLATION

As discussed in section 4.5, the separate and exclusive definition of physical and intellectual impairment in the New South Wales Anti-Discrimination Act

1977 (requiring that there be a defect or disturbance of structure and functioning in the person's body or brain respectively) involves a number of problems. Other features of existing definitions require further discussion.

10.2.1: Psychiatric disabilities and mental disorders

The NSW legislation does not specifically include impairments arising from mental illness or disorder, but is wide enough to cover at least some mental illnesses. Some such impairments would be covered by this legislation where they are reasonably well established as arising from a "defect or disturbance" in the structure or functioning of the body or the brain, although in many cases it will clearly be inappropriate and confusing that people with such impairments are required, if they are to be protected by the legislation, to be defined as physically or intellectually impaired. However, in cases where a person's illness or disorder is not known to arise from such defects or disturbances in the body or the brain, or where the cause is unknown, there are potential difficulties in securing protection under the NSW legislation.

The Victorian Act includes "a mental or psychological disease or disorder" within the definition of physical impairment, by categorising such diseases or disorders as "malfunction of part of the body". Although this categorisation is clearly artificial in some cases, it does mean that no issues of the causation of mental disorders arise as barriers to the application of the Victorian legislation.

The South Australian legislation, although closely resembling the Victorian definition in other respects, specifically excludes impairments arising from mental illness from the definitions of physical impairment and of intellectual impairment, and thus from protection under the Act.

The Western Australian legislation, in addition to impairments arising from a defect or disturbance in the structure or functioning of the body or brain (similarly to the NSW definition), covers (section 4 paragraph (c)) "any illness or condition which impairs a person's thought processes, perception of reality, emotions or judgment or results in disturbed behaviour". Thus the Western Australian legislation is clearly intended to cover impairments arising from mental disorders and does so with more certainty than the NSW legislation.

Paragraph 4(c) of the Western Australian legislation, although intended to cover mental disorder, would also apply to some types of intellectual disability and possibly some physical disabilities. This may help to overcome some of the limitations imposed by the defective "structure or functioning of the body or brain" definitional model adapted from the NSW legislation. As noted by Astor (supra), however, this is ironic in view of the fact that it was intended to define intellectual impairment and mental disorder separately to avoid confusion and possible offence.

10.2.2: Defect or disturbance in structure and/or functioning

The definitions of physical and intellectual impairment under the NSW legislation require a defect or disturbance in the "structure and functioning" of the body or brain respectively. This definition would be severely restrictive if complainants were required to show that their impairment involved disturbance or defect in both structure and functioning. In Kitt v. Tourism Commission (supra), the NSW Equal Opportunity Tribunal indicated that, despite the problems involved in arriving at a construction of the definition which did not involve "absurd" results (and hence, the need for revision of the definition), this provision should be interpreted to require a defect or disturbance in structure or functioning.

The definition of impairment in the Western Australian Equal Opportunity Act follows this approach by referring to structure "or" functioning.

As pointed out earlier, this interpretation, while important, does not address the position of a person whose disability is of unknown cause or is not adequately described by reference to either the body or the brain separately.

It is also open to question, at least, whether definitions which refer to "structure or functioning" include disabilities which consist of disfigurement and the social reactions to disfigurement.

Any definition depending on defect or disturbance in the structure or functioning of the body or the brain therefore requires additional elements to ensure that disabilities not attributable to such defects or disturbances are covered. Preferably, definitions should avoid focussing on causes of impairment in this way.

10.2.3: Victorian definition

The definition of impairment in the Victorian Equal Opportunity Act 1984 avoids a number of the problems which may arise under definitions which refer to "structure and/or functioning" of the brain or the body. Section 4 of the Victorian Act defines impairment as meaning:

- total or partial loss of a bodily function;
- the presence in the body of organisms causing disease;
- total or partial loss of a part of the body;
- malfunction of a part of the body or
- malformation or disfigurement of a part of the body.

"Malfunction of a part of the body" is defined to include both a mental or psychological disease or disorder and "a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction.

This definition has a number of advantages. It does not make the definition of impairment, and the protection of the legislation, dependent on a person showing a loss of functional capacity. In particular, it makes clear that disfigurement, loss of part of the body, and the presence of organisms causing disease such as the HIV virus are in themselves covered (although it would be preferable to use the term "capable of causing disease" to avoid any dispute that this is what was intended and that therefore asymptomatic HIV infection, for example, is covered).

Both the Victorian and South Australian definitions focus on the fact of impairment rather than on its causes. In general, this appears a more appropriate approach than that of the NSW legislation.

The Victorian definition also avoids the problem of the NSW legislation in defining physical and mental disabilities separately and exclusively, requiring an impairment to be caused by a defect in structure and functioning of the body or of the brain. This is achieved, however, by the obvious and unsatisfactory fiction of defining all mental and psychological disorders and all disabilities affecting learning as "a malfunction of part of the body". A single comprehensive definition which avoided this fiction could also avoid any possible debate as to whether all intellectual disabilities are adequately categorised as conditions or malfunctions "as a result of which a person learns more slowly".

The Victorian definition also protects those who have an impairment which existed in the past but has now ceased to exist, and those to whom impairment is imputed.

10.2.4: Human Rights and Equal Opportunity Commission Act

The Regulations under the HREOC Act define impairment to mean total or partial loss of a bodily function; or the presence in the body of organisms causing disease; or total or partial loss of a part of the body; or malfunction of a part of the body; or malformation or disfigurement of a part of the body. This closely follows the Victorian definition. However, these regulations do not repeat the fiction of including mental disorder or illness and conditions affecting learning within the definition of "malfunction of a part of the body".

Mental, intellectual or psychiatric disabilities are included, but not defined, by the Regulations (although under a separate heading to "impairment), as is "physical disability".

The former or imputed existence of these grounds is also covered.

There is clearly some overlap between the grounds of "disability" and those of

"impairment", intended to ensure comprehensive coverage. A similar approach, using alternative conceptual models which may have some overlap, may be appropriate to avoid definitional problems restricting the protection afforded by enforceable anti-discrimination legislation, although impairments leading to intellectual or psychiatric disabilities should be included within the definition of "impairment" for any enforceable legislation.
The lack of definition of "disability" is not critical under the present legislation given that there is no provision for enforceable orders to be made. More definition would however be likely to be required for the purposes of legislation providing for legally enforceable rights and legally enforceable obligations.

10.2.5: Americans with Disabilities Act (1990)

The Americans with Disabilities Act of 1990 defines a person with disability by reference to:

(a) a physical or mental impairment that substantially limits one or more of the major activities of such an individual;

(b) a record of such an impairment; or

(c) being regarded as having such an impairment.

Elements (b) and (c) provide appropriate models for legislation in Australia.

The Victorian definition and the Western Australian definition also protect those who have an impairment which existed in the past but has now ceased to exist. Such a provision is absent from the South Australian and New South Wales legislation.

The requirement that impairment "substantially limits one or more major life activities" is not appropriate as a precondition for the application of anti-discrimination legislation in Australia, for reasons discussed below.

10.2.6: Requirement that impairment limit major life activities

The NSW legislation defines a person as handicapped, and thus covered by the protection of the Act, only if the person is, by reason of a physical impairment, "limited in his [or her] opportunities to enjoy a full and active life", or by reason of an intellectual impairment "is substantially limited in one or more major life activities". Similarly, in the United States the Rehabilitation Act 1973 defines a "handicapped person" as a person who has (or has had or is regarded as having) a physical or mental impairment "which substantially limits one or more of such person's major life activities".

In the Human Rights Commissioner's view there are serious problems with any

definition which contains this as an essential element.

In significant numbers of cases a requirement that a person's impairment substantially limits major life activities may be a source of unnecessary legal difficulties or complexities.

Problems in this respect may potentially arise in a variety of cases. The application of such a definition to a person whose condition has disabling effects only intermittently rather than continuously, or whose condition is in fact controlled by medication and/or other treatment (for example many people with epilepsy, some forms of mental illness, or asthma) may raise difficulties. A person whose disability relates to physical disfigurement, rather than loss of any functional capacity, or a person who has overcome any loss of capacity (through their own efforts, with or without any assistance and use of aids and appliances) might not be limited at all in any major life activities - apart from the effects of prejudice or discrimination.[22]

Many hearing impaired people, in particular, would deny that they are "disabled" or limited in their ability to lead a full and active life, other than by prejudice and discrimination. The need for protection against discrimination does not disappear as a person becomes more able to participate in the community.

It may be, and has been, argued that (particularly where the definition of handicap refers to the effect of social attitudes) where a person who faces discrimination or prejudice in any area on the basis of their impairment, a definition such as that in New South Wales is satisfied whether or not the impairment in itself would limit the person's ability to lead a "full and active life" in any respect. The NSW Equal Opportunity Tribunal accepted this view in Kitt's case. While (in the Human Rights Commissioner's view this is correct as a legal interpretation, this does not mean that the NSW legislation or the U.S. Rehabilitation Act 1973 (which is similar in this respect) affords a satisfactory model.

The application of the legislation should be as clear as possible, without the need for further extension by legal interpretation, for the benefit both of people with disabilities and other parties affected by the legislation. In the United States there was extensive uncertainty, and expensive litigation, before it was established by the U.S. Supreme Court in School Board of Nassau v. Arline[23] that a person whose condition (tuberculosis) was not in itself disabling (at the relevant time) was nonetheless within the definition of "handicap" under the

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[22] See similarly Astor and Nothdurft, "Anti-discrimination law and physical disability: A leap in the dark", (1986) 11 Legal Service Bulletin 250 at 253

[23] 107 S.Ct. 1123 (1987)

Rehabilitation Act 1973 due to reactions (relating to an incorrect fear of contagiousness) based on "prejudiced attitudes or ignorance". The Court said that:

> *the legislative history of the Rehabilitation Act demonstrates that Congress was as concerned about the effect of an impairment on others as it was about its effect on the individual. Such an impairment might not diminish a person's physical or mental capacities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment. Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from impairment.*

This result was reached despite an argument by the U.S. Solicitor-General that to say that the complainant was limited in a major life activity by reason only of the employment discrimination complained of would be a "totally circular argument which lifts itself by its bootstraps"[24].

National anti-discrimination legislation in Australia, and any further legislation or amendments at State and Territory level, should be drafted so that time and money are not consumed in having points such as this determined by the courts, possibly with a different outcome. This is particularly relevant to the adequacy of legislation in providing protection against discrimination based on AIDS or HIV-related impairment. (In this respect the explicit reference to attitudes and prejudices in the NSW legislation is important, although limitations in the definition adopted are discussed later in this paper).

In addition to any legal difficulties, it is questionable whether such a provision is appropriate. A person with a disability, seeking the assistance of anti-discrimination law in asserting their ability and entitlement to participate equally (with any assistance and accommodation which may be required and to which the law entitles them), may - paradoxically - find it necessary to argue that their ability to participate is in fact limited by their impairment in order to qualify for the protection of the law.

Such a definition may not in practice exclude people who require protection (depending on other provisions of the legislation in each case, and on how realistically the law is interpreted and applied). However, it has been repeatedly emphasised (including by participants in consultation processes conducted by HREOC) that law in this area should, wherever possible, avoid even the appearance of requiring focus on a person's disabilities rather than on

[24] Cited in Waters, supra.

their abilities.

In Bogie v. University of Western Sydney[25] the complainant had in her evidence in effect argued that her visual impairment did not substantially limit her in major life activities. In order that this should not defeat the complainant's claim to be a "handicapped person" covered by the legislation, as argued by the respondent (which clearly would have been contrary to the purpose of the legislation) the Tribunal stated[26]:

> *It is no answer to say that the complainant believes that he or she is enjoying a full and active life…*

The Tribunal also noted that Sir Douglas Bader VC (who, among other attainments, served as a fighter pilot with outstanding success while having two artificial legs) might similarly have denied that he was limited in his ability to enjoy a full and active life, but would be regarded as so limited, apparently by reference to limitations in abilities e.g. to dance or play tennis. It is difficult to see why reference to areas of life which are irrelevant to the case should be required by anti-discrimination legislation.

Clearly, the Tribunal acted appropriately in Bogie's case to ensure that the complainant was not excluded from legal protection by technicalities of definition - and was careful to note that despite limitations in ability to lead a full and active life a person might in fact lead such a life. However, the case demonstrates that it may be perceived as inappropriate and insulting for legislation to require that complainants be limited in ability to enjoy a "full and active life".

It is recommended that Federal anti-discrimination legislation should not require as an essential element for protection against discrimination that a person's impairment limit their ability to lead a full and active life, or limit one or more major life activities. These requirements may in some cases be appropriate as conditions for receipt of social security and other benefits or participation in programmes designed to assist particularly disadvantaged people with disabilities. In the context of anti-discrimination legislation, such requirements may have some place in determining eligibility for affirmative action programmes which may be included as an element of (and should at least be considered in the context of) such legislation. For the purpose of protection against discrimination, however, effects of impairment on opportunities are more appropriately regarded as reasons for legislation rather than as essential preconditions for its application.

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[25] (1990) Equal Opportunity Cases 92-313

[26] At 78-143

10.2.7: Prejudice model

The NSW Act defines a "physically handicapped" person as one who:

> as a result of having a physical impairment to his [or her] body, and having regard to any community attitudes relating to a person having the same physical impairment as that person and to the physical environment, is limited in his [or her] opportunities to enjoy a full and active life.

In requiring regard to be had to community attitudes, this definition incorporates (at least in part) what has been described as the "prejudice model" of definition[27].

The NSW Equal Opportunity Tribunal has commented[28] that "the concept that the community attitudes to the person's impairment might be responsible for the limitation in life activities is expressly imported into the definition of physically handicapped person".

This model recognises that prejudices may be as important as physical limitations in limiting opportunities for people with disabilities, and indeed that in many cases prejudice may be equally or more disabling than physical or mental impairment itself.[29]

Although explicit reference to community attitudes is lacking in the NSW provisions relating to discrimination on grounds of intellectual disability, the Equal Opportunity Tribunal in Kitt's case held that such attitudes could also be referred to in such cases.

It is important that any Federal legislation to deal with discrimination against people with disabilities include this element (and, similarly, a recognition of the importance of environmental constraints. As stated by the Equal Opportunity Tribunal in Bogie v. University of Western Sydney:

> *To ignore such attitudes would serve to render the impairment provisions of the Act least effective in the very circumstances when justice most demands a remedy, that is, in the case of a person whose opportunities are limited as much by unfounded stereotyping as by his or her actual physical or intellectual impairment.*

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[27] Peter Waters, "The coverage of AIDS related discrimination under handicap discrimination laws: the U.S. and Australia compared", (1990) 12:2/3 Sydney Law Review 377

[28] Kitt v. Tourism Commission (1986) Equal Opportunity Cases 92-186

[29] This has also been recognised for example in the NSW Anti Discrimination Board Report Discrimination and Physical Handicap (1979) and by the NSW Court of Appeal in Jamal's case.

However, it is not recommended that Federal legislation require the existence of community prejudices or widespread discrimination for a condition to be defined as an impairment covered by the legislation.

In Bogie's case the Equal Opportunity Tribunal interpreted the NSW legislation as follows:

> *If such an impairment relevantly limits opportunities, then the person is physically handicapped, unless community attitudes would deny a link between such an impairment and the relevant limitations* [emphasis added].

In many cases, however, barriers to people from disabilities may arise not from actively held prejudices or conscious attitudes, but rather from a failure to recognise or consider the situation of people with disabilities at all. It is impossible to see why a person with a disability which, in fact, limits their opportunities and who has experienced discrimination on the basis of that disability should be denied a remedy under anti-discrimination legislation because "community attitudes" (however these may be defined or ascertained) do not recognise that the person's disability limits their opportunities. Federal legislation should ensure that no such interpretation is open.

The definition refers to community attitudes generally, rather than the attitudes or prejudice relevant to the specific case. While this may succeed in ensuring that the legislation covers people who are the subject of widespread prejudice and discrimination, it is likely to leave some gaps. With sufficient community education, it may for example come to be accepted as a matter of general community attitudes that HIV/AIDS justifies restrictive differences in treatment or opportunities only in restricted circumstances - but significant cases of discrimination may well occur long after "community attitudes" generally have moved forward.

While protection against discrimination should be available to people whose opportunities are significantly restricted by widespread community prejudices, protection should also be available against the effects of less widespread prejudice.

The law should not allow people to put their prejudices into practice more readily when those prejudices are out of step with community attitudes than when those prejudices (more understandably) result from a general lack of knowledge or understanding in the community. When community attitudes have moved forward to recognise the right of people with a particular type of disability to equality, it is easier, and appropriate, for the law to protect this right and prohibit conduct which falls behind accepted community standards.

Discrimination by one employer, for example, should be more readily permitted simply because the person discriminated against would not face discrimination from most other employers or in other areas of life. It is not generally an accepted defence in other areas of discrimination law that the person can get a job, or the service or benefit they are seeking, elsewhere, nor that they enjoy equality of opportunity in areas other than the one relevant to the particular case.

An argument against the law dealing with individual, rather than community wide, prejudices, is that this restriction is necessary to exclude trivial cases. Although an isolated instance of discrimination based on unusual prejudices is unlikely to limit a person's opportunities to the same extent, and have the same damaging effects, as a lifetime of experience of general community prejudice and discrimination, it does not follow that such a single instance is "trivial".

Anti-discrimination laws contain specific provisions intended to allow anti-discrimination authorities, tribunals and courts to dismiss trivial complaints. Idiosyncratic prejudices against for example left handed people do not relate to "impairment" or disability and would not therefore be within the scope of disability related anti discrimination legislation in any event.

Moreover, prejudices which relate to impairment but are not accurately described as "community" attitudes may nonetheless be more widespread than individual idiosyncrasies.

Conduct by employers in a person's particular chosen field, by providers of education or training in a particular area, by professional qualifying bodies, by providers of accommodation or of goods or services of a particular type, or by others involved in fields addressed by anti-discrimination legislation, may - in individual cases or on a more widespread basis - be more restrictive than the attitudes of the community generally. It is important that legislation clearly provides protection in these cases without the need to resort to artificial, and legally uncertain, arguments about general community attitudes.

The following approach is therefore recommended:

- reference to prejudices or community attitudes should be available to establish that a person has a disability for the purposes of the legislation; but

- it should be clear that a complainant is not required to refer to such attitudes, and that reference to such attitudes or prejudices is not available to negate the existence of disability where this is established by reference to objective factors;

- relevant attitudes or prejudices should include "any attitudes or

prejudices relevant to the case" rather than being required to be "community attitudes".

10.2.8: Imputed characteristics

A related matter is discrimination on the basis of characteristics imputed to people with disabilities. Discrimination legislation in a number of jurisdictions includes discrimination on the basis of a characteristic generally appertaining to, or "generally imputed" to persons having the characteristic which is covered as an express ground of discrimination. For example, the direct discrimination provisions of the Sex Discrimination Act cover discrimination not only on the basis of sex, marital status and pregnancy as such, but also discrimination by reason of "a characteristic that appertains generally to" or "is generally imputed to" persons of the same sex or marital status, or to "persons who are pregnant"[30].

The purpose of provisions of this type is to ensure that anti-discrimination is not evaded simply because other characteristics (for example, in the case of sex, the capacity to become pregnant) are used as "proxies" for discrimination on the grounds covered.

It has been questioned, however, why the characteristic should have to be "generally" imputed:

> *…it is not clear why a discriminator should be able to escape by attributing a bizarre characteristic as opposed to one "generally imputed to that class of person.*[31]

As discussed earlier, discriminators with idiosyncratic prejudices out of step with community attitudes should not be put in a better position than discriminators whose prejudices are more common. It would be preferable, therefore, to refer simply to a characteristic "imputed to" persons in the relevant class.

10.2.9: Imputed impairment

As already noted, the U.S. Rehabilitation Act 1973 includes within the definition of "handicapped person" a person who is "regarded as having" a physical or mental impairment which substantially limits one or more major life activities. The definition of "impairment" under the Victorian Equal

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[30] Sections 5, 6, 7.

[31] John Basten, "Indirect discrimination and the Sex Discrimination Act", in Papers from the "Indirect Discrimination and the Sex Discrimination Act Seminar (Occasional Paper no. 6 from the Sex Discrimination Commissioner, HREOC, Sydney, 1991

Opportunity Act 1984 was amended in 1988 to include "an impairment which is imputed to a person". The grounds of discrimination added to the coverage of the Human Rights and Equal Opportunity Commission Act from 1990, including disability, impairment and medical record, also include the imputed existence of any of these grounds of discrimination.

Such provisions are necessary parts of comprehensive protection against discrimination in this area, since discrimination may result from incorrect perceptions that a person has a type or degree of disability which they do not in fact have. However, there is a potential gap in the operation of these provisions.

It is clear that the U.S. Rehabilitation Act definition, for example, covers a person being regarded as having a condition which, in fact, constitutes an impairment for the purposes of the legislation. It is not clear that this aspect would cover a person actually having (or being regarded to have) a condition which does not in fact constitute, but is regarded as constituting, such an impairment. [There has been debate, for example, regarding whether a person with asymptomatic HIV infection has an "impairment" under some other definitions, and whether legislation covers discrimination against such persons notwithstanding the clear existence of prejudices affecting them.] Similarly, someone who is imputed to have a condition which in fact would constitute impairment for the purposes of the Victorian legislation, is covered by the definition of "impairment" under that legislation; but a person who has (or is imputed to have) a condition which is not, but is imputed to be, an impairment within the definition may not be covered.

This problem has less significance if the definition of impairment adopted is a wide one (as is the case under the Victorian legislation). It has also been suggested that the problem is of no significance under the U.S. Rehabilitation Act due to the interpretation which has been adopted in relation to community prejudices. The position may, however, be different under the NSW legislation. That legislation, while stating that regard should be had to community attitudes in determining whether a person is handicapped by an impairment, appears to require as a separate and prior condition that the person has a physical or intellectual impairment as defined, without reference to questions of community attitudes. Reference to community attitudes would not therefore resolve the problems presently arising from the split between physical and intellectual impairment in this definition.

10.2.10: Association

Anti-discrimination legislation in a number of other areas provides protection against discrimination on the basis of association with persons having a particular characteristic. For example, the Racial Discrimination Act makes it unlawful to discriminate against a person because of their association with persons of a particular race.

Discrimination against a person on the basis of association with people with particular disabilities may involve an imputation that that person also has the same disabilities. Although such cases would be in principle be covered by a provision dealing with discrimination based on imputed disability, problems of proof of this imputation (which might not be expressed, or even be consciously made) might arise. An express provision dealing with discrimination on the basis of association would be relevant in such cases.

Discrimination based on association may also be an expression of prejudice against the relevant group rather than of imputation that the person discriminated against has the relevant characteristic. This is particularly the case in the area of racial discrimination but may also arise in relation to disability. A provision expressly covering discrimination based on association with people with disabilities or who are impaired is recommended.[32]

10.3: DEFINITION OF "DISCRIMINATION"

Australian anti-discrimination legislation generally defines and prohibits discrimination of two forms or types: "direct" and "indirect" discrimination.

Although the terms used vary slightly, direct discrimination is defined as occurring in relation to disability where a person with disability is treated less favourably than a person without that disability, in the same circumstances or in circumstances which are "not materially different".

Indirect discrimination in relation to disability is defined as occurring where a condition or requirement is imposed which has a disparate, unfavourable impact on people with disabilities, and this condition or requirement is not reasonable.

This basic definition (accompanied, however, by a range of exceptions) is applied in existing State legislation to each ground of discrimination covered (such as sex and race) as well as to disability. A similar model is adopted in the Federal Sex Discrimination Act.

Adopting the same basic definition of discrimination in relation to disability as for other grounds, rather than adopting a definition designed specifically for disability discrimination legislation, may be argued to have a number of advantages, apart from making legislative drafting simpler:

(a) it might be thought to make administration of the legislation simpler and

[32] The Law Reform Commission of Victoria also supported such a provision in its review of the Equal Opportunity Act.

therefore more efficient, as well as making the legislation itself more understandable to the public;

(b) Where disability is to be added to existing grounds under anti-discrimination legislation, using the same basic definitions of discrimination makes experience and judicial interpretations accumulated regarding other grounds more directly usable than if a distinct definition is adopted;

(c) as a matter of principle it indicates that legislation prohibiting disability-related discrimination is not a matter of "special rights" for people with disabilities, but (with legislation against racial discrimination and sex discrimination) part of protection for all people of the right to equal enjoyment of basic human rights.

However, there are problems with each of these arguments.

(a) Experience has shown that aspects of existing definitions of discrimination in relation to disability are extremely difficult for courts, tribunals, anti-discrimination bodies, lawyers, people with disabilities and their advocates, and other parties directly affected, to understand.

(b) Judicial interpretations of definitions of discrimination indicate that in important respects existing definitions should be avoided or at least modified, rather than being simply reproduced in national legislation in relation to disability discrimination. To the extent that the definition of discrimination in the Sex Discrimination Act follows the same lines as those in State legislation, the same comment would apply. Moreover, experience with the Sex Discrimination Act itself has revealed problems of interpretation in relation to indirect discrimination in particular which would need to be addressed before this definition could be used as a model.

(c) Application of existing definitions of discrimination has clearly led in some cases to less effective protection in fact against discrimination for people with disabilities than is provided regarding other grounds of discrimination (in particular, because of problems of comparability).

To the extent that the Sex Discrimination Act takes a similar approach to State legislation, similar problems would arise from its use as a model in this respect.

10.3.1: Comparability

Direct and indirect discrimination provisions relating to disability both require comparison of the situation of people with disabilities with the situation of

people not having the relevant disability or disabilities.

The point has been made by participants in HREOC's consultations that it can be difficult for people with disabilities to find an appropriate group for comparison.[33] People working in traditional "sheltered workshop" environments, for example, are likely to experience difficulties in using complaints under anti-discrimination legislation to deal with inequalities in working conditions, since it may not be possible to find a comparable work situation for people not having similar disabilities. These difficulties emphasise the need for provision for methods other than complaint based strategies under anti-discrimination legislation, and for other legislative and programmatic measures in addition to anti-discrimination legislation to promote equality for people with disabilities.

Major problems of comparability, however, have also arisen in the operation of anti-discrimination legislation itself. As noted by Dr Astor (supra):

> *…the main problem with comparability which arises for people with disabilities is that the disability itself may create a difference in the way that the person does his or her work, uses service or facilities, occupies accommodation etc.*

This is a particular problem in the application of direct discrimination provisions. In essence, these provisions require that "like cases be treated alike", irrespective of sex, race, disability, or whatever grounds are covered by the legislation. (While this problem could be addressed to some extent by greater use of indirect discrimination provisions - which require to some extent at least that "unlike cases be treated unlike" - than has occurred in Australia so far, indirect discrimination cases have their own complexities and difficulties. It is therefore important that the best possible direct discrimination model be adopted.)

[33] See also Astor, supra, pointing out that comparability problems are not restricted to people with disabilities - similar problems may arise for women for example working in traditionally female occupations.

Anti-discrimination legislation is often thought of as requiring the factor in question (race, sex, disability etc) as irrelevant. On this model, application of anti-discrimination legislation to people with disabilities appears particularly difficult. However, it would be more accurate to say that anti-discrimination legislation attempts to ensure that race, sex and other factors which are commonly the basis of discrimination should only be treated as relevant when, and to the extent that, they are in fact relevant and it is just for them to be taken into account. Racial discrimination and sex discrimination legislation recognises that, while in many situations race and sex should be treated as irrelevant, for some purposes they should be taken into account. For example, being a woman may be a genuine qualification for some jobs assisting sexual assault victims; being an Aboriginal person may be a genuine qualification for some positions working with Aboriginal people.

Where disability is not relevant to how a person performs work, uses facilities etc, legislation should ensure that it is treated as irrelevant. Where disability is relevant, legislation should ensure that it is treated as relevant only so far as it is just to do so.

Anti-discrimination legislation attempts to allow for the differences in situation which may flow from a person's disability by, on the one hand, requiring "reasonable accommodation" by other parties to such as employers to take account of different needs, and on the other hand by providing for exceptions which permit different treatment where this is thought to be reasonable in the interests of balancing the rights and needs of people with disabilities against possible expense or inconvenience to others. (Reasonable accommodation and exceptions, and problems relating to these, are discussed later in this paper.)

However, the drafting of some legislation creates a risk that a person with a disability seeking to make a complaint will not even reach the stage of arguing whether the accommodation required is reasonable or whether the different treatment is permitted by the exceptions provided. Under legislation which defines discrimination as different treatment "in circumstances that are not materially different", a complainant may face the argument that the very fact of their disability, and a consequent need that other parties need to make some adjustments (no matter how reasonable, and whether or not these would be defined as "reasonable accommodation" if that stage were reached), means that the circumstances are "materially different" compared to the situation of a person without the same disability.

Similar problems have arisen regarding the definition in the U.S. Rehabilitation Act 1973 which requires reasonable accommodation for, and prohibits discrimination against, an "otherwise qualified handicapped person". There has been confusion as to whether this means:

- qualified "in spite of" the handicap, that is able to do the job adequately

even before reasonable accommodation is considered (which would only benefit a person who [in the employment context] is qualified to do the job without any accommodation of his or her handicap, but needs reasonable accommodation to be able to perform as well as or better than other qualified applicants); or

- qualified "apart from" the handicap (which would mean that the issue would then be whether the person could do the job with reasonable accommodation).

These problems led to the term "otherwise qualified handicapped person" being avoided in the subsequent Americans with Disabilities Act.

In Jamal v. Secretary of the Department of Health[34] the NSW Supreme Court, on appeal from the Equal Opportunity Tribunal, held that complainants needed to pass the initial hurdle of showing less favourable treatment in circumstances which were "the same or not materially different" before issues of reasonable accommodation and exceptions could be reached.

This aspect of the decision was overturned when this decision, in turn, was appealed to the Court of Appeal. The Court of Appeal noted that such an approach "would virtually destroy the effectiveness" of the legislation regarding discrimination in determining who should be offered employment, and held rather that issues of discrimination, reasonable accommodation and exceptions had to be considered together.

It would be possible for Federal legislation to reproduce the NSW provisions or adopt a similar model, in the hope that the NSW Court of Appeal's approach will be followed by courts and others in interpreting and applying the equivalent provisions. It would be preferable, however, for the legislation itself to make it clear beyond dispute that the circumstances are not materially different by reason that reasonable accommodation is required. A provision intended to have this effect is included in the Western Australian legislation.

Another feature of the NSW legislation (which is retained in the Western Australian legislation) which should be avoided in this respect has been noted (John Basten, "Indirect Discrimination and the Sex Discrimination Act", supra). Section 49I of the NSW Act permits discrimination on the basis of physical impairment if it appeared to the employer on grounds on which it was reasonable to rely that the person because of impairment:

(a) would be unable to carry out that work; **or**

(b) would, in order to carry out that work, require services or

[34] (1988) Equal Opportunity Cases 92-234

> facilities which are not required by persons who are not physically handicapped persons and which, having regard to the circumstances of the case, cannot be reasonably provided or accommodated by the employer …

Potentially (although this would be clearly contrary to the intention of the provision), the word "or" might be interpreted to prevent the issue of reasonable accommodation being reached, if the person is "unable to carry out that work" unless reasonable accommodation is made. (It is also questionable to class not employing a person as "discrimination" - although permitted - if they are in fact unable to carry out the work even if reasonable accommodation is made and the work is confined to the inherent requirements of the job).

10.3.2: Work requirements: particular problems

A further complication, which should be avoided in national legislation, arises under the NSW legislation and may arise under the Western Australian legislation which in this respect is similar.

The provision of the NSW legislation which deals with reasonable accommodation in relation to employment (section 49I) refers to "the work required to be performed" and requires reasonable accommodation necessary "in order to carry out that work".

Clearly, anti-discrimination legislation cannot and should not require that a person with a disability be given a job which he or she cannot in fact do, even with reasonable accommodation being made.

There is no requirement in the section, however, that the work required be that required by the essential or inherent requirements of the job. An interpretation to this effect by the NSW Equal Opportunity Tribunal in Jamal's case was specifically rejected by the NSW Supreme Court and the Court of Appeal. This contrasts with the Victorian legislation which refers to "the work reasonably required" and the South Australian legislation which refers to "the work genuinely and reasonably required".

Under the NSW legislation, the requirements of the job are to be determined entirely by the employer, and may include requirements or aspects which are not essential, and could be readily altered within the concept of "reasonable accommodation", but constitute severe barriers to employment of people with disabilities.

On this approach, a person with a disability may be required to show that they can perform the job without modifications to premises, equipment or job description, no matter how minor or lacking in additional cost or inconvenience, if because of ignorance, prejudice or inertia these adjustments have not been or will not be made.

This approach is not consistent with the award restructuring process in which Australian employers, unions and employees, and governments have been engaged and to which they have been committed for some years. It is also inconsistent with the approach indicated by Australia's international obligations under the Discrimination (Employment and Occupation) Convention. Article 1 of the Convention defines as discrimination for the purposes of the Convention "any distinction, exclusion or preference … that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation" but specifies that discrimination does not include "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof".

The Victorian legislation (section 21(4)) refers to the "work reasonably required" while the South Australian legislation (section 71(2)) refers to the work "genuinely and reasonably required". Although "reasonable" requirements may be interpreted as broader than "inherent" requirements[35] both criteria indicate that an objective assessment of the work requirements is required rather than design of jobs and the circumstances in which they are to be performed being taken as given.

An essential point which has been identified by a number of commentators is that it should be clear that it is not reasonable to discriminate against a person with a disability in order to accommodate the prejudices or fears of clients, co-workers or others.[36] This is of central importance given the role of such prejudices and fears in restricting the opportunities available to many people having or perceived as having disabilities. (This, clearly, does not mean that legislation should prohibit distinctions which are objectively justifiable for the protection of the health or safety of the person concerned or of other persons.)

10.3.3: Who assesses what is reasonable?

On a number of important issues (including "reasonable accommodation" anti-discrimination legislation in relation to disability uses the concept of reasonableness. The intention is that a reasonable decision made on legitimate grounds should not be defined and prohibited as "discrimination", and that decisions or actions which affect the equal enjoyment of human rights and were not made or taken reasonably on legitimate grounds should be so defined and prohibited. This approach is consistent with the meaning in international law of

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[35] See Styles v. Secretary, Department of Foreign Affairs and Trade, (1988) Australian Law Reports 407 at 429. This point is discussed in more detail in relation to indirect discrimination later in this paper.

[36] See similarly InterGovernmental Committee on AIDS Discussion Paper, HIV/AIDS and Anti-Discrimination Legislation, which notes that United States courts have consistently rejected customer prejudices as a reason for discrimination.

"discrimination".

A legal requirement that an action or decision be reasonable in the circumstances does not require that the decision be objectively the right one, in hindsight and in the light of all the facts, some of which could not reasonably have been known to the person making the decision. (For example, some distinctions affecting people with AIDS which are now clearly not justifiable may have been reasonable in the early 1980s when knowledge of how the infection was transmitted were very limited.) It generally involves, however, an opportunity for some objective assessment by a court or tribunal of whether the decision was reasonable in the circumstances.

The NSW Anti-Discrimination Act, however, allows discrimination in relation to employment where "it appeared to the employer … on such grounds as, having regard to the circumstances of the case, it was reasonable to rely" that a handicapped person would be unable to carry out the work required or would require services or facilities which could not reasonably be accommodated.

This does not require that the decision objectively be reasonable in the circumstances, but only that it be made on a ground on which it is reasonable to rely. As pointed out by Dr Astor:

> *… many employers rely upon the report of a medical practitioner when making decisions about appointment of people with disabilities. It seems entirely reasonable to do so. However, whilst medical practitioners are expert at diagnosing and describing disabilities, few indeed are expert at assessing the duties required for specific jobs and relating the individual case of disability to the real employment situation.*[37]
>
> *… Many employers rely on a simple diagnosis of a disability as a reason to refuse to employ an individual when what is important is the effect, if any, of the disability on the actual requirements of the job. It is difficult to see how a medical report could be anything other than a reasonable ground to rely upon, and yet it may not lead to a reasonable decision.*

The Victorian, South Australian and Western Australian legislation by contrast provides for an objective assessment of whether a decision was reasonable in the circumstances. Similarly, in relation to insurance, the Sex Discrimination Act permits differential treatment only if the difference was not only based on

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[37] See also Graham Innes, "Equal Opportunity in the NSW Public Service: The rhetoric-reality gap", (1987) 12 Legal Service Bulletin 163 at 164. The same point has been made by HREOC in submissions to the Australian Public Service Commission on medical standards for appointment to the Australian Public Service, and in a number of submissions relating to assessments under the Migration Act.

grounds on which it was reasonable to rely, but also was itself reasonable. National legislation should follow this approach rather than that of the NSW legislation.

It has also been pointed out that in some cases in public service employment unreasonable and discriminatory decisions based on medical reports may be protected from challenge under anti-discrimination law by the legislation regulating public service employment[38]. It is essential that such problems be removed as early as possible.

10.3.4: Reasonable accommodation

Ensuring equal treatment in practice for people with disabilities in many (though not all) situations requires some accommodation by other parties (e.g. employers or persons or organisations offering services). This may include, in different circumstances, modification to premises to allow access, or modification to equipment, practices, or job design. In many cases this may be straightforward and inexpensive - or, in fact, lead to economic benefits: for example by making services more accessible to consumers or users generally, or by focussing employment practices more effectively on the needs of the organisation. In other cases, however, substantial costs or other adverse consequences for other people may be involved. There are, therefore, issues which legislation needs to address of what measures other parties may be required to take to accommodate the needs of people with disabilities, and how these decisions are to be made.

Existing anti-discrimination law in Australia and overseas uses the concept of "reasonable accommodation" (either expressly or impliedly) in prescribing what is required.

The NSW, Victorian and South Australian legislation, while using the concept of reasonable accommodation, does not indicate how what is reasonable is to be determined or what factors are to be taken into account.

Case law under the Victorian Act indicates a number of relevant factors: the costs involved in achieving equality of opportunity or access; the nature and financial resources of the enterprise or organisation involved; and any risk to health or safety of the person or of others. However, they do not indicate how these factors are to be weighed against the achievement of equality and other benefits which may result.

The Western Australian legislation provides more explicit guidance in this respect.

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[38] Innes, supra, discussing Kitt's case.

Employers and providers of accommodation, education, goods and services, and clubs, are not required to accommodate the needs of a person with a disability where this would impose "unjustifiable hardship". Section 4 of the W.A. Act specifies that:

> all relevant circumstances of the particular case shall be taken into account including the nature of the benefit or detriment likely to accrue or be suffered by all persons concerned, the nature of the impairment of the person concerned and the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

This provision might be improved by referring to the "nature and degree" rather than to the "nature" of impairment, to make clear beyond argument that stereotypes which treat all people with a particular class of disability alike regardless of their abilities are not acceptable. Apart from this issue, this provision appears to offer a very useful model. In particular, it focuses attention on the benefits to be gained from making reasonable accommodation, not only for the person making the complaint but for "all persons concerned". In this respect as in others legislation should emphasise that the goal, and basic rule, is equality of opportunity and access, with any departures from this being exceptional. Providing more equal opportunity or access for a person with disabilities may also lead to benefits for other people with disabilities, for aged people and for children, for other employees or service users.

In many cases it may also have offsetting benefits in reduced need for income support and other forms of assistance and special services as people with disabilities are enabled to participate in the community on equal terms. (These wider benefits to the community are particularly relevant in cases concerning discrimination by government or public authorities. In cases where an individual or private organisation is required to make reasonable accommodation, it may be considered fair to give less weight to economic benefits to the community through reduced need for specific government expenditure and assistance - except where there are tax or other incentives available to offset the costs of making such accommodation.)

National legislation should clearly require that all relevant benefits, rather than only costs, risks and burdens, are considered in assessing what is "unjustifiable hardship" and what is "reasonable accommodation".

10.3.5: Americans with Disabilities Act

In the Americans with Disabilities Act, reasonable accommodation includes requirements of making facilities accessible and useable; and job restructuring and the acquisition or modification of equipment or devices. Requirements to provide reasonable accommodation are limited by reference to the concept of "undue hardship", which is defined to require "significant difficulty or expense" and to relate to further factors, including the nature and cost of the accommodation, the overall financial resources of the facility or employer and the type of operation concerned.

A distinctive feature of the Americans with Disabilities Act is that the making of reasonable accommodation is not left completely for determination in cases where complaints are made. In a number of areas, including transport and communications, further regulations associated with the Americans with Disabilities Act set out specific requirements to improve access for people with disabilities. These requirements apply either immediately, or from phase-in dates in 1992 and 1993 to new premises, facilities and services. In the case of existing facilities and premises, more time is allowed for these adjustments to be made. For making existing railway stations accessible, for example, the date set is 2010 (with provision for further extension) except that a number of key commuter stations are required to be made accessible by 1993.

This approach has a number of advantages:

- it provides people with disabilities and people providing services and facilities with some certainty as to their entitlements and obligations in advance, rather than having to await the outcome of complaints;

- it provides a definite agenda and timetable for adjustments to be made rather than depending on complaints being made;

- all enterprises required to make adjustments can know what the requirements are, and are subject to the requirements at the same time. Without such a requirement there may be disincentives to make adjustments which have not been yet been made by competitors (in those cases where adjustment involves, or is thought to involve, significant costs) - which may be a reason not to make adjustments until after a complaint is made.

These types of requirements have not been directly incorporated within existing Australian anti-discrimination legislation to date. However, requirements which are comparable in some (though not all) respects are contained in the Affirmative Action (Employment of Women) Act 1986 which was originally intended to form part of the Sex Discrimination Act, although it was ultimately introduced as separate legislation. In other areas of legal regulation it is common for the Act to set out the basic framework and provide for the making of regulations to set out more detailed requirements. Although there are some

issues of legislative policy regarding how far the operation of the Act should be made to depend on such regulations, the Americans with Disabilities Act clearly provides a model deserving consideration in this context.

An alternative approach would be for the legislation to provide for the issuing of enforceable guidelines (rather than only the non-enforceable guidelines already provided for under the Human Rights and Equal Opportunity Commission Act, the Sex Discrimination Act and the Racial Discrimination Act). This approach has already been adopted in some areas under the Privacy Act 1988. Such guidelines could be issued by HREOC, or (in some areas) by authorities with more specific responsibilities and expertise.

Detailed regulatory requirements or guidelines covering particular areas in Australia would require further development in consultation with interested parties. It might not, therefore, be possible to introduce such requirements in all areas at the same time as the main anti-discrimination legislation. In the Human Rights Commissioner's view, however, such requirements are closely connected with, and necessary for the success of, anti-discrimination legislation in relation to disability. Anti-discrimination legislation should expressly provide for the making of regulations or introduction of guidelines as discussed here.

10.3.6: Remedies before discrimination occurs

The cost and inconvenience involved in altering premises, facilities or equipment after they have been constructed to make them accessible to or usable by people with disabilities or installed is typically substantially greater than if accessibility had been required in the original construction, design or installation.

It is much less likely, therefore, that accommodating the needs of people with disabilities will be found to require "unjustifiable hardship" if a complaint can be made - or other means used to ensure that the needs of people with disabilities are taken into account - before premises, facilities or equipment are constructed or installed which restrict access for people with disabilities.

Under both the Victorian and NSW legislation, however, it has been held that a complaint cannot be made regarding discrimination which will occur in the future.

The situation, where such a restriction applies, will often be as described by Dr Astor (supra):

> *People with disabilities are placed in an impossible position by the legislation. They cannot complain before the inaccessible building or transport service is completed, and if they complain afterwards they will not succeed because, at that stage, it will almost certainly be unreasonably expensive to provide access. Amendment of the legislation to allow complaints to be determined before lack of access becomes an insuperable problem is clearly required.*

In Waters v. Rizkalla[39] the Supreme Court of Victoria overruled this interpretation of the Victorian legislation and held that in some cases a decision to take action in future could be the subject of a complaint.

It is not clear, however, whether this interpretation will be applied in other jurisdictions or in all cases.

Principle 8 of the Declaration on the Rights of Disabled Persons states that "Disabled Persons are entitled to have their special needs taken into consideration at all stages of economic and social planning". Principle 12 goes on to state that organisations of disabled persons "may usefully be consulted in all matters regarding the rights of disabled persons". It is clear that at present the entitlement recognised by Principle 8, and the recommendation of Principle 12, are not adequately complied with in many cases; and that compliance with these principles could significantly reduce the incidence of discrimination and avoid costs in remedying discrimination after it occurs.

National anti-discrimination legislation should provide, and State legislation should be amended to expressly provide, for complaints, and orders, to be made in such cases before discrimination occurs.[40] It should be made possible for such orders to include orders that people with disabilities and/or organisations representing them be consulted in relevant planning processes.

However, other measures than allowing complaints under anti-discrimination legislation are also required, including effective, enforceable and uniform provisions requiring bodies responsible for approving premises and facilities to ensure that reasonable measures are taken to accommodate the needs of people with disabilities; and standards which can be referred to in advance, including standards contained in guidelines or regulations associated with anti-discrimination legislation as discussed in the previous section of this paper.

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39 (1990) Equal Opportunity Cases 92-282

40 This is also recommended by the Victorian Law Reform Commission in its Report no 36: Review of the Equal Opportunity Act (1990).

10.4: INDIRECT DISCRIMINATION

The purpose of "indirect discrimination" provisions was summarised by the United States Supreme Court in Griggs v. Duke Power Co.[41] (in the context of racial discrimination in employment):

> *What is required … is the removal of artificial, arbitrary and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.*
>
> *The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited …*
>
> *… but good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as "built in headwinds" for minority groups and are unrelated to measuring job capability.*

Clearly, such provisions may have considerable relevance to people with disabilities, in employment and in other areas. There is likely to be considerable overlap between properly designed (and interpreted) direct discrimination provisions relating to disability and indirect discrimination provisions, particularly if "reasonable accommodation" requirements of wide application are included. This does not mean, however, that indirect discrimination provisions are unnecessary, since in many cases indirect discrimination will offer a clearer and more effective means of approaching requirements which do not refer expressly to disability - and may have been adopted with no intention to discriminate (or in fact with no regard at all to the situation of people with disabilities) - but in fact impose restrictions on opportunities and access for people with disabilities.

There are generally four elements to statutory definitions of indirect discrimination:

- the alleged discriminator requires the person aggrieved to comply with a requirement or condition;

- the aggrieved person does not or cannot comply with the requirement or condition;

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[41] 401 United States Reports 424 (1971)

- the requirement or condition has a disparate impact on persons in the same class as the aggrieved person; and

- the requirement or condition is unreasonable or unjustifiable.

This model is followed in State indirect discrimination provisions and in the Sex Discrimination Act. (The indirect discrimination provisions of the Racial Discrimination Act adopt a different approach to the last two elements, discussed below.)

10.4.1.: Requirement or condition

A narrow and technical interpretation of this phrase could lead to problems in a range of cases, including many in relation to disability. However, more realistic interpretation appears to have been settled on by the courts.

In Australian Iron & Steel Pty Ltd v Banovic[42] although several members of the High Court thought that there was some difficulty in fitting the facts of the case (where workers with less seniority were retrenched first) into the phrase "requirement or condition", it was held that this element of the definition of indirect discrimination was satisfied.[43]

In Secretary, Department of Foreign Affairs and Trade v. Styles[44] the Full Federal Court held that a "requirement or condition" did not need to be an absolute barrier in theory: what was important was its effect in practice.[45]

This element of the definition, on these interpretations, appears reasonably appropriate.

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42 (1989) 168 Commonwealth Law Reports 165

43 Dawson J, for example, emphasised that the term should be construed broadly: at 185.

44 (1989) 88 Australian Law Reports 621

45 At first instance Wilcox J had held similarly: Styles v. Secretary, Department of Foreign Affairs and Trade (1988) 84 Australian Law Reports 408.

However, in Public Transport Corporation v. Waters[46] the Supreme Court of Victoria held that, while to require passengers on trams to use a particular type of ticket (which would be a barrier to some people with disabilities) was a "requirement or condition", to remove conductors from some trams (which constituted a further barrier) did not amount to a "requirement or condition". The Equal Opportunity Board found a "requirement or condition" of "being required to use a tram without the assistance of conductors", but the Court described this as "to distort the situation in order to achieve a desired result".

Whether or not this decision (presently the subject of an appeal) is legally correct, it indicates that not all barriers are covered by the term "requirement or condition" with the degree of certainty which is desirable. Consideration should therefore be given to clarifying that any feature which in practice restricts opportunity or access may be a "requirement or condition" for this purpose; and/or including additional provisions in national legislation which do not depend on an action or feature which has a disparate impact being found to be a "requirement or condition" in order for indirect discrimination to be found.

10.4.2: Unable to comply

Problems might arise with this element if it were interpreted to mean that it must be completely impossible for the person to comply with the requirement. It might, for example, be theoretically possible, although difficult and/or dangerous, in some situations for a person in a wheelchair to negotiate stairs.

There are indications in English cases that the test is whether a requirement can be complied with in practice rather than theoretically.

It may, however, be better for national disability discrimination legislation to refer to a condition or requirement which the person does not or cannot comply with in practice without unreasonable or excessive difficulty.

10.4.3: Disparate impact

(a) Sex Discrimination Act model

The Sex Discrimination Act and State anti-discrimination legislation refer to requirements or conditions with which the aggrieved person does not or cannot comply and "a substantially higher proportion of persons" who are not in the same category as the aggrieved person are able to comply with the requirement or condition.

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[46] (1991) Equal Opportunity Cases 92-334

This element of comparison is an essential feature of indirect discrimination, and may in some cases involve complex and difficult issues of evidence. However, selecting the appropriate basis for comparison has given rise to considerable difficulties of interpretation which national disability discrimination legislation should avoid as far as possible.

One issue on which a variety of approaches have been taken is how the appropriate "base pool" - within which proportions of the different groups should be compared - is to be determined. For example, the comparison could be between people with disabilities and people without disabilities in the whole population of Australia; or in the region where the employer or service operates; or among people who are actually or potentially employees or service users in the relevant category; or amongst those who are in fact in the workforce or using the service. A different base pool may lead to widely different results in comparing proportions.

The legislation does not give any explicit guidance on which of these methods should be adopted. (In the Styles case, Bowen CJ and Gummow J in the Full Federal Court complained that the legislation was ambiguous and lacked the desirable degree of clarity, as it did not specify how the relevant proportions were to be identified or calculated.) However, the decision of the High Court in Australian Iron and Steel Pty. Ltd. v. Banovic[47] has (while not removing all areas of uncertainty[48]) rendered the operation of provisions of this type more workable.

It is important that the base groups selected

> *do not themselves incorporate the effect of allegedly discriminatory practices and … can accordingly be used as reference points for ascertaining the effect of those practices.*[49]

Thus, in the particular case the majority of the High Court took as the base pool persons who had applied for work during the period found to be relevant, rather than only those actually employed (since past discrimination had affected the employment of applicants).

In some cases (including in relation to people with disabilities) the appropriate pool might be constituted by potential applicants or service users rather than

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47 (1989) 168 Commonwealth Law Reports 165

48 See Philip Tahmindjis, "Indirect Discrimination in Australia: the High Court decision in A.I.S. v. Banovic", (1990) Australian & New Zealand Equal Opportunity Reporter 90-128

49 Deane and Gaudron JJ, Australian Iron and Steel Pty. Ltd. v. Banovic (1989) 168 Commonwealth Law Reports 165 at 180.

those who actually apply for jobs or request services, since substantial numbers of people may be deterred from applying or seeking services by the knowledge that barriers which have a discriminatory effect exist.

(b) Racial Discrimination Act model

The definition of indirect discrimination in the Sex Discrimination Act (and similar definitions in State legislation) provides one possible model. Another model is provided by the indirect discrimination provisions inserted into section 9 of the Racial Discrimination Act 1975 in 1990 to confirm that this Act applied to indirect discrimination:

> (9A) Where:
>
> (a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and
>
> (b) the other person does not or cannot comply with the term, condition or requirement; and
>
> (c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life;
>
> the act of requiring such compliance is to be treated … as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

The approach taken in paragraph (c) is consistent with the definition of discrimination under the existing general prohibition of racial discrimination under section 9, which in turn closely follows the provisions of Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination on which the Act is based. There are therefore sound reasons why the Sex Discrimination Act definition was not followed in this case.

In the context of disability discrimination legislation, a definition on the Racial Discrimination Act model might give more general coverage than the model adopted in the Sex Discrimination Act and State legislation. However, it has been questioned whether in this regard

> *any great purpose is served by abandoning the definition contained in the Sex Discrimination Act (and other State Acts) at a time when the High Court has adopted a reasonably liberal and purposive interpretation*[50].

While in some respects the operation of the model provided by State legislation

[50] Basten, supra.

and the Sex Discrimination Act remains unclear, it is also unclear how the courts would interpret a provision based on section 9 and 9A of the Racial Discrimination Act.[51] In particular it is not clear what method of comparison might be adopted by the courts in determining when a requirement operates "equally".

10.4.4: Definition of affected group

Defining the appropriate groups for comparison for assessment of indirect discrimination may be more complex in relation to disability than in other areas. Whereas in the area of sex discrimination for example a person is either female or male (apart from problems of definition in cases of transexualism) and married or not, and a woman is either pregnant or not, there are a wide range of types and degrees of disability. Problems may arise from simply dividing the population into people with disabilities and people without disabilities (other than those problems which may be regarded as being inherent in the stereotyping involved).

The NSW Anti-Discrimination Act refers to indirect discrimination on the ground of physical or intellectual impairment as occurring where a person is subjected to an unreasonable condition or requirement with which they cannot comply and

> a substantially higher proportion of persons who are not physically or intellectually handicapped are able to comply with the requirement or condition.

This might be interpreted as implying that the proportions to be compared are those of all people defined by the Act as "handicapped" and all others. Problems may arise from this where a condition or requirement is a substantial barrier to a particular (but relatively small) group with disabilities of a particular nature and degree but not to other people with disabilities. In such a case, comparison of people with disabilities generally with other people might lead to no "substantial" difference in proportions, and thus no indirect discrimination, being found.

Rather than leaving this issue for interpretation, it would be preferable for national legislation to cover situations where a substantially higher proportion of people who are not handicapped [or impaired], or a substantially higher proportion of people who do not have a similar impairment, are able to comply with the requirement or condition.

The indirect discrimination provisions (section 66) of the South Australian

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[51] Justice Dawson has indicated a view that the provisions of the Convention on the Elimination of All Forms of Racial Discrimination may lack specific legal meaning in the Australian legal system without a process of further translation into more specific rights and obligations: Gerhardy v. Brown (1985) 159 Commonwealth Law Reports 70 at 157.

legislation appear to address this issue, covering requirements where:

> the nature of the requirement is such that a substantially higher proportion of persons who do not have such an impairment complies, or is able to comply, with the requirement than of those persons who have such an impairment.

The Western Australian legislation (s.66A) is similar except that it refers to comparison with persons who do not have the "same" impairment, which might be more likely to lead to technical arguments and problems of definition.

10.4.5: Reasonableness of condition or requirement

Consideration of indirect discrimination cases under existing provisions[52] indicates that the test that a requirement or condition having a disparate impact must be "reasonable" may not be sufficient.

It should not be sufficient to show that it was reasonable to in effect differentiate on the basis of disability: it should also be explicitly required that the particular differential treatment was proportionate to the circumstances.

Such a requirement would be consistent with the approach of United States discrimination law, where the applicable test refers to "business necessity" rather than only to reasonableness. Perhaps more importantly, it would also be consistent with the general requirements of international human rights law that restrictions on rights, to be permissible, must not only be for a legitimate purpose but must be proportionate to the need to be addressed[53].

10.5: MUST DISCRIMINATION BE CONSCIOUS?

The Victorian Supreme Court (Fullagar J) in Arumugam v. Department of Health[54] decided that under the Victorian Act the definition of discrimination required that direct discrimination be conscious. This appears to indicate that for there to be unlawful discrimination a discriminatory motive on the relevant ground must be proved. This would substantially restrict the protection offered by legislation in many cases of direct discrimination.

In Australian Iron and Steel v. Banovic (supra) however several members of the High Court interpreted similar provisions to mean only that the "true reason" for less favourable treatment should be a prohibited ground of discrimination,

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52 Including the Full Federal Court decision in Secretary, Department of Foreign Affairs and Trade v. Styles

53 See for example Handyside v. United Kingdom (1979) 1 European Human Rights Reports 737; Sunday Times v. United Kingdom (1979) 2 European Human Rights Reports 245.

54 [1988] Victorian Reports 319

rather than that there be a conscious intention to discriminate. It may, therefore, be unnecessary for national legislation to specifically indicate that the approach in Arumugam is not applicable.

10.6: ONUS OF PROOF

A person who makes a complaint under anti-discrimination legislation generally bears the burden of proving that each element of the definition of unlawful discrimination is satisfied, including that any accommodation required does not constitute "unjustifiable hardship", or does constitute "reasonable accommodation". In indirect discrimination cases, the complainant, having proved that the condition or requirement complained of has a disparate impact on persons in his or her category, has generally been regarded under Australian legislation as required to prove that the condition or requirement does not satisfy the conditions of reasonableness set out in the legislation.

In United States indirect discrimination cases, by contrast, once disparate impact is shown it falls to the respondent to at least produce evidence to demonstrate that the condition or requirement satisfies the requirements of necessity or reasonableness. The Supreme Court has held[55] that although the legal burden of proof continues to rest with the complainant throughout, the respondent bears an "evidential burden" of justification once disparate impact is shown.

Canadian courts, similarly, have generally held that once disparate impact has been shown by the complainant, the onus shifts to the respondent to demonstrate whatever level of justification is required by the legislation.[56]

It is reasonable in most areas for the onus of proof at the first stage to be on the complainant: to show that conduct has occurred which, unless shown to fall within an exception, will constitute unlawful discrimination, or, in indirect discrimination cases, to show that the condition or requirement concerned has a disparate impact which disadvantages people in the same class as the complainant.

However, burdens at the second stage - showing that exceptions do not apply, or that a condition or requirement with a disparate impact is not reasonably required - are frequently found to be very difficult to discharge.[57]

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55 Wards Packing Co. Inc. v. Atonio 109 S.Ct. 2115 (1989)

56 See Sue Tongue, "Indirect Discrimination: Some Recent Overseas Cases and Developments", in Papers from the "Indirect Discrimination and the Sex Discrimination Act" Seminar, Sydney, HREOC 1991.

57 This has been a serious problem for complainants under the United Kingdom legislation, discussed by Tongue, supra.

Typically, the reasons why a decision was made or action taken will be better known to the person or persons making the decision or taking the action than to people affected by the decision or action. Thus, as Basten (supra) has observed:

> *… common sense would suggest that the justification for the discriminatory provision should lie on the respondent and not on the complainant. The employer (or other alleged discriminator) who applies the requirement or condition is the person most likely to be able to say why it is reasonable … It would … be quite wrong for a complainant to fail where a tribunal is satisfied that the requirement might be reasonable, even though it is unable to come to a conclusion as to whether it is in fact reasonable or not.*

A model placing the burden of justifying any departure from equal treatment on the other party, at least to the extent of requiring production of evidence, would be more consistent with the basic principle that people with disabilities have the right to equality.

In relation to employment, for example, the onus could be placed on the employer to demonstrate that requirements which are shown to have a disparate impact on people with disabilities are reasonable by reference to the inherent requirements of the particular job in question or other legitimate criteria such as the objective requirements of health and safety. Where it is alleged that accommodation which would be required constitute "unjustifiable hardship" and therefore do not constitute reasonable accommodation, the onus might be placed on the party alleging this to produce evidence demonstrating it.

This would be consistent with provisions such as s.109 of the NSW Anti-Discrimination Act which place the onus of proving that conduct which would otherwise be unlawful comes within an exception provided for under the Act. It appears anomalous that the respondent should only bear this onus if what is in substance an exception - such as a claim of "unjustifiable hardship" or of justification of a condition or requirement having disparate impact - is in fact classified by the legislation in question as an exception, or found by the courts to constitute an exception.

Legislation should make clear where the onus of proof of each element of its provisions lies.[58]

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[58] The decision of the Supreme Court of Victoria in Keefe v. McInnes (1990) Equal Opportunity Cases 92-331 indicates a number of difficulties in determining which provisions are "exceptions" which the respondent is accordingly required to prove.

10.7: EXCEPTIONS

Australian anti-discrimination provides for a range of exceptions and exemptions. A number of these in both existing Federal legislation and State legislation apply generally. Others in State legislation are specifically applicable to impairment or disability.

10.7.1: Sex Discrimination Act

The Sex Discrimination Act provides for a number of exemptions. The permanent exemptions under this Act are presently the subject of a review convened by the Federal Sex Discrimination Commissioner. Definitive views on the operation and appropriateness of these provisions in the Sex Discrimination Act can not therefore be expressed in this paper.

However a number of general comments may be made:

Acts done under statutory authority:

At its commencement, the Sex Discrimination Act exempted from the definition of discrimination any act done "in direct compliance with" any other existing Federal Act or any existing State or Territory Act, or any existing regulation, rule, by-law, direction or determination under such an Act. This exemption was limited to two years (except for the Social Security Act and four [now two] Acts relating to compensation and defence service benefits). However, provision was also made for this exemption to be extended regarding specific legislation, or generally, by making of regulations. A number of specified Acts or Regulations, including several relating to industrial health and safety, have been the subject of such regulations.

It may be appropriate in the case of disability discrimination legislation to allow for a transition period in which discriminatory laws can be reviewed, rather than delay anti-discrimination legislation until review of other laws has occurred. It is not considered appropriate, however, that this transition period can be extended indefinitely by regulations which may be made without any meaningful and publicly accountable consideration.

Every effort should be made by Federal, State and Territory Governments to identify and remove discriminatory provisions in the law - and in particular to remove those already identified, such as discriminatory provisions relating to medical standards - prior to the introduction of anti-discrimination legislation, rather than the effect of these provisions being protected for a substantial period by transitional provisions.

Orders of courts or tribunals

Section 40 of the Sex Discrimination Act exempts any action done in direct

compliance with an order of a court, industrial awards or orders of industrial tribunals.

This may appear reasonable, as an anti-discrimination body could hardly require a person to disobey a court order or industrial awards or orders having the force of law.

It is not clear, however, why provision could not be made for review of court decisions which would require conduct otherwise unlawful under anti-discrimination legislation.

Whether industrial tribunals should be able validly to make awards or orders which do not comply with, or at least take account of, anti-discrimination legislation is also a separate issue from whether valid awards should be complied with.

The Industrial Relations Act 1988 requires the Industrial Relations Commission to "take account of the principles embodied in the Sex Discrimination Act" in making determinations. A similar provision (in the Industrial Relations Act, dealing only with the Federal body, and/or in the national disability discrimination Act itself, also binding State bodies) requiring industrial tribunals to take account of national disability discrimination legislation would be one possibility.

This requirement to "take account", however, does not amount to a requirement that awards comply with discrimination legislation.

A possibility would be for national disability discrimination legislation to provide that compliance with provisions of an industrial award which are discriminatory or have a discriminatory effect is not unlawful, but require industrial tribunals to comply with the legislation in making awards and allow for the making of binding declarations that an award is not binding to the extent of any discrimination.

It is recognised that a number of complex industrial and legal issues may arise in this area. However, a complete exemption of industrial awards from the operation of anti-discrimination legislation could substantially undermine the protection provided in a centrally important area of life.

Such a complete exception for industrial awards, or for an aspect such as rates of pay - as is provided for under the South Australian legislation - does not therefore appear acceptable. This is an area where detailed consultation with employer organisations, trade unions and other appropriate bodies (including organisations representing people with disabilities), as required by the Discrimination (Employment and Occupation) Convention is particularly necessary to determine what mechanisms and procedures are appropriate and

necessary for the practical realisation of non-discrimination in this area.

Exemptions granted by the Commission

The Sex Discrimination Act (section 44) provides that the Commission may grant an exemption from the provisions which render discrimination in particular circumstances unlawful. Exemptions may be granted to a particular person or to a class of persons. Exemptions may be granted for a maximum of five years, but there is provision for further exemptions to be made. Exemptions may be made on conditions specified by the Commission.

Section 45 of the Sex Discrimination Act specifies that decisions made by the Commission under section 44 are reviewable by the Administrative Appeals Tribunal.

It is unusual in Australia for an administrative body such as the Commission (and also, by under section 45 as it has been interpreted, therefore, the Administrative Appeals Tribunal) to be given such a power to exempt persons from complying with provisions of the law. Generally, when Parliament proclaims conduct, including discrimination, to be unlawful, it means just that, for all persons. Where more detailed provisions specifying the circumstances in which the law is to apply are provided for, this is usually by making of regulations - which are subject to supervision and possible disallowance by Parliament.

There is no equivalent power, for example, in the Racial Discrimination Act. That the law should apply to all persons alike is usually thought to be one of the requirements of the right to equality before the law.

There are, however, a number of advantages to having an exemption procedure such as that contained in section 44 of the Sex Discrimination Act, so that such a model at least needs to be considered for national disability discrimination legislation.

If exemptions from the prohibition of discrimination, as defined in the Act - in addition to those included in the definition of discrimination itself, by reference for example to inherent requirements, reasonable accommodation and "unjustifiable hardship" - are thought to be necessary, it is important that these exceptions are indeed recognised to be "exceptional" and do not undermine the basic principle of equality and progress towards its fuller implementation. As pointed out by the Sex Discrimination Commissioner, the procedure under section 44 of the Sex Discrimination Act:

> *recognises the extraordinary nature of exemptions and the fact that they should be subject to conditions, limited in duration and capable of being monitored and reassessed at regular intervals.*

Review by the Administrative Appeals Tribunal provides an additional level of consideration to ensure both that the Act is properly implemented and that decisions taken by the Commission and conditions imposed by it are correct, appropriate and supportable.

By contrast the granting of permanent exemptions in the Act itself does not ensure any process of review or monitoring to keep exemptions as narrow as possible and subject to further refinement over time.

The fact is that circumstances change. Improvements in technology and more and better information mean that from time to time exemptions can be more narrowly stated. A permanent exemption is not subject to this process of refinement - unless Parliament itself is prepared to go through regular review and amendments to the legislation. A time-limited exemption, by contrast, places the emphasis on a program of change … to restrict and ultimately eliminate discrimination. [59]

These comments, particularly in relation to the need to reflect changes in technology and knowledge, appear equally applicable to any exemptions from a prohibition of discrimination on the basis of disability.

An important element of the potential of this exemption process to contribute to progress towards equality is that exemptions, if granted, be granted with appropriate conditions to achieve this end. These conditions could include an agreement to take measures to move towards equality of access or opportunity during the period of the exemption, or to provide opportunities in alternative areas to that covered by the exemption.

The Sex Discrimination Act does not expressly prescribe the purposes for which exemptions may be granted or for which conditions should be imposed. However, the Commission has taken the view that since the provision for exemptions is part of the Act more generally, the power to grant exemptions and to impose conditions should be exercised in a manner which promotes the purposes of the Act, which include to eliminate discrimination as far as possible and promote acceptance of the principle of equality. While disability discrimination legislation would be expected to provide for similar objects, it might be preferable for any provision for an exemption procedure to be specifically required to be exercised to promote these objects.

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[59] Address to National Occupational Health and Safety Commission Lead Forum delivered by Quentin Bryce AO, in Occasional Papers from the Sex Discrimination Commissioner no.5: Discrimination against Women in the Lead Industry, HREOC, 1990.

Insurance

The NSW Anti-Discrimination Act (s49N) permits differentiation in the terms of insurance policies on the basis of disability where this is based on statistical or actuarial data (or other data if these are not available) and this is reasonable having regard to the data and to any other relevant factors. The source of any such data and relevant factors relied upon are required to be disclosed to the Equal Opportunity Tribunal if required.

The Victorian Equal Opportunity Act (s.39(c), (d)), the Western Australian Equal Opportunity Act (s.66T) and the South Australian Equal Opportunity Act (s.85) are similar except that there is no express requirement of disclosure to the Equal Opportunity Board or Tribunal.
The Sex Discrimination Act (section 41) provides that it is not unlawful to differentiate on the grounds of sex in the terms and conditions on which insurance is offered or may be obtained if the differentiation is:

(a) based upon actuarial or statistical data from a source on which it is reasonable … to rely; and

(b) reasonable having regard to the matter of the data and any other relevant factors.

Clearly, under the Sex Discrimination Act actuarial or statistical data is required before differentiation can be justified, including by reference to "other relevant factors". The requirements of the Sex Discrimination Act are thus more rigorous than those of State legislation which permit reference to other data if actuarial or statistical data from an acceptable source are not available.

The Sex Discrimination Act requires that data should not only be actuarial or statistical data, from a source on which it should be reasonable to rely, but that the differentiation should itself be reasonable. This implies that there should be an objective assessment of the differentiation concerned.

In its report Insurance and the Sex Discrimination Act 1984 (1990) HREOC concluded that the approach adopted by the Sex Discrimination Act was essentially appropriate but that there was a need for greater accountability to ensure that differentiation was fair and based on accurate and reliable data.

In the area of life insurance, the High Court decision in AMP v. Goulden[60] indicates that State anti-discrimination legislation, so far as it relates to terms and conditions of life insurance, is inoperative under s.109 of the Federal Constitution as being inconsistent with the Commonwealth Life Insurance Act 1945. The High Court held that, despite the fact that the Life Insurance Act

[60] (1986) 160 Commonwealth Law Reports 330

only deals with a restricted range of matters and does not provide protection against discrimination, it showed an intention to allow registered life insurance companies to classify risks and fix premiums according to their own judgment based on actuarial advice and prudent practice. Federal legislative protection against discrimination in this area is therefore particularly necessary.

Superannuation

The Sex Discrimination Act as introduced provided for a complete exemption in relation to superannuation. The Act has now been amended, however, to provide (with a two year phase-in period) that discrimination in terms or conditions of superannuation is unlawful, except for distinctions (similar to those allowed in relation to insurance) which are reasonable and are made on the basis of reliable statistical or actuarial data. Certain addition exemptions are also allowed in relation to vesting and portability of benefits.

Although a concluded view cannot be expressed in this paper, this provision as amended may provide an appropriate model for disability discrimination legislation.

State legislation provides for similar exemptions in relation to superannuation as in relation to insurance.

Sport

The NSW Anti-Discrimination Act (sections 49O and 49ZE) provide for a complete exemption for discrimination on the ground of impairment except for coaching or administration and except for any "prescribed sporting activity" (that is an activity prescribed by the regulations).

Such a blanket exemption, which does not refer or require reference to the requirements of the activity, health and safety or other factors relevant to reasonable accommodation, is not justifiable and is not consistent with the right of people with disabilities to participate in recreational activities.

The Victorian legislation (s.33(3)) and the Western Australian legislation (s.66N) each adopt a model prohibiting discrimination in relation to sport, but exempting distinctions where the person because of impairment is not capable of performing the activity required, or selection for the activity is by a method which is reasonable in relation to skills and abilities. The South Australian legislation (section 81) is similar except that selection procedures are not expressly covered. (Each of these three Acts also explicitly permits reference to disability where a sport is conducted for persons with a particular disability.)

The Victorian and Western Australian legislation appears to afford a suitable

model in this area (read in conjunction with other provisions recommended in relation to reasonable accommodation).

The exemption in the Sex Discrimination Act (section 42) in relation to sport is the subject of ongoing review. However, it is framed by reference to general differences in levels of strength and stamina, and rates of development, between men and women. Given that a different set of considerations apply in relation to disability, the Sex Discrimination Act does not appear to offer an adequate model in this respect.

Combat duties

The Sex Discrimination Act (section 43) provides for an exception in relation to employment of women in the armed forces in positions involving combat duties. This exception (reflecting a reservation made by Australia when ratifying the Convention on the Elimination of All Forms of Discrimination Against Women) is referable to specific concerns held at the time when the Sex Discrimination Act was introduced regarding the role of women in the armed forces.

In relation to disability, it may be argued that all legitimate concerns in relation to combat duties are addressed by provisions permitting distinctions based on the inherent requirements of a job, together with elements permitting reference to health and safety included in the concept of discrimination and of reasonable accommodation. No specific exemption, on this argument, is required.

10.7.2: Other exceptions contained in State legislation

Number of employees:

There are various exceptions in State legislation in relation to employment discrimination, exempting businesses on the basis of the number of persons employed. No such provisions appear in Federal anti-discrimination legislation. In HREOC's view, no exceptions of this type should be included in national disability discrimination legislation.[61]

Any additional difficulties experienced by small enterprises should be able to be accommodated within the general requirements of reasonable accommodation, particularly by including reference to the nature and resources of the enterprise among the factors to be considered in determining whether accommodation involves "unjustifiable hardship", and in any timetable of phasing in of requirements.

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[61] The InterGovernmental Committee on AIDS Discussion Paper HIV/AIDS and Anti-Discrimination Legislation also rejected such exceptions.

Rates of salary, wages or other remuneration and terms and conditions

The South Australian Equal Opportunity Act (section 79) provides that the Act:

> does not render unlawful discriminatory rates of salary, wages or other remuneration payable to persons who have impairments.

Such a blanket exception substantially reduces the protection provided against discrimination in employment and is considerably broader than could be justified by any legitimate purpose.

Any provision designed to protect legitimate training and employment schemes with the purpose of providing opportunities for people with disabilities should be more specifically drawn.

The South Australian provision would appear to permit a lower rate of pay, solely on the basis of impairment, to a person who has an impairment but has the same or a higher level of ability or productivity compared to other workers. It clearly does not require that there be any direct relationship between any difference in abilities or productivity (which may be minor) and the difference in pay rates.

Where different rates of pay are intended to reflect different levels of productivity or ability, these factors should be referred to rather than the fact that a person has an impairment. Differentiation on the basis of differences in ability which are relevant to the job, rather than on stereotypes of disability, would not be unlawful under any properly drafted definition of discrimination. If a specific provision confirming that such differentiation is not discriminatory is necessary, it should require reference to all relevant factors such as training, qualifications, experience and performance as an employee, and any other indicators of ability in relation to the objective requirements of the position, rather than to the person's impairment.

The Western Australian legislation (s.66Q(1)) and the New South Wales legislation (s.49I(2)) permit differences in terms and conditions of employment which are reasonable having regard to any restriction imposed by the person's impairment on their ability to perform work required, and to any services or facilities required in order for them to carry out the work which are not required by other persons.

These provisions in effect present employers with a less "black and white" position in employing people with disabilities, where the disability makes some difference to ability to perform the work, or where costs are involved in providing reasonable accommodation. In effect, these provisions permit the employer to shift an unspecified ("reasonable") amount of the costs involved to the persons with a disability in reduced terms and conditions of employment.

Such provisions may serve in practice to improve access to employment (including by expanding the level of accommodation which would be regarded as "reasonable"). This is at the expense however of equality in terms and conditions of employment. The suitability of these provisions as a model is questionable for a number of reasons.

1. Focussing on the extent to which disability restricts a person's capacity to perform work required gives an incomplete picture of their abilities in comparison with other workers or applicants for employment. An impairment might restrict a person's productivity in a particular situation by (for example) as much as 50%, and yet because of superior training, experience, abilities or other factors his or her productivity might be at or near, or in fact superior to, that of other employees. As with levels of remuneration, any provision permitting differentiation in terms and conditions more generally should refer to levels of ability rather than disability.

2. It may be questioned why accommodation of the needs of people with disabilities justifies an offsetting reduction in terms and conditions of employment when accommodation of at least some needs of other groups (such as workers who are pregnant or have family responsibilities) is not similarly offset.

Consideration of costs to employers or other parties would appear more appropriate to be included in a single test of what constitutes "reasonable accommodation".

Inaccessible premises or vehicles

The Western Australian legislation (section 66(2)) and the South Australian legislation (section 84) provide exceptions in relation to business or other premises, or parts thereof, or vehicles which are inaccessible to persons with an impairment. The exception in relation to premises in Western Australia applies only to premises built prior to adoption of uniform standards in 1985.

Such an exception is not recommended, as it would appear to undercut the duty to afford reasonable accommodation. Where barriers to access cannot be removed without unjustifiable hardship, reasonable accommodation provisions on the model discussed earlier in this paper would not render such barriers unlawful. A blanket exception, however, appears to require no progress towards affording equal access and permits barriers to remain even if unjustifiable hardship is not involved in their removal.

Health and safety

Differentiation based on the objective requirements of protection of the health and safety of a person with a disability or of other persons, in employment and in other areas, should be regarded as not constituting discrimination and as permitted by provisions specifying that accommodation involving "unjustifiable hardship" is not required. That is, the ability to perform work, use a service or participate in an activity without unacceptable risks to self or others should be accepted as part of the inherent requirements of each of these activities. However, in the interests of certainty, legislation dealing with disability related discrimination generally also provides for specific exceptions to deal with issues of health and safety. This is in principle acceptable so long as measures in this area are strictly limited to what is objectively justified, rather than serving as a basis for excessive restrictions on the basis of unfounded fears, preconceptions and prejudices.

Accordingly, differentiation or restrictions based on health and safety concerns should be required to be objectively justifiable, rather than simply based on reasonable grounds, as discussed earlier in relation to work requirements and reasonableness of assessments of ability to fulfil these requirements.

As indicated by the Victorian Law Reform Commission in its review of the Victorian Equal Opportunity Act, exceptions in the interests of health and safety should be subject to a duty to take reasonable measures to reduce the risk of detriment to the health or safety or the person with a disability or other persons.

Specific exceptions for particular areas

State legislation contains a range of exceptions intended to accommodate reasonable considerations of cost, inconvenience and the rights of others, or other problems in providing equal access or opportunity in particular areas such as education, accommodation, or the operation of clubs. In principle, it appears preferable that provisions relating to "reasonable accommodation" and "unjustifiable hardship" should be designed to cover these areas, rather than there being separate criteria for each area.

10.8: REDRESS AND ENFORCEMENT

10.8.1: Who should be able to complain

The most obvious means for a possible instance of unlawful discrimination to be brought before anti-discrimination authorities is for the person affected to lodge a complaint on their own behalf. It is clear, however, that this should not be the only means available.

Existing State anti-discrimination legislation contains various restrictions on

how possible unlawful discrimination may come to be investigated, which should not be reproduced in national legislation.

The Sex Discrimination Act and the Racial Discrimination Act, although offering a more suitable model, also have a number of limitations which would need to be addressed in disability discrimination legislation.

Complaints under the Sex Discrimination Act and the Racial Discrimination Act may be made by:

- one or more persons aggrieved by an act, on their own behalf or on behalf of themselves and others aggrieved by the same act; or
- by a trade union of which such a person or persons is or are members.

The provision for representative complaints is important. However, none of the people directly affected by an action may be in a position, or have the resources, to make a complaint. This is particularly relevant in institutional settings. Provision is need, therefore, for representative complaints to be made by a person who is not within the group directly affected by the action (that is, who is not a "person aggrieved").

Similarly, the provision for complaints by trade unions on behalf of members is important but insufficient. In many areas union coverage of, and responsiveness to, people with disabilities in employment, or who are seeking to enter the labour market, remains partial at best. Moreover, while the principal concern of trade unions is with employment and related areas, the legislation should cover a considerably wider range. Other representative and advocacy groups and organisations should therefore also be able to lodge complaints. Funding for advocacy services would also contribute greatly to the effectiveness of such legislation.

The provisions of the Human Rights and Equal Opportunity Commission Act which refer to complaints do not specify any restriction on who may make a complaint, Complaints under that Act therefore can be and are made by organisations or by individuals on behalf of another person. It would be preferable, however, for enforceable legislation to make clear that this is permitted, to avoid any potential legal dispute.

The Racial Discrimination Act, the Sex Discrimination Act and the Human Rights and Equal Opportunity Commission Act each permit the relevant Commissioner to initiate an inquiry into a matter him or herself, without a formal complaint having been made. This power should be included in national disability discrimination legislation.

Existing Federal legislation provides for an investigation to be discontinued if the person alleged to have been discriminated against does not wish the

investigation to proceed. A similar provision should be included.

10.8.2: Enforcement provisions

For the reasons set out earlier in this paper, national disability discrimination legislation should retain the conciliation and wider policy functions which the Human Rights and Equal Opportunity Commission already has in this area under existing legislation, with the addition of enforceable remedies which are effective and accessible.

Although the issue of appropriate enforcement mechanisms for Federal anti-discrimination legislation generally is presently under review, a number of comments can be made in this paper.

The existing model under the Racial Discrimination Act and the Sex Discrimination Act provides (if a matter cannot be settled by conciliation) for hearing and determination by the Commission, with provision for enforcement proceedings in the Federal Court if the Commission's determination has not been complied with.

The Commission's hearing and determination processes, although more formal (and in some cases more time consuming and expensive) than the conciliation process, offer a considerably cheaper and more accessible model than if complainants were required to go directly to the Federal Court.

However, there is considerable duplication between the Commission hearing process and the Federal Court.

Some of this duplication may be unavoidable, due to constitutional limitations on how far an administrative body such as the Human Rights and Equal Opportunity Commission may be given judicial power. Clearly, however, the need for the Federal Court to reconsider matters already determined by the Commission is to some extent the result of interpretation of the drafting of the existing legislative provisions.

In response to the Report of the Labour and Disability Workforce Consultancy, the Human Rights Commissioner indicated that, within the restrictions of existing interpretations of the Constitution, Commission determinations could be given greater effect in a number of ways, including by requiring the Federal Court to accept findings and determinations of the Commission on at least a prima facie basis. Consideration should be given to these and other means of avoiding duplication in consideration of cases under national disability discrimination legislation.