The Disability Discrimination Act: Ensuring Rights of Australians With Disabilities, Particularly Hearing Impairments

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INTRODUCTION

This article will suggest means by which the Australian *Disability Discrimination Act* 1992 (Cth) ('*DDA*') can and should be interpreted and implemented to provide maximum protection to persons with hearing-impairments. Prior to addressing this primary issue, however, some brief background is essential.

The *DDA* was enacted in 1992 'to eliminate, as far as possible,'[1] discrimination against people with disabilities with respect to the following areas: employment; education; accommodation (ie housing, hotels, motels); the provision of goods, facilities and services; land transactions; transportation; premises; administration of Commonwealth laws and programs; and implementation of existing laws.[2] The premise of the Act is that people with disabilities have 'the same fundamental rights,' and 'the same rights to equality before the law'[3] as others. A Disability Discrimination Commissioner was appointed to promote, implement and enforce the law, with the assistance of staff hired by the Commissioner,[4] under the auspices of the Human Rights and Equal Opportunity Commission (HREOC).

The *DDA* was based on the *Americans with Disabilities Act* ('*ADA*'),[5] which was enacted in 1990. The *DDA* also followed passage of laws enacted in every state and territory except Tasmania between 1977 and 1992.[6] The national legislation was intended in part to provide a uniform law prohibiting

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1 *DDA* s 3(a).

2 *DDA* ss 3(a), 20–8.

3 *DDA* ss 3(b),(c).

4 *DDA* s 113.

5 The *ADA* is found at 42 USCA (West Supp 1991) ss 12101–12113. For an explanation of the fact that the *DDA* was based on the *ADA*, see eg, E Hastings, 'The Disability Discrimination Act, 1992: Its Impact on Tertiary Institutions' (1993) 9 *Socio-Legal Bulletin*, 36, 38; The National Centre for Socio-Legal Studies, 'Issues Paper: Disability Standards Under the Disability Discrimination Act', prepared by the Disability Discrimination Commissioner for the *DDA* Disability Standards Working Group, HREOC, November 1993, 1, 12–15 (hereafter 'Issues Paper'). See also *Parliamentary Debates*, Senate (Cth), 7 October 1992, 1309–15 (remarks of Senator Tambling (Northern Territory — Deputy Leader of the National Party of Australia)), 1317–19 (remarks of Senator Lees (South Australia — Deputy Leader of the Australian Democrats)).

6 *Anti-Discrimination Act* 1977 (NSW); *Equal Opportunity Act* 1984 (Vic); *Anti-Discrimination Act* 1991 (Qld); *Equal Opportunity Act* 1984 (SA); *Equal Opportunity Act* 1984 (WA); *Discriminaton Act* 1991 (ACT); *Anti-Discrimination Act* 1992 (NT).

discrimination on the basis of disability, and to eliminate loopholes that existed, or arguably existed, in state and territorial legislation.[7]

The processes by which the *ADA* and *DDA* were passed were quite different. The American law was enacted as a result of a grass roots effort by people with disabilities and their advocates all over the United States. People with disabilities demanded the same rights and protections given to members of racial minorities and women under the *United States Civil Rights Act*.[8] A draft law was developed by the United States National Council on Disability, and Congress held about 63 public hearings in every state in the nation to discuss the proposed law.[9] There was much publicity about the law,[10] and much opposition from some quarters — such as small businessmen, broadcasters, insurance companies, transportation providers, some religious entities and numerous other special interest groups. Negotiations between all groups were intense; lobbying efforts were equally intense. People with disabilities and their advocates marshalled their forces to work together to educate the public, to focus the issue as one of *civil rights* rather than as a plea for 'charitable' assistance. Eventually compromises were made by all sides, and, after a series of modifications, additions and deletions, the final law was passed.[11]

The Australian law, unlike the American law, was initiated and passed by the Commonwealth government on its own. No public hearings were conducted and people were — and still are — generally unaware of the law. Thus, while a few people with disabilities provided some input, special interest

[7] See eg, M C Tyler, 'Law and Change — The Disability Discrimination Act 1992: Genesis, Drafting and Prospects' (1993) 19 MULR 211, 220. For an article discussing problems with specific state legislation, see H Astor, 'Discrimination in Employment on the Ground of Physical Impairment' (1988) 1 AJLL 79 (discussing 'chronic problems' with respect to the *Anti-Discrimination Act* 1977 (NSW)).

[8] 42 USCA (1981), ss 2000a-a-6, 2000e-e-17.

[9] See eg, L P Weicker, Jr, 'Historical Background of the Americans with Disabilities Act' (1991) 64 *Temple LR* 387; T M Cook, 'The Americans with Disabilities Act: The Move To Integration' (1991) 64 *Temple LR* 393.

[10] Most, if not all, major newspapers in the United States published several articles about the *ADA*. While the volumes of articles are too lengthy to mention, a few examples are: *Newsday*, 9 September 1989, 2; *Chicago Tribune*, 8 September 1989, section 1, 1; *The New York Times*, 29 August 1989, 19.

[11] By way of example, the initial draft of the *ADA* required employers to provide reasonable accommodations for employees with disabilities unless such accommodations would 'threaten the existence of the [employer's] business' (See Hearings Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped, 100th Cong, 1st Sess 90 (9, 10, 16 May and 22 June, 1989)). Proponents of the business sector termed that requirement the 'bankruptcy provision'. The Act was thus subsequently altered to provide that employers need not make accommodations if 'undue hardship' will result. (42 USCA (West Supp 1991) s 12112(b)(5)(A)). Another example involves television broadcasters. The initial draft of the *ADA* required television broadcasters to close-caption television programs for viewers with hearing-impairments (pursuant to which decoders would portray written captions setting forth the audio portions of television shows). That section was deleted from the final Act in the spirit of compromise. (See generally, B P Tucker and B A Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (1990 and yearly supplements) 23:4).

groups (particularly those who might oppose portions of the law) had no chance to provide input — there was no negotiation process.[12]

The difference between the manner in which the two laws were passed is significant. Under the Australian law, disability standards are to be promulgated with respect to implementation of the *DDA* in areas of employment, education, accommodation, transportation and administration of Commonwealth laws and programs.[13] (For unknown reasons, the *DDA* does not require disability standards to be promulgated with respect to access to premises or goods, services and facilities. The Disability Commissioner views this as an oversight; the Commissioner intends to work to amend the law to remedy that oversight.[14]) Presumably, opposition from special interest groups will surface when the standards are being drafted. Thus, people with disabilities and their advocates will be in the awkward position of having to negotiate and compromise with respect to the promulgation of standards *after* the law has been passed. Moreover, the negotiations must take place in a climate that views accommodations for people with disabilities as a form of charity rather than as a necessary means of providing equal rights. The Australian public, unfortunately, has *not* been educated about the concept of civil rights for people with disabilities.

The reason this is so important is that the disability standards promulgated under the *DDA* (unlike the regulations promulgated under the *ADA*) will have the force of law. It will be illegal to violate a disability standard;[15] conversely, a person or entity that complies with a disability standard will not violate the *DDA*.[16] Thus, it is imperative that people with disabilities and their advocates work together as a cohesive body to ensure that the standards maximise the rights to be provided to people with disabilities. This will first necessitate promotion of an environment in which equality for disabled people is viewed as an *entitlement*, rather than as an issue of charity.

Another reason that the difference in the manner in which the two laws were passed is so important has to do with implementation of the law. The bulk of the employment section of the American *ADA*, for example, became effective in July of 1992 (at that time employers having more than 25 employees became subject to the *ADA*).[17] Between July 1992 and January 1994, over 16 000 complaints alleging employment discrimination on the basis of disability were filed with the United States Equal Employment Opportunity Commission (EEOC), which is the federal agency with whom *ADA* employment discrimination claims must initially be filed.[18] The EEOC

[12] Personal communications between the author and Elizabeth Hastings, Australian Disability Discrimination Commissioner. See also, Tyler (fn 7) supra.
[13] *DDA* s 31.
[14] Personal communications between the author and Elizabeth Hastings, Disability Discrimination Commissioner, and between the author and David Mason, a member of Commissioner Hastings' staff.
[15] *DDA* s 32.
[16] *DDA* s 34.
[17] 42 USCA (West Supp 1991) ss 12111 note, 12111(5).
[18] See eg, *US Equal Employment Opportunity Commission News Release* 12 January 1994.

expects 18 000 cases to be filed during fiscal year 1994.[19] And those are just employment cases. Many thousands of cases were also filed under the remaining sections of the *ADA*, alleging discrimination with respect to access to goods, facilities and services, transportation, postsecondary education, and so forth. The United States Department of Justice received approximately 5000 complaints between 1992 and 1994,[20] about half under Title II of the Act, which covers accessibility of government facilities and programs,[21] and half under Title III, which covers accessibility of privately owned and operated places of public accommodation.[22] Since complaints under Titles II and III do not have to be filed with the Department of Justice, but can be filed directly in court,[23] there is no way of knowing how many thousands of complaints have been filed under those titles.

During the first year after the Australian *DDA* became effective, however, the Disability Discrimination Commissioner (with whom *all* complaints under the *DDA* must be initially filed)[24] received a total of approximately 220 complaints — covering *all* aspects of the *DDA*.[25] While this vast discrepancy is presumably due in part to cultural differences between Americans and Australians (including the tendency of Americans to litigate at the drop of a hat), and in part due to population differences,[26] it is primarily due to the fact that most people with disabilities in Australia are not familiar with the *DDA* and have no idea what they are entitled to under the Act. Education of people with disabilities is *sorely* needed.

Further, it is not only people with disabilities who must be educated; everyone to whom the *DDA* applies must be educated. Immediately after the *ADA* was passed American employers, owners and operators of places of public accommodation and transportation systems, educational institutions and others began making necessary modifications in their enterprises to comply with the law. That has not yet happened under the *DDA*. The Disability Discrimination Commissioner has hired one person to begin the education process,[27] and the HREOC has funded a few people in each state to begin

[19] Ibid; personal communications between the author and members of the EEOC. Compare 4 NDLR Issue 20, 27 March 1994, 3, 4.

[20] Personal facsimile to the author from the Public Access Section of the US Department of Justice (19 May 1994), stating that as of 12 May 1994 Department of Justice received 2367 complaints under Title III and 2481 complaints under Title II. See also, 'Enforcing the *ADA*, A Status Report from the Department of Justice' 4 April 1994.

[21] Title II of the *ADA* is found at 42 USCA (West Supp 1991) ss 12131–12134.

[22] Title III of the *ADA* is found at 42 USCA (West Supp 1991) ss 12181–12189. The definition of the term 'public accommodation' is found infra in the text to fns 137, 138.

[23] See 42 USCA (West Supp 1991) s 12188(a) (Title III), and S Rep 101–16, 101st Cong, 1st Sess, 30 August 1989, 58 (Title II).

[24] See generally *DDA* Part IV.

[25] Personal communications between the author and Elizabeth Hastings, Disability Discrimination Commissioner, and between the author and David Mason, a member of Commissioner Hastings' staff.

[26] The population of the United States is approximately 14 times the population of Australia. See *World Almanac and Book of Facts* (1994) 361, 739 (stating that the population of the United States is 248 709 873 and the population of Australia is 17 576 000).

[27] Personal communications between the author and Elizabeth Hastings, Disability Discrimination Commissioner.

educating people about the law.[28] But, to date, few, if any, entities appear to be worrying about compliance with the *DDA*.[29]

Unfortunately, the HREOC has to date done very little to enforce the *DDA*. The Disability Discrimination Commissioner and her staff have been able to resolve only a handful of the cases filed. This appears to be primarily due to lack of funds. The Commonwealth government has allocated the Disability Discrimination Commissioner a 1994–5 budget of $500 000, of which $205 000 must be utilized for salaries for the Commissioner and her staff (three policy people, one public education person and two people to process complaints).[30] A substantial portion of that money must also be spent to remedy the fact that people who live in Victoria and Western Australia do not have access to the administrative process under the *DDA*.[31]

According to the Australian Bureau of Statistics, there are approximately 3.2 million people with disabilities in Australia (18% of the population),[32] and that figure may not include many people covered by the *DDA*, such as people with cancer and heart disease, and clearly does not cover associates of people with disabilities, who are also protected from discrimination under the *DDA*.[33] Yet, only $500 000 has been allocated to implement and enforce the entire *DDA* during 1994–5.[34]

The third result of the difference in the manner in which the American and Australian laws were enacted has to do with the process of developing guidelines under the two Acts. Under the *ADA*, federal agencies were given one year to promulgate regulations implementing the various sections of the *ADA*.[35] For example, the EEOC promulgated regulations under Title I — the employment section;[36] the Department of Justice promulgated regulations under

[28] The following agencies have been funded to some (and differing) extents to provide legal advocacy support services in relation to the *DDA*: Welfare Rights Legal Centre, Canberra, ACT; NSW *DDA* Legal Advocacy Service (to be established by the NSW Community Legal Secretariat, Redfern NSW); Darwin Community Legal Service, Darwin, NT; Cairns Community Legal Centre, Cairns, Qld; Norwood Community Legal Centre, Norwood, SA; Northern Community Legal and Welfare Rights, Launceston, Tas; Federation of Community Legal Centres, Fitzroy, Vic; Sussex Street Community Law Service, Perth, WA.

[29] David Hall, Chief Executive Officer of the Victorian Deaf Society, told the author that several employers informed him that their solicitors had reviewed the *DDA* and the solicitors informed them that the Act does not require any action on their part, at least until the disability standards are drafted. A student in the author's Comparative Disability Law class at Monash University in the spring of 1994 planned to write a paper discussing what Melbourne employers were doing to comply with the *DDA*. Unfortunately, none of the employers the student spoke with were even aware of the *DDA*.

[30] Personal communication between the author and Elizabeth Hastings, Disability Discrimination Commissioner.

[31] Personal communication between the author and Disability Discrimination Commissioner Elizabeth Hastings. As of the date of this writing, there are no offices of the HREOC in Victoria or Western Australia, and thus residents of those states filing complaints under the *DDA* must file their complaints in Sydney.

[32] Australian Bureau of Statistics, 'Disability, Ageing and Carers Australia, 1993, Summary of Findings' (1993) 1.

[33] See eg, *DDA* ss 15(1), (2); 16(1), (2); 17(1); 18(1), (2); 19(1); 20(1), (2); 21(1); 22(1), (2); 23(1); 24(1); 25(1), (2); 26(1); 27(1), (2); 28(1); 29.

[34] See text at fn 31 supra.

[35] See eg, 42 USCA (West Supp 1991) ss 12116, 12134, 12149, 12164, 12186.

[36] 29 CFR (1993) Part 1630.

both Title II — covering discrimination by state and local government entities,[37] and Title III — covering discrimination by owners and operators of places of public accommodation;[38] and the Department of Transportation promulgated regulations with respect to the transportation provisions.[39] Thus, several different sets of voluminous, detailed regulations were drafted during that year. In addition, at least three Technical Assistance Manuals were promulgated which provide detailed examples to assist the public in understanding the regulations.[40]

Conversely, the *DDA* does not set a time frame in which the disability standards must be drafted, and the Disability Discrimination Commissioner assumes that it will be several years before this is accomplished.[41] At the moment a 'working party' has been established by the federal Attorney-General's office, composed of representatives from six groups (including the Attorney-General's office, the HREOC, the federal Department of Health and Human Services and disability organisations).[42] At the time of writing this group was only informally meeting, and had no formal working plans.[43] The disability community has formed the National Coalition on Disability Standards (NCDS), which has drafted a discussion paper outlining suggestions for forming committees and asking for input from members of the disability community.[44] This is all very informal, however. The Commonwealth government, having passed the *DDA*, does not appear to be in any hurry to go about implementing it. In fact, no one, including the Disability Discrimination Commissioner, even knows *who* is responsible for drafting the standards.[45]

Despite all of these problems, the *DDA* is an excellent law, that has the

[37] 28 CFR (1992) Part 35.

[38] 28 CFR (1992) Part 36.

[39] 49 CFR (1992) Part 37.

[40] See eg, EEOC, 'A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act' 28 January 1992 ('EEOC Technical Assistance Manual'); Department of Justice, Title II Technical Assistance Manual; Department of Justice, Title III Technical Assistance Manual.

[41] Personal communications between the author and Elizabeth Hastings, Disability Discrimination Commissioner.

[42] Personal communications between the author and Michael White, Executive Director, Disabled Peoples' International (Australia) Limited. Mr White is serving on the Committee of the Attorney-General.

[43] Ibid.

[44] National Coalition for the Development of the *DDA* Standards ('NCDS') 'Woe or Go! A Discussion Paper on the Disability Discrimination Standards' March 1994. Membership of NCDS is made up of the following national organizations which represent consumers:
Australian Association of the Deaf;
Australian Carers Association;
Australian Federation of AIDS Organizations;
Australian Psychiatric Disability Coalition;
Disabled Peoples' International (Australia);
Head Injury Council of Australia;
National Council on Intellectual Disability; and
National Federation of Blind Citizens of Australia.

[45] Personal communications between the author and Elizabeth Hastings, Disability Discrimination Commissioner, and between the author and Michael White, Executive Director, Disabled Peoples' International (Australia) Limited.

potential to enable people with disabilities to become fully participating members of Australian society, *if* the disability standards are properly drafted, and *if* the Act is interpreted in the manner in which it was intended to be interpreted. It is of utmost importance that Australians with disabilities and their advocates be aware of the *DDA*'s potential, and that members of individual disability communities and their advocates join forces with other disability groups to ensure that the disability standards provide maximum protection for *all* Australians with disabilities.

People with a specific disability will primarily be interested in ensuring that the disability standards provide maximum protection for persons with that disability. Each 'group' of persons with disabilities, therefore, will have its own priorities (although in some instances the priorities of different groups will be similar).[46] It is crucial for different groups of people with disabilities and their advocates to identify the protections required to accommodate people with that particular disability. It is also crucial, however, that the different groups marshal their forces to speak with one voice when lobbying for standards that will further the objectives of the *DDA*. Where conflicting needs are at issue, advocates for different groups should make every effort to reach compromises among themselves before entering into comprehensive

[46] It should be noted that the *DDA*, like the *ADA*, covers a broad range of people with disabilities. Section 4 of the *DDA* provides that the term 'disability' with respect to a person means:

(a) total or partial loss of the person's bodily or mental functions; or
(b) total or partial loss of a part of the body; or
(c) the presence in the body of organisms causing disease or illness; or
(d) the presence in the body of organisms capable of causing disease or illness; or
(e) the malfunction, malformation or disfigurement of a part of the person's body; or
(f) disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
(g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;

and includes a disability that:

(h) presently exists; or
(i) previously existed but no longer exists; or
(j) may exist in the future; or
(k) is imputed to a person.

This definition is similar to the definition of a person with a disability under the *ADA*. The *ADA* provides that:

the term 'disability' means, with respect to an individual—

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
(B) a record of such an impairment; or
(C) being regarded as having such an impairment

(42 USCA (West Supp 1991) s 12102(2)).

There are some differences between the two definitions. In some respects the *DDA* definition is much broader. For example, the *DDA* does not contain the substantial limitation of a major life activity requirement, although the Act is likely to be interpreted as implying such a requirement. By way of another example, the *ADA* has been interpreted as not protecting persons with a genetic predisposition to illness or disease. See eg, M A Rothstein, 'Genetic Discrimination in Employment and the Americans with Disabilities Act' (1992) 29 *Houston Law Review* 23. The *DDA*, however, would seem to protect such individuals, since it protects persons who are discriminated against due to the 'presence in the body of organisms capable of causing disease or illness'.

negotiations with appropriate officials. While this may not always be possible, minimising differences to the maximum extent feasible, and presenting a unified front, is crucial.

This article is intended to provide a guideline for accomplishing the first step: identifying the protections required for people with a specific disability. The article focuses on the needs of individuals with hearing-impairments in Australia. It outlines the protections provided to people with hearing-impairments under the *ADA*, and explains how similar — or greater — protections should be provided under the *DDA* to fulfil the purposes of that Act.[47]

I EMPLOYMENT

The following basic principles and rules apply under both the *ADA* and the *DDA* with respect to the prohibition of employment discrimination.

A Affirmative Action Not Required

Employers governed by both the *ADA*[48] and *DDA*[49] must refrain from discriminating on the basis of disability with respect to *all* aspects of employment. Employers are *not* required to affirmatively seek to hire or promote people with disabilities, however; preference toward persons with disabilities is *not* required. If two equally qualified persons apply for a job, one disabled and one not disabled, there is no requirement that the employer hire the applicant with a disability, as long as the reason that applicant is not hired is not due to his or her disability. It is important, however, that the rejected applicant's disability plays *no* part in the decision to reject that applicant. The *DDA* provides that an employment action will be considered to be based on a person's disability if the disability is only one of two or more factors leading to the action, even if the person's disability is not a dominant or substantial reason for the action.[50] This provision is one instance in which the *DDA* is more favourable to people with disabilities than the *ADA*. Under the *ADA*, to constitute prohibited discrimination a person's disability would probably have to be a motivating or substantial factor in the employment decision.[51]

[47] Clearly, the *ADA* regulations are to be considered, and followed in at least some respects, when drafting the disability standards. See eg, 'Issues Paper' (fn 5) supra.
[48] See generally, 42 USCA (West Supp 1991) ss 12111–12117.
[49] See generally, *DDA* ss 15–21.
[50] *DDA* s 10.
[51] See generally, Tucker and Goldstein, op cit (fn 11) 3:13–14, 20:17–18.

B Direct and Indirect Discrimination

Both the American and Australian laws prohibit direct *and* indirect discrimination.[52] Thus, under the *ADA* employment actions that have a discriminatory effect on persons with disabilities are prohibited, unless they are shown to be job related and consistent with business necessity, *and* it is shown that performance of the required conduct cannot be accomplished with reasonable accommodation.[53] Under the *DDA* an action that has an indirect effect on a person with a disability is impermissibly discriminatory if it 'is not reasonable having regard to the circumstances of the case.'[54] These two provisos should be construed in a similar manner. People with disabilities should ensure that the *DDA* disability standards specify what this provision means and provide examples.

By way of illustration, a requirement that all employees must be able to use the telephone will have a discriminatory effect on many people with hearing-

[52] See 42 USCA (West Supp 1991) s 12112(b)(3)(A) (*ADA*); *DDA* s 6.

[53] 29 CFR (1993) s 1630.15(c).

[54] *DDA* s 6(b). Several cases decided under state anti-discrimination laws have considered the issue of whether an action that has an indirect affect on persons with disabilities is reasonable having regard to the circumstances of the case. For example, in *Byham* v *Preston City Council* (1991) EOC 92-377 (Victoria EOB, 27 September 1991), the EOC Board held that the failure of the Preston City Council to install a lift to allow persons with mobility impairments to attend meetings of the Council held at the council chambers, which could only be accessed by stairs, constituted impermissible indirect discrimination under the *Equal Opportunity Act* 1984 (Vic). The Board determined that the refusal to install a lift costing $150 000 was not reasonable in the circumstances, since the building at issue was a public building substantially maintained by public monies. Council meetings are the one available mechanism to determine important municipal decisions, and every ratepayer has the basic right to have the ability to present his or her views to the Council through an established mechanism. The Board concluded that the Council's efforts to address the concerns of persons unable to climb the stairs — by having such persons meet in a room on the ground floor and relay their concerns to a messenger — were insufficient. The Board further determined that future plans for the Council to relocate were too speculative to ensure alleviation of the situation, and that there were two possible sites in the building at which a lift could be installed without major disruption.

Another illustrative case is *Waters* v *Public Transport Corporation* (1991) 173 CLR 349, which also arose under the *Equal Opportunity Act* 1984 (Vic). That case involved challenges to proposed changes to the Victoria public transport system, including: (1) a new ticket system for trams under which 'scratch tickets' were required to be purchased at retail shops and scratched off by the traveller; and (2) the removal of conductors from some trams. Because some people with disabilities could not use scratch tickets and some could not ride trams without conductors, the changes had an indirect discriminatory effect on persons with disabilities. The Victorian Equal Opportunity Board ruled that the proposed changes violated the law. The Supreme Court of Victoria apparently disagreed, and dismissed the complaint. The High Court reversed the decision of the Supreme Court, and ordered that the case be remitted to the Equal Opportunity Board to determine whether the proposed changes were reasonable under the circumstances as a matter of statutory interpretation. The members of the Court disagreed with respect to the factors that should be considered when determining if the changes were reasonable under the circumstances of the case. The majority, however, held that under the Victorian Act all relevant factors, including economic and financial considerations, should be taken into account. Similarly, in *Woods* v *Wollongong City Council & Ors* (1993) EOC 92-486 (New South Wales Equal Opportunity Tribunal, 17 March 1993), the Tribunal held that under the *Anti-Discrimination Act* 1977 (NSW) *all* circumstances of the case must be considered. For a comprehensive analysis of the subject of indirect discrimination, see R Hunter, *Indirect Discrimination in the Workplace* (1992).

impairments, even if the employer has no intent to discriminate. If the employer can show that the nature of the employment *requires* telephone use by all employees, such as in the case of a telephone sales business, the telephone policy will satisfy the 'job related' and 'business necessity' tests under the *ADA*, or the 'reasonableness' test under the *DDA*, and will be valid despite its discriminatory effect. If, however, the nature of the employer's business would not require telephone use by *all* employees, the policy would be discriminatory and illegal. Moreover, even if the telephone policy were found to be job related and to satisfy the business necessity or reasonableness tests, the policy would have to be modified to the extent that it would be possible to permit an employee with a hearing-impairment to perform telephone tasks via use of an interpreter or a 'TTY' and relay service.[55]

C Coverage

The *DDA* prohibits employment discrimination by all employers except a person who hires another person to perform domestic duties on the premises of his or her residence.[56] This includes obligations to refrain from discriminating against commission agents[57] or contract workers.[58] Partnerships of three or more persons cannot refuse to allow a person with a disability to become a member or discriminate in the terms or conditions of the partnership.[59] Qualifying or certifying bodies (ie, those who license or certify persons for professions or trades), may not discriminate on the basis of disability.[60] Registered organizations under the *Industrial Relations Act* 1988 (Cth) must also refrain from such discrimination,[61] as must employment agencies.[62] With a few differences, this is analogous to the *ADA*. One difference of some significance is that the *ADA* covers only employers having 15 or more employees,[63] while the *DDA* covers all employers, regardless of the number of employees.[64]

[55] A TTY is a typewriter telephone for hearing and/or speech-impaired people. When using a TTY, the telephone receiver is placed into two headset cups (similar to a modem) on a machine that resembles a small typewriter with a video screen and/or a paper printout. The TTY user types a message on a keyboard, which is relayed to a party on the other end of the line with a similar device. The receiver returns his or her message by typing it to the sender and the conversation proceeds via typewriter and video screen or printout. Because most hearing people do not have TTYs, a relay service is required to allow TTY users to communicate with non-TTY users. Thus, the TTY user calls a relay service, and a relay operator answers via TTY and places the call to the non-TTY user (or vice versa). The operator then relays messages back and forth between the TTY and non-TTY users, typing messages for the TTY user and speaking messages for the non-TTY user.

[56] *DDA* s 15.

[57] *DDA* s 16.

[58] *DDA* s 17.

[59] *DDA* s 18.

[60] *DDA* s 19.

[61] *DDA* s 20.

[62] *DDA* s 21.

[63] 42 USCA (West Supp 1991) s 12111(5).

[64] *DDA* s 15. The *ADA* also provides that a religious entity 'may require that all applicants and employees conform to the religious tenets' of the entity (42 USCA (West Supp 1991) s 12113(c)(2)), while the *DDA* does not contain a similar exemption. Further, under the *ADA* the term 'employer' does not include the United States or a private membership

D Reasonable Adjustments

Under the *ADA*, employers must make 'reasonable accommodations' for 'otherwise qualified' people with disabilities.[65] Under the *DDA*, employers must make 'reasonable adjustments' to accommodate people with disabilities.[66] The two concepts are the same. 'Reasonable accommodations' or 'reasonable adjustments' include modifications or adjustments to the employment setting that will allow a person with a disability to perform the 'essential functions'[67] or 'inherent requirements'[68] of the job — to the extent that such modifications or adjustments will not cause the employer to suffer 'undue hardship'[69] or 'unjustifiable hardship'[70] or require the employer to 'fundamentally alter' the nature of the business.[71]

Reasonable accommodations/adjustments may include any accommodations appropriate to a given situation. The *ADA* lists specific examples, including (but not limited to):

(a) job restructuring — by reallocating or redistributing non-essential job functions (such as having an office worker with a hearing-impairment sort the mail or file while another clerical worker answers infrequent telephone calls);

club that is exempt from ordinary tax rules (42 USCA (West Supp 1991) s 12111(5)(B)). The *DDA* does not contain similar exemptions.

In addition, the *DDA* covers both Commonwealth and state employers, as well as private employers. The *ADA*, however, does not cover federal employers (although federal employers are prohibited from discriminating on the basis of disability pursuant to s 501 of the *Rehabilitation Act*, 29 USCA (1991) s 791).

[65] 42 USCA (West Supp 1991) ss 12112(b)(5)(A), (B).

[66] See generally, *DDA* ss 5, 15(4), 16(3)(b), 17(2)(b), 18(4)(b). See also, Human Rights and Equal Opportunity Commission Consultation Draft 'The Disability Discrimination Act 1992, A Guide to the Act, Employment and Related Issues', 17 December 1993, ss 4.2.2, 6, pp 11, 22–3 ('HREOC Consultation Draft').

[67] This terminology is used under the *ADA*. See 42 USCA (West Supp 1991) s 12111(8).

[68] This terminology is used under the *DDA*. See *DDA* ss 15(4)(a); 16(3)(a); 17(2)(a); 18(4)(a); 19(2); 21(2). For a discussion of the 'inherent function' requirement, see generally, HREOC Consultation Draft, op cit (fn 66) s 5, pp 17–21.

[69] This terminology is used under the *ADA*. See 42 USCA (West Supp 1991) s 12112(5)(A).

[70] This terminology is used under the *DDA*. See *DDA* ss 15(4)(b); 16(3)(b); 17(2)(b); 18(4)(b). The definition of 'unjustifiable hardship' is found in s 11 of the Act. For a broader discussion of this exemption see the HREOC Consultation Draft, op cit (fn 66) s 7, pp 24–6. Note that the unjustifiable hardship exemption does not apply to employment agencies or certifying bodies. All the employment agency or qualifying body has to do is determine whether a disabled person can perform the inherent functions of the job at issue with or without the provision of reasonable adjustments. The unjustifiable hardship issue can only be raised by the prospective employer who will be providing the reasonable adjustment.

[71] The 'fundamental alteration' exemption has been implied under s 504 of the *Rehabilitation Act* 29 USCA (West Supp 1990) s 794, upon which the *ADA* was premised. See *Southeastern Community College* v *Davis* (1979) 442 US 397, 99 S Ct 2361.

The regulations promulgated by the EEOC under the employment section of the *ADA*, Title I, recognise this exemption in principle when noting that the impact of the accommodation upon the employer's business must be considered when determining whether an accommodation/adjustment would be considered reasonable. See 29 CFR (1992) s 1630.2(p)(2)(v). The HREOC appears to interpret the *DDA* employment sections in a similar manner. See generally, HREOC Consultation Draft, op cit (fn 66) s 5, pp 17–21.

(b) reassignment to an equivalent vacant position when accommodation within an employee's current job cannot satisfactorily be made (such as reassigning a receptionist who becomes hearing-impaired and unable to answer the phone to a *vacant* position as a file clerk. An employer has no obligation to create a new position for an employee who becomes disabled or to promote the employee with a disability as an accommodation);
(c) acquisition or modification of equipment or devices (such as a TTY, amplifier, or assistive listening device);
(d) modification or adjustment of examinations, training materials or policies (such as providing written rather than oral examinations or training materials for persons with hearing-impairments); and
(e) the provision of qualified interpreters.[72]

The *DDA* does not list suggested reasonable adjustments. It is imperative that the disability standards do so, and that the list includes interpreters for persons with hearing-impairments.[73] The standards must also note that individualism is the key, and that the adjustments needed will differ in each case.[74]

[72] 42 USCA (West Supp 1991) ss 12111(9)(A), (B); 29 CFR (1992) s 1630.2(O)(2). See generally, Tucker and Goldstein, op cit (fn 11) 20:22–4. Under the *ADA* a 'qualified' interpreter need not necessarily be a *certified* interpreter. In Australia interpreters may be certified by the National Accreditation Association for Translators and Interpreters. Presumably, however, the *DDA* will not be interpreted as requiring use of certified interpreters, because in some areas certified interpreters who are able to converse in the chosen communication mode of the individual with a hearing-impairment may not be available.

Interpreters for persons with hearing-impairments may be fluent in sign English, in Australian Sign Language ('Auslan') (a language of its own with its own syntax and grammar), or in a variety of combinations of the two. Moreover, a sign language interpreter must be able to interpret *at the language level* of the deaf client. In addition, some interpreters are oral interpreters who, rather than signing, silently mouth the words of a speaker for the benefit of a deaf lipreader who (due to a variety of factors, such as distance) is not able to lipread the speaker.

[73] Many people who are deaf are employed in positions where interpreters are required to ensure effective communication. The author, for example, an attorney and law professor, is deaf, and utilizes an oral interpreter on the telephone, in large classes, in court, at depositions, and so forth.

[74] Several cases decided under state laws prohibiting discrimination on the basis of disability have noted that individualism is the key to determining what adjustments are reasonable. See eg, *Vanderhorn* v *VYMP International Pty Ltd Known As Artflo Design* (1992) EOC 92–402 (Victoria EOB, 15 November 1991) (an employer, a small company with ten employees, improperly dismissed a 'Person Friday' with a hearing-impairment after the latter evidenced difficulty hearing callers on the telephone; the employer did not meet its obligation to ensure that adequate telephone assistance was provided to the employee); *Madafferi* v *City of Northcote* (1993) EOC 92–512 (Victoria EOB, 19 July 1993) (an employer impermissibly discriminated against an applicant with a hip injury and resulting limp by refusing to employ the individual due to his disability; the employer's method of assessing the applicant as unemployable did not take into account the applicant's actual and individual medical, personal and work history); *O'Neill* v *Burton Cables Pty Ltd* (1986) EOC 92–159 (Victoria EOB, 14 March 1986) (an employer's decision that an applicant with a disability was not fit for employment was made without proper inquiry of the applicant or his family doctor; an employer must investigate the particular circumstance of the individual case and cannot rely on generalisations); *Urie* v *Cadbury Schweppes Pty Ltd* (1986) EOC 92–180 (Victoria EOB, 3 December 1986) (an employer's decision not to employ an applicant with a history of a disability was based on inadequate considerations; the employer failed to consider the circumstances of the particular applicant).

Under the *ADA*, the employer is required to consult the employee with a disability to ascertain job limitations caused by the disability, and to identify potential accommodations and assess their effectiveness.[75] The employer must consider the preference of the individual with a disability with respect to the accommodation to be selected.[76] Ultimately, however, the employer has discretion to choose the accommodation to be provided and may choose the less expensive accommodation or the accommodation that is easier to provide, *so long as the accommodation provided is effective.*[77] The *DDA* disability standards also need to address this issue, and must emphasise the requirement that the employer must provide *effective* adjustments.

E Unjustifiable Hardship

As previously noted, an accommodation or adjustment is not reasonable if it would impose an 'undue hardship' (under the *ADA*) or an 'unjustifiable hardship' (under the *DDA*).[78] The *ADA* defines this as 'an action requiring significant difficulty or expense' on the employer's business.[79] This 'undue' or 'unjustifiable' hardship test is intended to balance the conflicts that may arise between the rights of people with disabilities and the rights or expectations of employers (or providers of goods and services, discussed later in this chapter). People with disabilities must be placed on equal footing with people without disabilities to avoid discrimination. However, that goal cannot be achieved at the cost of imposing unreasonable burdens on employers or service providers. Thus, the concept of what constitutes undue or unjustifiable hardship is ambiguous, indeed somewhat nebulous, as the line to be drawn to resolve this conflict will, of necessity, move from situation to situation.

The *ADA* specifies that whether the undue hardship test is satisfied must be determined on a case by case basis, considering the nature and cost of the accommodation needed; the size, type and budget of the employer's program; any relevant relationship between the specific facility involved and the entire covered entity (such as the relationship between one branch of a department store and the department store company as a whole); and the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties.[80]

The *DDA* states that factors to be considered when determining whether making an adjustment for a disabled employee would constitute an unjustifiable hardship include the nature of the benefits and detriments to be suffered by all people concerned (ie employer, employees, clients, customers); the effect on the disabled person; and the employer's financial circumstances.[81] The disability standards will need to define as specifically as

[75] 29 CFR (1992) s 1630.9 (Appendix).
[76] 29 CFR (1992) s 1630.9 (Appendix).
[77] 29 CFR (1992) s 1630.9 (Appendix).
[78] See fns 69, 70 supra.
[79] 42 USCA (West Supp 1991) s 12111(10)(A).
[80] 42 USCA (West Supp 1991) s 12111(10)(B).
[81] *DDA* s 11.

possible what constitutes 'unjustifiable hardship' and provide illustrative examples.[82]

Advocates for people with hearing-impairments will want to ensure that no cost limit is proposed. For example, a disability standard providing that an employer need not pay for an adjustment to accommodate an employee with a disability if the cost of that adjustment exceeds a certain percentage of the employee's salary would severely limit the right of employees who are deaf to be provided with interpreters on the job. The United States Congress rejected a proposed amendment to the *ADA* that would have limited the required expenditure for an accommodation to a certain percentage of the salary of an employee with a disability.[83] The drafters of the *DDA* disability standards should do the same.

The undue/unjustifiable hardship exemption is a very subjective determination, and there is no magic formula to be applied. For example, whether — and to what extent — an employer must provide an interpreter for an employee who is deaf will vary tremendously from case to case. It is important to note, however, that while an employer may be required to provide an interpreter to *assist* a person with a hearing-impairment in performing a job, the employer is not required to hire two people to perform one job. For example, an employer would not have to hire an interpreter to 'assist' a deaf telephone operator, because the interpreter would actually be performing the operator's job.

F Inherent Requirements of the Job

Only 'qualified' disabled individuals with disabilities are protected from job discrimination under the *ADA* and *DDA*. As previously discussed, a 'qualified' individual with a disability is one who can perform the 'essential functions' (under the *ADA*) or 'inherent requirements' (under the *DDA*) of the position, with or without the provision of reasonable accommodations/adjustments.[84] 'Essential functions' or 'inherent requirements' are those that are fundamental, rather than marginal.[85] Thus, for example, suppose a person

[82] Several cases interpreting state anti-discrimination legislation have considered the concept of unjustifiable hardship, See eg, *Blair & Ors* v *Venture Stores Retailers Pty Ltd* (1984) EOC 92-103 (Victoria EOB, 9 April 1984) (holding that to provide necessary services to enable individuals who use wheelchairs to have free access to the first floor of a department store would impose an unreasonable and onerous burden on a retail store).

[83] HR Rep No 101-485 (1990) part 3, 101st Cong, 2d Sess 41 ('HR Rep No 101-485, part 3').

[84] See fns 67, 68 supra.

[85] The EEOC's regulations promulgated under Title I of the *ADA* provide that the term 'essential functions' means 'job tasks that are fundamental and not marginal' (29 CFR (1992) s 1630.2(n)). While the *DDA* does not define the term 'inherent requirements', the HREOC interprets that term as being analogous to the definition of 'essential functions'. See HREOC Consultation Draft, op cit (fn 68) s 5, pp 17-21.

In *Jamal* v *Secretary, Department of Health* (1988) 14 NSWLR 252 the New South Wales Court of Appeal rejected the 'essential function' analysis when deciding whether an employee was qualified for a job under the *Anti-Discrimination Act* 1977 (NSW). Under the NSW Act an individual with a disability is not qualified to perform a job if the individual would be 'unable to carry out the inherent requirements of the particular

who is deaf, who cannot use the voice telephone, applies for a job as one of four chefs in a restaurant that serves only dinner. During the day, while the chefs are cooking in preparation for the dinner crowd, the phone is answered by the manager, who takes calls from food suppliers and customers making reservations. While the manager is running errands, however, the chefs must answer the phone. The function of answering the phone is not essential to the job of a chef, since while it is necessary for *some* chefs to be able to answer the phone, it is not necessary for *all* chefs to be able to do so.

Moreover, the *ADA* specifies that the essential function analysis applies only to tasks to be performed, and not to the manner in which those tasks are performed.[86] Thus, for example, suppose an important function of our restaurant chefs is to call the butcher and baker every morning and order supplies for the evening meal. The person who is deaf can perform this task using a TTY and relay service. Thus, the deaf person *is* qualified for the job. The essential function is to order the supplies. It is irrelevant whether the supplies are ordered via voice telephone or via TTY and relay service. The *DDA* disability standards should encompass a similar concept.

When considering whether a particular job function is essential, the *ADA* regulations promulgated by the EEOC provide that a variety of factors must be considered, including: (a) the employer's judgment (which is *not* conclusive); (b) written job descriptions prepared *before* advertising or interviewing for the job; (c) the amount of time spent performing the function; (d) the practical consequences that will result if one employee does not perform the function; (e) the terms of an applicable collective bargaining agreement (an enterprise agreement); and (f) the work experience of others who have held that job or similar jobs.[87] *None* of these factors is determinative. But all of these factors, plus any other relevant factors, must be considered.[88] The disability standards should cite similar factors when discussing the inherent requirements issue.[89]

employment' or if the individual 'would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an unjustifiable hardship on the employer' (*Anti-Discrimination Act* s 49D(4)). The NSW Court of Appeal held, *inter alia*, that under this section there is no basis for differentiating between 'essential' and 'non-essential' aspects of the job. Rather, the proviso refers generally to 'the work' to be performed.

The HREOC has not followed the reasoning of *Jamal* when interpreting the *DDA*. In light of: (a) the overall purpose and framework of the *DDA*; (b) the *DDA*'s reliance on *ADA* principles; (c) the intent that the *DDA* is to resolve inconsistencies and interpretive disputes under state and territorial laws; and (d) the *DDA*'s use of the term 'inherent requirement' rather than just 'the work', it seems likely that the HREOC's reasoning will prevail.

86 HR Rep No 101–485, part 3, op cit (fn 83) 33.

87 29 CFR (1993) s 1630.2(n)(3).

88 29 CFR (1993) s 1630.2(n)(3).

89 The HREOC assumes that similar factors will be considered under the *DDA*'s inherent requirement analysis. See HREOC Consultation Draft, op cit (fn 66) s 5.

G Safety

The *ADA* expressly provides that an individual with a disability is not qualified for a job if he or she poses a direct threat to the health or safety or other individuals in the workplace.[90] A 'direct threat' means a *significant* risk that cannot be eliminated by reasonable accommodation.[91] An *individualised* inquiry must be conducted to determine whether the particular individual would actually pose such a safety risk, when looking to several factors, including: (a) the duration of the risk; (b) the nature and severity of the potential harm; (c) the likelihood that harm will occur; and (d) the imminence of the potential harm.[92] An individual does not pose a safety risk simply because a particular disability, such as a hearing-impairment, poses a statistically significant risk of harm. A safety risk cannot be found on the basis of generalisations about the disability.[93]

There is some dispute in the United States about whether a person with a disability may be held unqualified for a job if performance of the job would pose a significant risk to the health or safety of the disabled person himself or herself, rather than to the health or safety of others. The EEOC's regulations have expanded the safety defence beyond the statutory language, to provide that a person with a disability is not qualified if performance of the job would pose a substantial risk to his or her own health or safety.[94] This appears to exceed the scope of the law, and could encourage the very type of paternalistic attitudes that the *ADA* was intended to eradicate. Thus many commentators disagree with the position taken by the EEOC.[95] It remains to be seen how the American courts will resolve this dispute. Even if it is determined that the safety defence applies when the health or safety of the individual with a

[90] 42 USCA (West Supp 1991) s 12113(b).
[91] 42 USCA (West Supp 1991) s 12111(3).
[92] 29 CFR (1993) s 1630.2(r).
[93] See HR Rep No 101-485 (1990) part 2, 101st Cong, 2d Sess 57.
[94] 29 CFR (1993) s 1630.2(r).
[95] See eg, Tucker and Goldstein, op cit (fn 11) 20:38. The argument for a safety defence to include the safety of the employee with a disability is premised in large part on the generalised notion that employees with disabilities are more likely to be injured on the job. The evidence does not appear to support that notion. In the United States studies have shown that the costs of insurance or workers' compensation fees do not increase when a employer hires employees with disabilities — thereby implicitly evidencing that the number of injuries is not higher, at least not to any significant degree. See eg, 'Hiring the Handicapped: Overcoming Physical & Psychological Barriers in the Job Market' (1986) *Journal of American Insurance* Third Quarter 13, 17 ('employers hiring disabled workers do not . . . see an increase in their workers' compensation insurance premiums'); Comment, 'Abroad in the Land: Legal Strategies to Effectuate the Rights of the Physically Disabled' (1973) 61 *Georgetown Law Journal* 1501, 1513 ('employment of the handicapped does not affect the premium rates either for non-occupational benefit plans or for workmen's compensation.') See also, R B Nathanson, 'The disabled employee: separating myth from fact' (May-June 1977) 55 *Harvard Business Review* 6.

The generalised fear that the safety of people with disabilities is frequently at risk is another example of stereotypical attitudes that defeat the goal of full independence of people with disabilities. As the Tenth Circuit Court of Appeals stated in *Pushkin* v *Regents of the University of Colorado*, 658 F.2d 1372, 1385 (10th Cir 1981), discrimination against people with disabilities 'often occurs under the guise of extending a helping hand or a mistaken, restrictive belief as to the limitations of handicapped persons.'

disability, rather than the health or safety of others, is at issue, the EEOC's regulations specify that an individualised inquiry is required, and that a *specific, substantial* risk must be found.[96]

The *DDA* does not cite a similar 'safety defence'. The only safety defence provided in the *DDA* applies to infectious diseases. The *DDA* provides that it is not unlawful for a person to discriminate against a person with an infectious disease when the discrimination is necessary to protect public health.[97] The HREOC, however, has identified a general safety defence, and implies that the defence applies to the safety of the person with a disability, under the premise that if an individual with a disability cannot perform the job without safety risks to himself or herself he or she is not qualified for the job.[98]

The *DDA* disability standards must address the safety issue. Advocates for people with hearing-impairments should fight for a standard that does not allow an employer to refuse a job to a person with a disability due to concerns for the safety of the employee with a disability. In many contexts people with disabilities (including people who cannot hear alarms, etc) are at greater risk of harm in the workplace. It is imperative that people with disabilities are not precluded from the workplace under this reasoning. Further, even if the 'safety of the employee with a disability' is permitted to be a defence, it is imperative that the standards specify that there must be a *specific* and *significant* safety risk, based on medical and other relevant *facts.*

H The Hiring Process

Under the *ADA* employers must follow specific rules and policies with respect to the hiring process.[99] The *ADA* and the *DDA* are premised on the theory that people with disabilities have the right to be judged in the employment context completely on their own merit. The focus must be on *ability*, not on *dis*ability. To further this end, the *ADA* prohibits employers from asking questions (either on application forms or orally) about an applicant's general health, past medical history, past history of workers' compensation claims, or any disability.[100] Thus, for example, application forms cannot list disabilities and ask an applicant to check the list, nor may an applicant be asked whether he or she has any disability that will prevent or hamper job performance. Questions relating to the ability of an applicant to perform a job (without relating to disability) are permissible, however.[101]

By way of illustration, an application form may list the duties of a chef in

[96] See fns 92, 93 supra.

[97] *DDA* s 48.

[98] HREOC Consultation Draft, op cit (fn 66) s 8.5, pp 28–30. The HREOC's safety defence is apparently 'borrowed' from the *ADA* as a matter of policy, since the *DDA* does not specifically provide for such a defence.

[99] See generally, Tucker and Goldstein, op cit (fn 11) 20:41–7.

[100] See 42 USCA (West Supp 1991) s 12112(d)(2)(A); 29 CFR (1993) s 1630.13(a) (App 418).

[101] See 42 USCA (West Supp 1991) s 12112 (d)(2)(B); 29 CFR (1993) s 1630.14. This issue is so complex that the EEOC has published an extensive Enforcement Guidance on the subject, 'Enforcement Guidance on Preemployment Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act of 1990' EEOC Notice No 915.002, 19 May 1994 ('Enforcement Guidance').

our hypothetical restaurant and ask whether the applicant can perform those duties. When asked whether he or she can perform the task of ordering food, an applicant who is deaf should simply respond in the affirmative; he or she need not explain *how* the food will be ordered (such as with the assistance of an amplifier or a TTY and relay service). Only if answering the telephone is an essential function of the job, and only if all applicants for the job as a chef are asked to explain how they will order the food, is the applicant with a hearing-impairment required to do so.[102]

If, however, the applicant's deafness is otherwise known to the employer — as it may be if the applicant utilises an interpreter during an interview or if the applicant *chooses* to inform the employer during an interview to facilitate communication — that applicant may be asked to describe how he or she will perform essential job functions that will be affected by his or her deafness.[103] The applicant may not be asked to explain or demonstrate his or her ability to perform job functions that are not affected by the deafness, however. For example, an employer may not ask an applicant with a hearing-impairment to demonstrate the ability to assemble small parts at a table unless *all* applicants are asked to do so, because a hearing-impairment obviously will not interfere with the ability to perform that job task. Further, an employer may never ask *how* an applicant became hearing-impaired, the prognosis of the hearing-impairment, or whether the applicant has 'other problems'.[104]

Under the *ADA*, job interviews must be accessible to applicants with hearing-impairments. Thus, for example, if a job interview is a part of the application process, a person with a hearing-impairment who requires an interpreter has the right to an interpreter at the employer's expense unless the undue hardship test is satisfied. In most employment settings governed by the *ADA*, which only covers employers having 15 or more employees, it is unlikely that the undue hardship test will be satisfied in this situation. That test should also rarely be satisfied under the *DDA*, although it may more frequently be satisfied in situations where the employer has fewer than 15 employees.

I Testing

Employers governed by the *ADA* must also follow specific rules and polices with respect to testing procedures. Qualification standards, tests and other selection procedures that screen out or tend to screen out individuals with disabilities must be job-related and consistent with business necessity.[105] Selection criteria that exclude people with disabilities and do not concern an essential function of the job, such as non-essential telephone functions that exclude a person with a hearing-impairment (as in our hypothetical regarding the chefs who answered the phone when the manager was not on the premises)

[102] See 29 CFR (1993) s 1630.14(a) (App, 419–20).

[103] 29 CFR (1993) s 1630.14(a) (App, 419–20). Even in that situation, however, the employer may not ask the applicant about the nature of the known disability.

[104] 29 CFR (1993) s 1630.14(a) (App, 419–20). The *DDA* is apparently intended to be interpreted in an analogous fashion. See HREOC Consultation Draft, op cit (fn 66) s 9, pp 32–4.

[105] 42 USCA (West Supp 1991) ss 12112(b)(6), (7); 12113(a).

are *not* consistent with business necessity.[106] Moreover, even selection criteria that *are* consistent with business necessity, in that they are related to an essential job function, may not be used to exclude a person with a disability if that person could satisfy the criteria with the provision of reasonable accommodation.[107] For example, if the employer's criteria require all employees to be able to communicate by phone, the employer may be able to accommodate an applicant's hearing-impairment by providing a telephone amplifier or a TTY.

The *ADA* further provides that employment tests must be given in the most effective manner to ensure that, when a test is administered to a job applicant with a hearing-impairment, the test results accurately reflect the factor the test purports to measure rather than the applicant's hearing-impairment.[108] Reasonable accommodations must be provided where necessary *when* the disability is made known to the employer.[109] By way of illustration, a written test may need to be substituted for an oral test for an applicant or employee with a hearing-impairment. This rule does not apply, however, when an employment test is actually intended to measure the sensory, manual or speaking skill at issue.[110] If a test is designed to measure the ability to write English, for example, a person with a hearing-impairment whose primary language is American Sign Language can be required to take the written test and can be judged by his or her ability to write English. But test results cannot exclude an applicant or employee unless the skill measured is necessary to perform an essential function of the job and no reasonable accommodation is possible.[111] In this case, therefore, the ability to write English must be an essential function of the job, or the poor test results of an applicant with a hearing-impairment cannot be the reason for excluding that applicant from the job.

J Medical Examinations

Medical examination procedures are also covered by the *ADA*. Because the focus of the hiring process should be on *ability*, not disability, employers may not require a medical examination of an applicant or employee except in limited situations. Medical examinations prior to making an applicant an offer are prohibited.[112] However, a medical examination (and/or inquiry) may

[106] See 56 Fed Reg 35749 (1991) (Section by Section Analysis of 29 CFR s 1630.10).
[107] 56 Fed Reg 35749 (1991).
[108] 42 USCA (West Supp 1991) ss 12112(b)(6), (7); 12113(a).
[109] See 56 Fed Reg 35749 (1991) (Section by Section Analysis of 29 CFR s 1630.11).
[110] 56 Fed Reg 35749 (1991).
[111] See 29 CFR (1993) s 1630.2(n) (App, 407–8).
[112] 42 USCA (West Supp 1991) s 12112(d)(2)(A); 29 CFR (1993) s 1630.30. This issue is enormously complex. As previously noted, the EEOC recently issued a comprehensive 'Enforcement Guidance' with respect to pre-employment medical examinations and inquiries under the *ADA*. ('Enforcement Guidance' (fn 101) supra.) The Enforcement Guidance lists examples of examinations that may be medical or non-medical in nature.

For a comprehensive article on this issue, see R Johnstone, 'Pre-employment Health Screening: The Legal Framework' (1988) 1 AJLL 115. The author describes 'how the law relating to the prevention and compensation of industrial accidents and disease has

be required *after* the applicant has been offered a job and before the applicant begins job duties.[113] The job offer may be conditioned on the results of the medical exam if *all* entering employees are subject to the same rule,[114] and:

(a) medical information is kept confidential in separate files, except that: supervisors and managers may be informed regarding necessary work restrictions or accommodations; first-aid and safety personnel may be informed if the disability might require emergency treatment; and government officials investigating compliance with the federal laws shall be provided recent information on request;
(b) the results of medical exams are not used to circumvent the law; and
(c) any exclusionary criteria utilised as a result of the medical examinations are job-related and consistent with business necessity.[115] The latter proviso requires that the employer show that no reasonable accommodation will enable the individual with a disability to perform the essential functions of the job.[116]

The *DDA* disability standards should incorporate all of the above factors. Advocates for people with hearing-impairments must work to ensure that maximum protection in the area of job applications, interviews and tests is ensured by the disability standards. The need for interpreters during the job interview process, and the need for appropriate modification during examinations, should be specified in the standards.

Some people have asked whether interpreting the *DDA* in such a liberal fashion is fair to employers in view of restrictions placed on employers by the *Industrial Relations Act* 1988 (Cth) regarding dismissal of employees.[117] The latter Act requires employers to: (a) give employees notice of dismissal (ranging from one week for individuals employed for up to one year, to four weeks for individuals employed for more than five years) or compensation in lieu thereof;[118] and (b) allow an employee the opportunity to defend himself or herself against any allegations regarding the employee's capacity or conduct, prior to dismissal.[119] The Act further prohibits employers from terminating an employee's employment except for 'valid reasons, connected with the employee's capacity or conduct or based on the operational requirements' of

"institutionalized" a form of discrimination against "disabled" people, a form of discrimination which has as one of its chief instruments pre-employment screening', and explains how anti-discrimination laws can remedy, and have remedied, some of this discrimination (Id 117). Several cases interpreting Australian state legislation prohibiting discrimination on the basis of disability have also addressed this subject. See eg, *Madafferi* v *City of Northcote* (1993) EOC 92–512 (Victoria EOB, 19 July 1993); *O'Neill* v *Burton Cables Pty Ltd* (1986) EOC 92–159 (Victoria EOB, 14 March 1986).

113 42 USCA (West Supp 1991) s 12112(d)(3).
114 42 USCA (West Supp 1991) s 12112(d)(3).
115 42 USCA (West Supp 1991) ss 12112(c)(3)(B), (C).
116 See eg, EEOC's Technical Assistance Manual, op cit (fn 40) s 6.4, VI 6–7.
117 *Industrial Relations Act* 1988 (Cth).
118 *Industrial Relations Act* 1988 (Cth), s 170DB. An exception is made if the employee is guilty of serious misconduct that would render it unreasonable for the employer to continue the employee's employment during the notice period (s 170DB(1)(b)).
119 *Industrial Relations Act* 1988 (Cth), s 170DC. An exception is made if the employer could not reasonably be expected to give the employee that opportunity.

the employer's business,[120] and provides that a reason is not valid if the termination is 'harsh, unjust or unreasonable.'[121] Moreover, the Act prohibits an employer from terminating an employee's employment for any of several reasons, including the employee's 'temporary absence from work because of illness or injury' or the employee's 'physical or mental disability',[122] unless the reason for the termination is 'based on the inherent requirements of the particular position.'[123] An employer who violates the Act may be subject to an order of the Industrial Relations Court of Australia for reinstatement or, if this is impracticable, may be required to pay compensation.[124] That employer may also be subject to a penalty up to $1000.[125]

Assumptions that a liberal interpretation of the *DDA* in conjunction with the *Industrial Relations Act* might be unfair to employers are premised on the ingrained notion that somehow employees with disabilities are not quite as able or productive as employees without disabilities. Studies have evidenced the fallacy of this assumption.[126] An executive of EI DuPont & Nemours and Company, which employs approximately 1500 Americans with disabilities, summed up this fallacy succinctly by stating: 'every one of the reasons for not [hiring employees with disabilities] is not only a myth — but has been proven to hold no semblance of fact whatsoever.' [127]

Why should treating people with disabilities in a non-discriminatory fashion be unfair to employers? Whether the *Industrial Relations Act* is overburdensome to employers is a question wholly independent of the *DDA*. The *Industrial Relations Act* simply incorporates *DDA* principles,[128] which in turn simply seek to equalise the playing field for persons with disabilities, and *not* to give applicants or employees with disabilities any advantage.

II ACCESS TO SERVICES/PLACES OF PUBLIC ACCOMMODATION

Both Title III of the *ADA*[129] and the *DDA*[130] prohibit discrimination against people with disabilities with respect to the provision of goods or services or access to or use of premises or facilities open to the public. The *DDA* provisions contain the same general admonitions prohibiting discrimination and requiring reasonable adjustments to accommodate people with disabilities

[120] *Industrial Relations Act* 1988 (Cth), s 170DE(1).
[121] *Industrial Relations Act* 1988 (Cth), s 170DE(2).
[122] *Industrial Relations Act* 1988 (Cth), s 170DF(1)(a), (f).
[123] *Industrial Relations Act* 1988 (Cth) s 170DF(2).
[124] *Industrial Relations Act* 1988 (Cth) s 170EE(2)(b), (c).
[125] *Industrial Relations Act* 1988 (Cth), s 170EF(1)(a).
[126] See eg, Louis Harris and Associates, 'Study no 8640009, the ICD Survey II: Employing Disabled Americans' (1987) 9 (a study of managers of 21 companies evidenced that workers with disabilities are often better workers than non-disabled employees).
[127] S Rep No 116, 101st Cong, 1st Sess 28 (1989).
[128] See eg, provisions prohibiting termination on the basis of disability unless the employee is unable to perform the inherent requirements of the job (*Industrial Relations Act* 1988 (Cth), s 170DF).
[129] 42 USCA (West Supp 1991) ss 12181–12189.
[130] *DDA* ss 23, 24.

unless unjustifiable hardship would result.[131] Title III of the *ADA*, however, and the regulations of the Department of Justice promulgated pursuant to Title III,[132] are much more specific. To understand the potential that may be realised under the *DDA* if disability standards are authorised[133] and properly structured on these subjects, a brief overview of Title III follows.

Title III of the *ADA* contains three basic sections relating to accessibility. First, Title III prohibits specified *private* entities from discriminating on the basis of disability in places of public accommodation.[134] Second, Title III requires all newly constructed and altered places of public accommodation and 'commercial facilities' (factories, warehouses, office buildings and other buildings where employment may occur) to be designed and constructed in such a manner that they are readily accessible to and usable by persons with disabilities.[135] Third, Title III mandates that all examinations and courses offered with respect to licensing and certification for professional and trade purposes must be accessible to people with disabilities.[136]

A 'public accommodation' is defined under Title III as a private entity that owns, leases, leases to, or operates a place of, public accommodation.[137] Title III lists 12 categories of places of public accommodation.[138] To fall within the first prong of Title III an entity *must* fit within one of those 12 categories: (1) places of lodging (eg, hotels, motels); (2) places serving food and drink (eg, restaurants, bars); (3) places of public entertainment (eg, movies, theatres, stadiums, concert halls); (4) places of public gathering (eg, auditoriums, convention centres); (5) sales or rental establishments (eg, stores); (6) service establishments (eg, petrol stations, dry cleaners, banks, doctors' and lawyers' offices); (7) transportation stations (eg, terminals, depots); (8) places of public display or collection (eg, museums, libraries); (9) places of recreation (eg, parks, zoos, amusement parks); (10) private schools; (11) social service centre establishments (eg, day care centres, food banks, homeless shelters, adoption agencies); (12) places of exercise or recreation (eg, gyms, health spas, bowling alleys, golf courses).[139]

All entities that fall within any of these 12 categories are covered by Title III regardless of the number of employees at such entities. Some entities that affect people with hearing-impairments, however, may not fall within these 12 categories. By way of example, producers of videos arguably do not fall within the list of covered entities. If that interpretation is upheld video pro-

131 *DDA* ss 23, 24.
132 See generally, 28 CFR Part 36.
133 See text at fn 14 supra. Note that if disability standards are not drafted with respect to the accessibility of premises, goods, services and facilities, it will be necessary to develop case law to incorporate the necessary requirements.
134 42 USCA (West Supp 1991) s 12181; 28 CFR (1993) s 36.104.
135 See generally, Tucker and Goldstein, op cit (fn 11) 22:2–4.
136 Ibid.
137 28 CFR (1993) s 36.104.
138 42 USCA (West Supp 1991) s 12181(7); 28 CFR (1993) s 36.104.
139 28 CFR (1993) s 36.104.

ducers will not be required to close-caption their videos.[140] Religious entities are specifically exempt from Title III.[141] Thus a church or temple, for example, is not required to provide an interpreter for a deaf worshipper. Further, Title III exempts private clubs from its coverage, 'except to the extent that the facilities of such [clubs] are made available to customers or patrons' of a place of public accommodation.[142] Thus, in the United States a private club may refuse to accept a person with a disability as a member. Also, Title III does not require television broadcasters to close (or open) caption television shows. While the initial draft of the *ADA* would have covered television broadcasters, that section was deleted from the final version of the Act in the spirit of compromise.[143] As an alternative, however, in 1990 Congress passed the *Television Decoder Circuitry Act*,[144] which requires that all television sets manufactured in — or for use in — the United States after July 1993 having picture screens at least 13 inches in size must be equipped with built-in decoder circuitry designed to display closed captions at the option of the viewer. It is anticipated that if all sets are equipped with built-in decoders, television stations will voluntarily increase the number of closed-captioned programs to reach the market of over 24 million hearing-impaired persons in the United States. This is not the same as mandating captioned television programs, however.

When talking about access to services, the *DDA* defines 'services' as 'including':

(a) services relating to banking, insurance and provision of grants, loans, credit, or finance; or

[140] In the United States, people with hearing-impairments (and others) can purchase decoders to be connected to their television sets, to enable viewing of closed-captioned television shows on 'line 21' of the television screen, which is reserved expressly for that purpose. Using this special decoding device, viewers with hearing-impairments may read what is said by the television actors in some television programs. (The purchase of a decoder will not ensure captioning, however. Producers must expressly provide closed-captioning for each show in order to enable owners of decoders to receive such captions.)

It is also possible for television sets to have a built-in decoder chip. Pursuant to the *Television Decoder Circuitry Act* (1990) 47 USCA s 303 (1962 and West Supp 1990), all television sets manufactured in — or for use in — the United States after July 1993 having picture screens at least 13 inches in size must be equipped 'with built-in decoder circuitry designed to display closed-captioned television transmissions'(S 1974, s 3, 136 Cong Rec H 8544 (1 October 1990)). The display of captions on such television sets is at the option of the viewer. It is anticipated that if all television sets are equipped with built-in decoders, television producers will voluntarily increase the number of closed-captioned programs.

In Australia, televisions and VCRs with 'teletext' capability may be purchased, which contain similar captioning capability at the option of the viewer. Currently, however, only 8% of Australia's television programs are captioned and there is virtually no captioning of news broadcasts. See eg, *Supertext News*, Issue 36, October 1993 (published by the Australian Caption Centre Haymarket, NSW). In the United States, however, a substantial percentage of television shows are closed-captioned, including almost all prime time television shows (between 6 pm and 11 pm daily) and most news programs.

[141] 42 USCA (West Supp 1991) s 12187; 28 CFR (1993) s 36.102(e).

[142] 42 USCA (West Supp 1991) s 12187; 28 CFR (1993) ss 36.102(e), 36.104.

[143] See Tucker and Goldstein, op cit (fn 11) 23:4.

[144] S 1974, 101st Cong, 2d Sess (1990); 47 USCA (1991) s 609, note s 303(u).

(b) services relating to entertainment, recreation or refreshment; or
(c) services relating to transport or travel; or
(d) services relating to telecommunication; or
(e) services of the kind provided by the members of any profession or trade; or
(f) services of the kind provided by a government, a government authority or a local government body.[145]

It is not clear whether this list is exclusive or simply illustrative. Arguably the list is not all-inclusive, and other entities that provide services will be covered by the *DDA*. In any event, however, the included categories are rather broad. For example, since videos provide entertainment, video producers should fall within section 24 of the *DDA*, which requires persons who provide services to members of the public (whether for payment or not) to make adjustments for people with disabilities unless unjustifiable hardship would result.[146] Advocates for people with hearing-impairments should work to ensure that the *DDA* disability standards provide maximum protection in this area. Telephone broadcasters also appear to be covered under section 24 of the *DDA*.[147] Thus, the disability standards should address the issue of closed-captioned television shows. At a minimum the standards should require broadcasters to immediately begin to close-caption the daily news, and to increase the number of closed-captioned programs by a specified percentage each year.

Unlike under the *ADA*,[148] religious entities are not exempt from the *DDA*. Thus, churches and temples may not discriminate against people with disabilities. Advocates for people with hearing-impairments should ensure that the *DDA* disability standards require provision of interpreters at worship services and the like unless the unjustifiable hardship test is satisfied. Further, under the *DDA*, private clubs are expressly precluded from discriminating on the basis of disability.[149] Thus, in Australia a person with a hearing-impairment may not be excluded from membership in a club due to his or her hearing-impairment.[150]

Under the *ADA*, a public accommodation may not apply eligibility criteria that tend to screen out people with disabilities.[151] Thus, for example, a restaurant, zoo, theatre or museum cannot request that a person who is deaf be accompanied by an interpreter; a store cannot require an individual to state on a credit application whether he has a disability — such as a hearing-

[145] *DDA* s 4(1).
[146] *DDA* s 24.
[147] *DDA* s 24.
[148] See text at fns 141–3 supra.
[149] *DDA* s 27.
[150] The *DDA* does, however, exempt 'discriminatory provisions in the *Migration Act* 1958 (Cth) or any regulations under that Act', as well as 'anything done by a person in relation to the administration of that Act or those regulations' (*DDA* s 52). Further, the *DDA* exempts actions taken against persons 'in connection with employment, engagement or appointment in the Defence Force', insofar as combat duties are involved (*DDA* s 53).
[151] 28 CFR (1993) s 36.301(a). An exception is made if the criteria at issue is necessary to enable the entity to provide the goods, services or benefits it is in the business of providing.

impairment. The *DDA* disability standards should include a similar precept.

Under both the *ADA* and *DDA*, owners and operators of places of public accommodation must allow people with disabilities to benefit equally from the goods or services provided.[152] To do so, they must make reasonable modifications, accommodations or adjustments in their practices or procedures unless that would constitute an 'undue burden' under the *ADA*,[153] which is defined as an action requiring 'significant difficulty or expense',[154] or would constitute an 'unjustifiable hardship' under the *DDA*.[155] As with the 'undue' or 'unjustifiable' hardship test in the employment context,[156] this requires that we consider the nature and cost of the action needed as well as the resources of the entity (including any parent entity).

The *ADA* regulations make it clear that the requirement that people with disabilities must be able to benefit equally from the goods and services provided does not require that people with disabilities must achieve equal results to those achieved by non-disabled people, but merely that people with disabilities must be given equal opportunity to realise the same results.[157] For example, a restaurant need not provide an interpreter for a customer who is deaf if the waiter will write down the specials of the day for the benefit of that

[152] See 42 USCA (West Supp 1991) ss 12182(b)(l)(A)(i), (ii), (iii), (iv) (*ADA*); *DDA* ss 23, 24.

[153] 42 USCA (West Supp 1991) ss 12182(b)(2)(A)(ii), (iii).

[154] 28 CFR (1993) s 36.104.

[155] *DDA* ss 23(2)(b), 24(2). There have been numerous cases decided under state anti-discrimination laws dealing with the issue of the accessibility of places of public accommodation or services. See eg, *Walters* v *Public Transport Corporation* (1991) 173 CLR 349. See also, *Woods* v *Wollongong City Council & Ors* (1993) EOC 92–486 (New South Wales Equal Opportunity Tribunal, 17 March 1993), which deals with the accessibility of a shopping complex, including the issues of ramps within the complex and disabled toilets. The Tribunal found for the complainant in part and the defendant in part.

An interesting question with respect to the accessibility of places of public accommodation or services is raised in *Ellis* v *Metropolitan Transit Authority* (1987) EOC 92–207 (Victoria EOB, 9 July 1987). In that case the complainant alleged that the Minister of Transport's proposed substitution of a light rail service for the existing rail system would be inaccessible to certain people with disabilities in violation of the Victorian *Equal Opportunity Act*. The Board dismissed the complaint, because the complaint did not allege that an act of discrimination had taken place, but merely that such an act would take place when the light rail service was implemented. The Board noted, however, that:

> This decision does not address the question of whether a complaint may be brought in respect of services which are to come into operation at some time in the future. Whether an act of discrimination has taken place in advance of the commencement of services will depend on the facts alleged in support of the complaint.

((1987) EOC 76 961.)

The *ADA* specifically provides that, *where new construction or alteration of places of public accommodation are at issue*, any person who has 'reasonable grounds' for believing that he or she is 'about to be subjected to discrimination' may file suit under Title III of the Act (42 USCA (West Supp 1991) s 12188(a)). This proviso was enacted for practical reasons. It is easier, and much less costly, to render new construction or alterations accessible before construction is completed. To require completion of construction prior to permitting a complaint to be lodged protesting inaccessibility would be inefficient and expensive. The *DDA* does not contain a similar provision. Whether the Act will be construed in such a fashion is problematic.

[156] See text at fns 69–71, 78–83 supra.

[157] See 56 Fed Reg (1991) 35566 (Section by Section Analysis of 28 CFR s 36.303).

customer. Presumably, the *DDA* will be interpreted in the same manner, either via the promulgation of disability standards or via case law.

Title III expressly provides that public accommodations must modify their policies to permit hearing dogs on the premises except in the *rare* case where a fundamental alteration of the entity would result or where the safe operation of the entity would be jeopardised.[158] Similarly, section 9 of the *DDA* prohibits discrimination because an individual is accompanied by a service animal, including a hearing dog.[159] The regulations of the Department of Justice promulgated under Title III provide that the 'broadest feasible access' must be provided to all service animals, including hearing dogs, in such places as movie theatres, restaurants, hotels, retail stores, hospitals and nursing homes.[160] In this regard, however, the *DDA* may provide greater protection to persons with hearing-impairments, since the *DDA* does not mention a safety exception. Advocates for people with hearing-impairments should ensure that an overly broad safety exception is not held to be implicit under the *DDA*.

As in the employment context under the *ADA*, public accommodations are not required to make fundamental alterations to their programs or activities.[161] Thus, a bank with a drive up teller would not necessarily have to revamp its banking system so that a teller was visible to enable a person with a hearing-impairment to see the teller's lips. When looking to the fundamental alteration exception, disruption is a factor to be considered. For example, a hearing-impaired waiter in a loud nightclub cannot demand that the music be played softly so that he can hear the patrons, while the owner of an elegant candlelit restaurant would not be required to turn on bright ceiling lights to allow a person with a hearing-impairment to lip-read. In both cases the ambience of the facility would be destroyed.[162]

ADA Title III and the Depatment of Justice regulations provide that owners and operators of places of public accommodation must provide auxiliary aids and services for people with disabilities unless that would constitute an undue burden.[163] Auxiliary aids and services include such accommodations as interpreters and special equipment (eg, TTYs,[164] amplifiers, and assistive

158 28 CFR (1993) s 36.302(c).
159 *DDA* s 9.
160 See 56 Fed Reg (1991) 35565 (Section by Section Analysis of 28 CFR s 36.302(c)).
161 42 USCA (West Supp 1991) s 12182(b)(2)(A)(ii).
162 In a case decided under the Victorian *Equal Opportunity Act*, however, which involved a claim of discrimination on the basis of parenthood rather than on the basis of disability, the 'destruction of ambience' argument was rejected. In *Borenstein & Anor* v *Lynch & Ors* (1994) EOC 92–597 (Victoria EOB, 14 April 1994), the Board held that a restaurant's refusal to admit people with young babies constituted impermissible discrimination on the basis of parenthood. The Board rejected the argument that the presence of young babies would destroy the ambience of a candle-lit restaurant. It should be noted, however, that in that case the baby at issue was asleep and the parents had volunteered to leave the restaurant if the baby awoke.
163 42 USCA (West Supp 1991) s 12182(b)(2)(A)(iii).
164 For an explanation of TTYs, see fn 55 supra.

listening devices).[165] The person with a disability may not be charged for the costs of such auxiliary aids or services.

Interpreters must be provided for clients or customers with hearing-impairments whenever that is necessary for effective communication. In many cases, for example, writing notes will not be an effective means of communication between doctor/patient, lawyer/client, audiologist/patient and in other professional relationships. Where necessary, therefore, such professionals must provide, *and pay for*, an interpreter for a deaf client or patient. Further, the professional may *not* refuse to care for or represent the person due to the need to provide an interpreter.[166] In other, non-professional, settings interpreters may also be required to be provided, such as at meetings of some self-help groups (eg, diet centres), aerobics classes, plays, and so forth. It is imperative that advocates for people with hearing-impairments ensure that the *DDA* incorporates similar protections.

As in the employment context, under the *ADA* the auxiliary aid requirement is flexible.[167] A public accommodation may choose among various alternatives so long as the alternative chosen is *effective*.[168]

Under the *ADA*, if a public accommodation customarily offers its customers, clients or participants the opportunity to make outgoing telephone calls on a more than incidental basis, it must make a TTY available for people with hearing-impairments.[169] However, because Title IV of the *ADA*[170] requires every state to have a 24 hour relay service,[171] Title III of the *ADA* does not require a public accommodation to use a TTY for receiving or making telephone calls incidental to its operations.[172] What this means is that individual retail stores, doctors' offices, restaurants or similar establishments are not required to have TTYs, because people with hearing-impairments will be able to request information and make appointments or reservations through relay services. Similarly, personnel at such places will be able to contact people with hearing-impairments through relay services. But places that regularly allow hearing people the opportunity to make outgoing calls on more than an incidental convenience basis must provide a TTY upon request.[173] This includes entities such as hotels and hospitals. Advocates for people with hearing-impairments must ensure that the *DDA* disability standards provide similar — if not greater — protections.

Under the *ADA*, hotels, motels, hospitals, nursing homes and clinics that have telephones in guest rooms must provide a TTY for use by a patron with a hearing-impairment who requests such assistance.[174] Further, hotels and motels are required to have a TTY at the front desk so that calls may be

[165] 42 USCA (West Supp 1991) s 12102(1)(A-D); 28 CFR (1993) s 36.303(b). See generally, Tucker and Goldstein, op cit (fn 11) 22:12–22:14.
[166] 28 CFR (1993) s 36.302(b).
[167] See 56 Fed Reg 35566 (1991) (Section by Section Analysis of 28 CFR s 36.303).
[168] See 56 Fed Reg 35566 (1991) (Section by Section Analysis of 28 CFR s 36.303).
[169] 28 CFR (1993) s 36.303(d)(1).
[170] See Section III infra.
[171] See Section III infra. For an explanation of relay services, see fn 55 supra.
[172] 28 CFR (1993) s 36.303(d)(2).
[173] 28 CFR (1993) s 36.303(d)(1).
[174] 28 CFR (1993) s 36.303(d)(1).

received from guests with hearing-impairments who use TTYs from their rooms (ie, to call room service, to request housekeeping services, to ask for information).[175]

Hotels and motels that provide televisions in five or more guest rooms must provide a means of decoding television programs (a decoder or television with built in decoder chip)[176] when requested to do so by an individual with a hearing-impairment.[177] Hospitals and clinics that provide televisions for patient use must provide a decoder upon the request of an individual with a hearing-impairment.[178] Again, advocates for people with hearing-impairments must ensure that the same protections are guaranteed under the *DDA*.

Movie theatres are not required under the *ADA* to present open-captioned films. As previously noted, video manufacturers may not be required to close-caption videos under the *ADA* (although the *DDA* apparently requires this).[179] Under the *ADA*, however, public accommodations that provide verbal information through soundtrack on films, video tapes or slide shows must make this information available for people with hearing-impairments — such as by captioning or by providing written scripts where appropriate.[180] Thus, museums, zoos and other entities that offer slide shows must caption the shows or otherwise make them accessible; where tapes are utilised, written transcripts must be provided for visitors with hearing-impairments. At a minimum, similar protections should be granted under the *DDA*.

As examples of auxiliary aids and services required to be provided by public accommodations, the Title III regulations promulgated by the Department of Justice list 'assistive listening devices', 'assistive listening systems', 'telephone handset amplifiers', 'telephones compatible with hearing aids', and 'other effective methods of making aurally delivered materials available to individuals with hearing-impairments'.[181] The phrase 'other effective methods' is left deliberately ambiguous, to ensure that new technology is covered as it becomes available.[182]

All public accommodations must provide such auxiliary aids unless the provision of such aids would 'fundamentally alter' the nature of the goods or services provided or would result in an 'undue burden'.[183] Thus, for example, theatres must provide frequency modulation systems or other assistive listening devices[184] for members of the audience who have hearing-impairments

[175] See 56 Fed Reg (1991) 35567 (Section by Section Analysis of 28 CFR s 36.303).
[176] For an explanation of close-captioning and decoders see fn 140 supra.
[177] 28 CFR (1993) s 36.303(e).
[178] 28 CFR (1993) s 36.303(e).
[179] See text preceding fn 140 supra.
[180] See 56 Fed Reg (1991) 35567 (Section by Section Analysis of 28 CFR s 36.303).
[181] 28 CFR (1993) s 36.303(b).
[182] See eg, 56 Fed Reg (1991) 35566 (Section by Section Analysis of 28 CFR s 36.303).
[183] 42 USCA (West Supp 1991) ss 12182(b)(2)(A)(ii), (iii).
[184] A frequently used assistive listening system in Australia is the T-loop. The T-loop is an induction loop system that enables an audio frequency signal, such as speech, to be transmitted to a listener by means of a magnetic field. The system eliminates direct sound transmission, which helps reduce the interfering effects of distance and background noise. An electric current flows in a wire and creates a magnetic field around the wire, which acts as a transmitting aerial. An audio signal is amplified through the loop

unless the undue burden test is satisfied. In addition, in many cases interpreters will have to be provided at live performances, such as plays, debates and speeches. Conference centres must provide either permanent or portable listening devices unless the undue burden test is satisfied (unlikely in most situations). Similar protections should be ensured under the *DDA*.

There is some confusion as to when amplified telephones must be provided under the *ADA*. It seems clear that, to the extent that TTYs must be provided (such as by hospitals and hotels), amplified phones must be provided. It is unclear, however, whether other amplified phones must be provided in any *existing* places of public accommodation covered by Title III. If disability standards are drafted under sections 23 and 24 they should specifically address this issue.

Under the *ADA*, public accommodations must remove structural, architectural and communication barriers in existing facilities when that is 'readily achievable'.[185] The term 'readily achievable' means 'easily accomplishable and able to be carried out without much difficulty or expense'.[186] Again, it is necessary to consider the nature and cost of the action needed and the resources of the covered entity.

This provision pertaining to the removal of barriers requires public accommodations to remove physical partitions that hamper the passage of sound between employees and customers, and to provide adequate sound buffers where necessary, to the extent that this can be done without much difficulty or expense, and to the extent that such action would not constitute a fundamental alteration of the entity's program.[187] This provision also obligates public accommodations to remove barriers such as those involving alarm systems that are not accessible to people with hearing-impairments. To the extent that it is readily achievable to do so, public accommodations that have fire or smoke alarm systems are required to install visual alarms.

Again, the *DDA* disability standards, if promulgated, should address this issue. It is important to note, however, that the *DDA* does not incorporate a 'readily achievable' standard. Rather, the *DDA* specifies that facilities must be accessible unless unjustifiable hardship would result. This is a much higher standard, and a more difficult defence for an entity to establish. Thus, this is another instance in which the *DDA* should offer greater protection to individuals with disabilities, including hearing-impairments.

ADA Title III also requires private entities that offer courses or examinations relating to secondary or postsecondary education or professional or trade purposes to make such courses or examinations accessible to persons with disabilities.[188] Auxiliary aids must be provided where necessary unless the fundamental alteration or undue burden tests are satisfied,[189] and

and carried by the magnetic field to a receiver (such as a hearing aid or headphones) worn by the listener with a hearing-impairment.

185 42 USCA (West Supp 1991) s 12182(b)(2)(A)(iv); 28 CFR (1993) s 36.304(a).

186 42 USCA (West Supp 1991) s 12181(9), 28 CFR (1993) s 36.104.

187 42 USCA (West Supp 1991) s 12182(b)(2)(A)(iv), 28 CFR (1993) s 36.304(a).

188 42 USCA (West Supp 1991) s 12189; 28 CFR (1993) s 36.309.

189 28 CFR (1993) s 36.309(b)(3).

examinations must be modified where appropriate.[190] By way of example, an entity offering a course to assist in preparation for the Certified Public Accountant examination or the Law School Admission Test[191] must provide an interpreter for a participant who is hearing-impaired when that is necessary to allow that individual to receive equivalent benefit from the course. Similarly, where necessary during the Certified Public Accountant examination or the Law School Admission Test a staff member will have to individually inform a candidate with a hearing-impairment of instructions and time warnings given to the group at large. The *DDA* should be interpreted as providing similar protections.

Title III also requires that all *newly constructed and altered* places of public accommodation *and* commercial facilities (ie, warehouses, factories, office buildings) be readily accessible to and usable by individuals with disabilities.[192] Thus, all newly constructed or altered public accommodations or commercial facilities must comply with the following requirements:

(1) Any newly constructed or altered building that has four or more public pay telephones (including both exterior and interior phones) must have at least one TTY.[193] At least one TTY must also be provided whenever there is a single interior public pay phone in a stadium, arena, convention centre, hotel with a convention centre, covered shopping mall, or hospital emergency, recovery or waiting room.[194]
(2) Each level of a newly constructed or altered public accommodation must contain at least one public pay phone that is accessible to people who are hard of hearing (ie, that contains an amplification device and is compatible with hearing aids).[195] If there are two or more banks of phones on one level, *each* bank must contain an accessible phone.[196]
(3) Assembly areas in newly constructed or altered facilities that have fixed seating accommodating 50 or more people or audio-amplification systems must have a permanently installed assistive listening system for persons with hearing-impairments.[197]
(4) Newly constructed or altered hotels and motels must ensure that four percent of the first 100 rooms and approximately two percent of the remaining rooms are accessible to people with hearing-impairments.[198] To comply with the accessibility requirement, such rooms must contain

[190] 28 CFR (1993) s 36.309(b)(2).
[191] The Certified Public Accountant exam is a required examination that must be passed in the United States to practise as a certified public accountant. The Law School Admission Test is an examination that must be taken prior to admission to a law school accredited by the American Bar Association, the results of which are heavily relied upon when determining whether applicants are admitted to law school.
[192] 42 USCA (West Supp 1991) s 12183(a); 28 CFR (1993) s 26.401.
[193] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 4.1.3(17).
[194] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 4.1.3(17).
[195] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 4.1.3(17)
[196] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 4.1.3(17).
[197] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 4.3(19)(b).
[198] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 9.1.2.

visual alarms, telephone with amplifiers, an accessible outlet for a TTY, and visual notification devices to alert occupants of telephone calls and door knocks or doorbells.[199]

These are all crucial issues for people with hearing-impairments. Advocates for individuals with hearing-impairments must ensure that the *DDA* provides at least the same protections.

III RELAY SERVICES/PUBLIC SERVICE ANNOUNCEMENTS

Title IV of the *ADA*[200] requires all providers of telecommunications services (ie, the telephone companies) to provide relay services, either individually or through a selected designee.[201] Such relay services must: (1) operate 24 hours a day, every day (both inter and intrastate); (2) cost no more than a regular phone service; (3) prohibit relay operators from refusing calls or limiting the length or number of calls; (4) require relay operators to maintain strict confidentiality with respect to all telephone messages relayed; and (5) prohibit relay operators from intentionally altering relayed conversations.[202] The ultimate cost of such relay services is to be borne equally by *all* telephone users (not users with hearing-impairments).[203]

The *DDA* provides that 'services relating to telecommunications' must be accessible to people with disabilities.[204] Clearly this requires that relay services be provided for Australians who are deaf. Currently at least two complaints have been filed with the Disability Commissioner alleging that Telecom and Optus Communications are in violation of the *DDA*.[205] No action has yet been taken on those complaints. The Commonwealth government, however, recently allocated $26.1 million over the next four years for the establishment of a national relay service.[206]

It is imperative that advocates for persons with hearing-impairments place primary emphasis on ensuring the provision of uniform 24 hour a day relay services throughout Australia pursuant to the *DDA*. The *DDA* disability standards must list specific rules with respect to such relay services. For example, relay services in the United States must be readily accessible. Inordinate delays (of more than 30 seconds or so) in reaching a TTY operator are

[199] 28 CFR (1993) Part 36, Appendix: *ADA* Accessibility Guidelines for Buildings and Facilities s 9.3.1.

[200] 47 USCA (1991) ss 225(a)(3), (b) (amending ss 225(a)(3), (c) of the *Communications Act* (1934)).

[201] 47 USCA (1991) s 225(a)(3).

[202] 47 USCA (1991) s 225(d).

[203] 47 USCA (1991) s 225(d).

[204] *DDA* ss 24, 4(1). The *DDA* contains one temporary exemption with respect to the accessibility of telecommunication services. Section 50 of the *DDA* provides that pay phones and public pay phones do not need to be accessible for three years after the effective date of the Act (until March 1996).

[205] One complaint was filed by Disabled Peoples' International (Australia). A second was filed by the Australia Association of the Deaf, Inc.

[206] See eg, Human Services and Health Media Release, Budget 1994–5, 10 May 1994 (by Dr Carmen Lawrence).

prohibited. Relay operators must be as easily reachable as ordinary telephone operators. Busy signals, long hold lines and the like are prohibited. Similar rules must be enacted in the *DDA* disability standards.

Title IX of the *ADA* requires close-captioning[207] of all television public service announcements produced or funded by the federal government.[208] The *DDA* requires that services provided by government entities and those provided by members of any profession or trade must be accessible to people with disabilities.[209] The *DDA* disability standards should mandate that television public service announcements be captioned pursuant to these provisions.

IV STATE AND LOCAL GOVERNMENT ENTITIES

Title II of the *ADA* prohibits all departments, agencies, special purpose districts or other instrumentalities of any state or local government from excluding a person with a disability from participating in, or denying a person with a disability the benefits of, the services, programs or activities of the entity, or from otherwise discriminating against a person with a disability.[210]

With respect to employment, Title II obligates state and local government entities to comply with the mandates of Title I of the *ADA*, discussed earlier in this article.[211] With respect to program and facility accessibility, Title II covers *all* programs or activities involving general public contact as part of the public entity's ongoing operation.[212] Thus, for example, in the context of a public school Title II requires that all events open to parents or the public, such as graduation ceremonies, plays, parent-teacher meetings and adult education classes, be fully accessible to people with disabilities. In appropriate situations, therefore, interpreters and assistive listening devices must be provided for individuals with hearing-impairments. Further, Title II applies to television and videotape programming provided by state and local government entities. Such programming, to be accessible to people with hearing-impairments, is required to be open-captioned or closed-captioned.

Under Title II of the *ADA*, all facilities and programs of state and local government entities that are open to the public must be accessible to individuals with disabilities. Thus, for example, state and local courts must be fully accessible, which means that interpreters and/or assistive listening devices must be provided for plaintiffs, defendants, witnesses, jurors, lawyers, judges, or members of the audience who are hearing-impaired. (In many cases, however, it would be appropriate for a court to request advance

[207] See fn 140 supra.
[208] 47 USCA (1991) s 611 (amending s 711 of the *Communications Act* (1934)).
[209] *DDA* ss 24, 4(1) (definition of 'Services' s (e), (f)).
[210] 42 USCA (West Supp 1991) ss 12131–12133.
[211] See section I supra. Under Title II, however, all state and local government entities must comply with Title I, even if they have less than 15 employees, while under Title I only employers having 15 or more employees are covered.
[212] See generally, the Department of Justice regulations enacted pursuant to Title II, 28 CFR (1993) Part 35.

notification of the need for certain assistance — such as the need for an interpreter.) To cite another example, state and local courts may not refuse to allow a person with a hearing-impairment to serve as a juror, except in the rare case where hearing loss would render the person unqualified (such as in a case where crucial evidence is on tape and there is no way to effectively interpret the tape).[213]

The most significant difference between *ADA* Titles III and II is that under Title III existing facilities must only be made accessible to the extent that accessibility is 'readily achievable'.[214] Under Title II, however, existing facilities of public entities (ie, state and local government entities) must be made accessible to people with disabilities unless that would constitute an 'undue financial and administrative burden' to the entity.[215] The latter exception is much narrower. Thus, state and local government entities have a greater obligation than private entities to make existing facilities accessible to people with disabilities. Under the *DDA*, to the converse, both government and private entities must meet the higher standard, thus providing greater protection for people with disabilities.

The regulations promulgated by the Department of Justice under *ADA* Title II provide comprehensive requirements with respect to communications accessibility.[216] State and local government entities have an affirmative obligation to ensure effective communication with individuals with disabilities, subject to the 'fundamental alteration' and 'undue burden' exceptions.[217] Public entities are required to furnish appropriate auxiliary aids and services necessary to ensure that communications with persons who are hearing-impaired or speech-impaired are as effective as communications with others.[218] When determining what type of auxiliary aids and/or service is necessary, the entity is required to give primary consideration to the request of the individual with a disability.[219] The public entity must honour that individual's choice unless it can demonstrate that another *effective* means of communication exists or unless it meets its burden of proving that the fundamental alteration/undue burden test is satisfied.[220]

The *ADA* Title II regulations specifically address the issue of when TTYs must be available in state and local government entities. Whenever a public entity communicates by telephone with applicants and beneficiaries, TTYs must be provided for people with hearing-impairments.[221] Thus, for example,

[213] Note, however, that *ADA* Title II only governs state and local courts. It does not govern federal courts. Curiously, no federal law prohibits American federal courts from discriminating on the basis of disability. The *DDA*, to the converse, prohibits both federal and state courts from discriminating on the basis of disability. This is another instance in which the *DDA* provides greater protection for people with disabilities, including those with hearing-impairments.

[214] See text at fns 185, 186 supra.

[215] 28 CFR (1993) s 35.150(3).

[216] 28 CFR (1993) s 35.160.

[217] 28 CFR (1993) s 35.160.

[218] 28 CFR (1993) ss 35.160(a), (b).

[219] 28 CFR (1993) s 35.160(b)(iii).

[220] 56 Fed Reg (1991) 35711–2.

[221] 28 CFR (1993) s 35.161.

public libraries, all state offices that have general information numbers, city halls and public assistance offices must have TTYs. The requisite test is: 'where the provision of telephone service is a major function of the entity, [TTYs] should be available.'[222] Moreover, it should be remembered that services provided to persons with hearing-impairments are to be as effective as those provided to others. Thus, for example, if a reference desk librarian at a city library personally answers the phone and responds immediately to questions posed by hearing callers, the same service must be provided via TTY to a caller with a hearing-impairment. It would not constitute the provision of equally effective services for TTY calls to be answered by a recording stating 'please leave your name and number and a librarian will return the call as soon as possible'.

Transportation terminals operated by state or local government entities (such as train stations and some airport terminals) are also covered by *ADA* Title II, and must provide accessible facilities and services. Thus, where such terminals provide general information to consumers via a special information telephone line, a TTY line must be available for persons with hearing-impairments to obtain such information. Further, since most transportation terminals have a considerable number of pay phones for the use of travellers, and since use of the telephone is often necessary when travelling, TTYs should be available at such terminals to permit people with hearing-impairments to make outgoing telephone calls. It is highly unlikely that a public transportation terminal could show that the provision of one or more TTY pay phones in an existing facility would constitute an 'undue financial or administrative burden'.

In addition, Title II requires that *all* telephone emergency services which people may call to seek immediate assistance (such as police, fire and ambulance services) must have TTYs.[223] In one of the first cases decided under the *ADA*, *Chatoff* v *City of New York*,[224] the Court entered a permanent injunction ordering the City to make its emergency services fully accessible to persons with hearing-impairments who use TTYs, by ensuring that such services are 'equivalent to the services received by the hearing population with regard to call set-up time, holding time, call response time, etc'.[225] The Court further ordered the City to assemble a TTY training program (including follow-up training) to train all telephone emergency personnel as to 'proper TTY techniques, use of [TTY] American Sign Language syntax, deaf culture, and other applicable techniques in order to reduce response time.'[226] In addition, the Court ordered a quarterly audit of 'the quality of service administered, the adequacy of maintenance of [TTY] machines and related equipment, and the general quality of [TTY] services'.[227] Finally, the Court ordered 'that at such time when a new "Enhanced 9–1–1 System" is implemented in New York

[222] 28 CFR (1993) Appendix.
[223] 28 CFR (1993) s 35.162.
[224] 3 NDLR (SDNY 1992) 80.
[225] Ibid.
[226] Ibid.
[227] Ibid.

City, the [City] must simultaneously make these enhanced capabilities directly and equally accessible to [TTY] users.'[228]

As previously noted, the *DDA* requires that all services provided by federal, state, and local government entities must be accessible to people with disabilities.[229] Thus, protections with respect to government services similar to those detailed under the regulations promulgated pursuant to *ADA* Title II should be detailed under the *DDA* disability standards.

In addition, the *DDA* requires that all transportation services be accessible to people with disabilities.[230] Detailed disability standards should be enacted with respect to the obligations of transportation companies. For example, when announcements are made over a loud-speaker on a train or subway they should be printed in text on a screen for riders with hearing-impairments. Advocates for persons with hearing-impairments should attempt to make the *DDA* disability standards as inclusive as possible.

V TERTIARY EDUCATION

Under both the *ADA* and the *DDA* colleges and universities must refrain from discriminating on the basis of disability.[231] Again, this requires provision of reasonable accommodations/adjustments unless undue/unjustifiable hardship will result. Under the *ADA*, colleges and universities must provide auxiliary aids and accommodations to allow students with hearing-impairments to receive equivalent educational opportunities.[232] In appropriate cases, therefore, interpreters, notetakers, assistive listening devices and the like must be provided at no cost to the student — up to the point where the undue burden test is satisfied. In most cases, a college or university will be hard pressed to show that it would constitute an undue burden to provide necessary accommodations for a student with a hearing-impairment.

Further, when a college or a university offers a program to the general public (such as a play, debate or speech), as a place of public accommodation it must provide reasonable accommodations to members of the public with hearing-impairments who attend such functions. Again, in appropriate situations interpreters or assistive listening devices will have to be provided. The *DDA* disability standards should incorporate similar provisions.

[228] Ibid. The 911 system in the United States is similar to Australia's 000 system.
[229] See text at fn 209 supra.
[230] *DDA* ss 23, 4(1) (definition of 'premises').
[231] With respect to the *ADA*, see 42 USCA (West Supp 1991) ss 12181–12182 (private colleges and universities), s 12132 (public colleges and universities). With respect to the *DDA*, see *DDA* s 22.
[232] See eg, 28 CFR (1993) s 36.303(a), (b); 28 CFR (1993) s 35.130.

VI ELEMENTARY — SECONDARY EDUCATION

The *DDA* prohibits *all* educational institutions (not just tertiary institutions) from discriminating on the basis of disability, and again requires provision of reasonable adjustments unless unjustifiable hardship will result.[233] While Titles II and III of the *ADA* also prohibit discrimination by public and private schools, in the United States a detailed and complex law, the *Individuals With Disabilities Education Act*,[234] outlines the obligations of school districts with respect to children with disabilities. A discussion of the *Individuals With Disabilities Education Act* is outside the scope of this article. It is important to note, however, that the education provision of the *DDA* is of crucial importance, and much thought and effort must go into drafting the *DDA* disability standards in the area of education. It is imperative that the disability standards:

(1) give parents of children with hearing-impairments the right to *choose* the type of education their children receive, such as oral (spoken English), manual (signs but no spoken language), bilingual (written English and Auslan[235]);
(2) require school districts to provide a continuum of educational options (so that children with hearing-impairments have *choices* and can receive appropriate educational services); and
(3) mandate provision of sufficient support services, such as speech and auditory training, instruction in reading and language by qualified teachers of the deaf, bilingual instruction (where appropriate), and/or appropriate interpreters.[236]

CONCLUSION

As this article illustrates, the *DDA* offers much hope for Australians with disabilities, including those with hearing-impairments. The purposes of laws such as the *DDA* are twofold. One purpose is to educate the public about the right of all persons with disabilities to be fully integrated members of society — to take their place as 'first-class', rather than 'second-class', citizens. A second purpose is to provide a mechanism whereby people with disabilities can ensure enforcement of that basic right. For hundreds of years people with disabilities have been relegated to second-class citizenship in all so-called 'civilised' societies. Education alone has not, and will not, turn the tide.

[233] *DDA* s 22.
[234] 20 (1992) USC ss 1400–85.
[235] 'Auslan' is Australian Sign Language, and is comparable to 'ASL' (American Sign Language). See fn 72 supra.
[236] The issue of appropriate educational services for children with hearing-impairments is fraught with controversy. Debates over this issue have raged for years in numerous countries, including both the United States and Australia. The issue of 'choice' in education for hearing-impaired children is highly political, and involves a myriad of concerns outside the scope of this article. The 'options' presented here are merely suggestive or illustrative.

History has unfortunately proven that 'no civil right has ever been secured without legislation'.[237]

While education is important, governmental and judicial enforcement is imperative. The *DDA*, therefore, serves not only to educate the public about the basic rights of persons with disabilities, but to ensure enforcement of those rights. People with disabilities, including those with hearing-impairments, must immediately take steps to help to achieve both of the *DDA*'s goals.

The *DDA* will only be effective if people with disabilities and their advocates work to make it effective. Currently the law is on the books, but it is of little value. The public needs to be made aware of the law, and people with disabilities, including those with hearing-impairments, need to begin demanding equal rights under the law. Attainment of both the educational and enforcement goals must begin *now*.

Initially, the various sectors of the disability community[238] must each outline principles and standards necessary to provide maximum accessibility for persons with the particular disability at issue, just as this author has attempted to with respect to persons with hearing-impairments. Subsequently, the different disability groups and their advocates must marshal their forces and work together to ensure the effectiveness of the *DDA* for *all* people with disabilities in Australia.

To ensure maximum protection under the law, it is imperative that people with disabilities, including those who are hearing-impaired and their advocates: (1) begin *now* to educate the public about the *DDA* and the entitlement of all people with disabilities to equal rights, and (2) become intimately involved in the formulation of disability standards under the Act.

The *DDA* allows for all appropriate remedies, including damages.[239] People

[237] J S Brady, 'Save Money: Help the Disabled' *The New York Times* 29 August 1989, section A, p 19.

[238] See eg, the listing of members of the National Coalition for the Development of Disability Standards in fn 44 supra.

[239] *DDA* s 103(1). That section provides that the HREOC, if it finds the complaint substantiated, may make a determination that may include:

(i) a declaration that the respondent has [violated the *DDA*] and should not repeat or continue such unlawful conduct;
(ii) a declaration that the respondent should perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant;
(iii) a declaration that the respondent should employ or re-employ the complainant;
(iv) a declaration that the respondent should pay to the complainant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
(v) a declaration that the respondent should promote the complainant;
(vi) a declaration that the termination of a contract or agreement should be varied to redress any loss or damage suffered by the complainant;
(vii) a declaration that it would be inappropriate for any further action to be taken in the matter.

The *DDA* further provides that if no party appeals the decision of the HREOC, that decision shall become binding after 28 days (see generally, *DDA* s 104). If the order is appealed to the court, the court has discretion to award any appropriate remedy (see generally, *DDA* ss 104B (8), (9), (10)).

The *DDA*, therefore, allows for broader remedies than the *ADA*. Under the *ADA*, for example, damages for employment discrimination are only available for intentional discrimination, and then such damages are subject to statutory caps. See generally, the

with disabilities, including those with hearing-impairments, should begin demanding such remedies. It is not necessary for disability standards to be enacted before people with disabilities can file suit under the Act. Rather, the Act has been effective since March 1993. It is time for people with disabilities, including individuals with hearing-impairments, to begin enforcing their rights under the law.

Civil Rights Act (1991) S 1745, 137 Cong Rec S15503 (30 October 1991); Tucker and Goldstein, op cit (fn 11) 20:49–52. And, under Title III of the *ADA*, damages may not be assessed against owners and operators of places of public accommodation when a private suit is filed (such damages may only be assessed when the Attorney-General files suit). See generally, 42 USCA (West Supp 1991) s 12188(b)(2)(B); Tucker and Goldstein, op cit (fn 11) 22:29–31.