

Submission to the Draft Report -Review of the *Disability Discrimination Act 1992*.

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Having submitted comments to the original review and spoken at the original hearing, I will keep my discussion to the draft report's Key Points (in bold) and clarify a few points I've already made –particularly in the first hearing. I would like to firstly express my disgust and loathing at the overall review process thus far. The enquiries main aim is to 'report on the appropriate arrangements for regulation' of the DDA, this 'appropriateness' must be questioned due to the lack of the draft reports general failure to incorporate views from submissions from ordinary members of the community –let alone people with disabilities. This is abject paternalistic rudeness considering a reasonable amount of such submissions were received by the commission. The entirety of this point needs to be recognised. This commission also asked:

any parts of the legislation which restrict competition should be retained only if the benefits to the community as a whole outweigh the costs and if the objectives of the legislation can be achieved only through restricting competition;

Surely, the authors of the draft report accidentally stumbled across the inherent inadequacy of the DDA as a benefit to the community as a whole. My only wish is that this is realised, but, as a person with a disability, doubt very much that the commission will be swayed by common sense, let alone even read this submission.

Key points

The Disability Discrimination Act 1992 (DDA) seeks to provide a fair go for Australians with disabilities—it gives them the right to substantive equality of opportunity in areas like employment, education and public transport.

The ideal of substantive equality of opportunity is meaningless for most people. It is wholly dependent upon the free agency of people to receive the opportunity. For instance, wheelchair accessible buses are neither universal nor able to be used by drivers. Not all buses on a route will have a low floor and not all drivers might be conversant/competent with use of the ramps.. Country trains often require people in wheelchairs to ride in the conductors cabin. In employment and education numerous factors may inhibit opportunity which may have absolutely nothing to do with education or employment, ie. cost, health status. Equality of opportunity is meaningless as opportunity is dependent on conditionality.

*The DDA appears likely to have provided net benefits to the Australian community:
– many benefits are intangible but widespread*

- costs of complying with the DDA should be quite small for many organisations
- in-built safeguards help ensure costs are outweighed by benefits
- its impact on competition is likely to be limited.

How beneficial is a system that removes legal right based on cost, known also as unjustified hardship. Also, proving discrimination is conditional based on legal right as opposed to actual or human right. It is important that the Australian community is defined fully. Why are people³ with disabilities afforded favoured status by the DDA, thereby excluding them from the Australian community?

But there is not enough information to quantify these costs and benefits. Comment is requested on costs and benefits both for people with disabilities and businesses.

This is a major concern, surely a lack of data must indicate something peculiar. At the very least this indicates the DDA's negative effect on competition. The costs and benefits for me in making a complaint is as follows. I have freelanced as a social/educational consultant where the minimum pay is approx \$25 per hour. My hourly expense/the amount of hours I spent on the complaint is as follows

Writing up initial complaint	3 hrs
Reading and responding to defense response	6 hrs
Conciliation attendance	6 hrs
Mediation preparation	3 hrs
Mediation attendance	6 hrs
Preparation for court appearance	8 hrs
Court appearance	24hrs

Total hrs	50 hrs

Cost in lost pay for hours unavailable to work due to complaint is 50x\$25, or \$1,250.

Added to this is legal fees, anywhere between \$500 and \$10,000. Benefits –respondent can get away with the discrimination by denying any discrimination and just apologizing for any anguish. More decisive ruling is needed by the mediator.

Overall, the DDA has been reasonably effective in reducing discrimination. But its report card is mixed and there is some way to go before its objectives are achieved.

- People with physical disabilities have been helped more than those with mental and intellectual disabilities.
- Access to transport and education has improved more than employment opportunities.
- People in regional areas, from non-English speaking backgrounds and Indigenous Australians still face particular disadvantages—but race discrimination, language, socioeconomic background and remoteness also play a part.

The DDA does not reduce discrimination; it enables, even legalizes it –as through unjustified hardship. It needs to be asked why the DDA needs to be defended by conditional statements without any basis in fact.

Minor changes would make the DDA more effective, including:

- changes to the Act (to clarify definitions, extend the power to make disability standards and restrict the scope of exemptions)
- changes to complaints processes (to provide more certainty about court costs and allow organisations and HREOC to initiate complaints)

Need to be careful of over-clarification and mindful of individual difference. Standards need to be increased and universalized. Individuals have always been isolated in complaints process. HREOC needs to be more aligned to complainant as due to

disability there is reduced capacity for complainant for equal representation. This is an area where the DDA legalizes discrimination.

Further measures may be considered to improve employment opportunities for people with disabilities, consistent with economic efficiency. Comment is sought on:
– *the appropriate sharing of costs of adjustments between government and business*

– *the introduction of a 'positive duty' on employers to identify and work toward removing barriers to the employment of people with disabilities*

The DDA needs to be decisive and universal instead of promoting exceptionism as with such recommendations.

The DDA, and HREOC, need the support of mainstream mechanisms wherever possible:

– *in monitoring and enforcing disability standards*

– *through co-regulation (backed by disability standards)*

The DDA sentiments need to be universally incorporated into all other legislation. Discrimination should not be legalized. Universal human rights should be protected, however.

These recommendations would promote the objectives of the DDA and enhance its net benefits to the Australian community.

Rather than promoting the objectives of the DDA all of these current recommendations merely entrench its un-workability for people with disabilities. At the moment it is lacking in proper accountability and transparency –all current recommendations will do little to alter this. Consideration needs to be given to broader more equitable reform.

ADDITIONAL COMMENTS

*In reviewing the DDA attention should have reflected an understanding of the consequences and interactions of competition, disability and individual difference. I provide an account of Amartya Sen's account in his 1999 work Development as freedom in clarifying this and previous comments from the first hearing.

*DDA should be abolished even outlawed. In its place we need a universal bill of human rights. Complaints need to be pursued and fully supported as human rights violations. At the very least we must apply a universal value to humanity.

*All other legislation needs to embrace universal design principles.

*A human rights development and promotion act is needed to protect, ensure and enable future development of human rights.

AN ANALYSIS OF AMARTYA SEN'S 'MARKET, STATE AND SOCIAL OPPORTUNITY'

The 'truth of the importance of markets in economic life (Sen A, 1999, p.111)' is crucial to Amartya Sen's take on globalization and human rights. Yet, global dynamics have tended to dictate blind adherence to this maxim, whereby 'One set of prejudices has given way to another –opposite- set of preconceptions (p.111).' The importance of the markets is commonly expressed, yet this introspection from Sen questions the voracity of market dynamics in the light of the value of freedoms and development. Growth in international markets and in market regulation constitutes the prejudices and preconceptions that comparatively test Sen's argument. For Sen the relation of globalisation and education is not a tale of markets over social opportunity or vice versa but a mutual bonding of the two, at all times mediated by the central dominance of the state.

Focusing on markets, state and social opportunity, Sen poses a reality of life in a world of institutions (p.142). He went on to observe that 'Not only do institutions contribute to our freedoms, their roles can be sensibly evaluated in light of their contributions to our freedom (p.142)'. No longer is their dual focus relevant. Conversely, Sen (1999) points out that

...problems that arise spring typically from other sources –not from the existence of markets per se- and include such concerns as inadequate preparedness to make use of market transactions, unconstrained concealment of information or unregulated use of activities that allow the powerful to capitalize on their asymmetrical advantage (p.142).

The focus of Sen's argument is on the overall utility of the market as opposed solely to market prosperity. This is evidenced in relation to the significance of transactions as the reason for wanting markets, whereby

The ubiquitous role of transactions in modern living is often overlooked precisely because we take them for granted. There is an analogy here with the rather underrecognised –and often unnoticed- role of certain behavioral rules (such as business ethics) in developed capitalist economies (with attention being focused only on aberrations when they occur). But when these values are not yet developed, their general presence or absence can make a crucial difference. In the analysis of development, the role of elementary business ethics thus has to be moved out of its obscure presence to a manifest recognition. Similarly, the absence of the freedom to transact can be a major issue in itself in many contexts (pp.112-3).

The pivotal role of transactions for Sen warrants greater attention and is more accountable under a number of contexts. The first two sections and section four- *Markets, liberty and labor*, *Markets and efficiency*, and; *Markets and interest groups* –set the market mechanism contexts for Sen's discussion. These contexts have '...achieved great success under those conditions in which the opportunities offered by them could be shared (p.142)'.

Sen (1999) notes 'In the context of developing countries in general, the need for public policy initiatives in creating social opportunities is crucially important (p.143)'. He

expresses a crucial role for public policy provisioning in sections seven to eleven (*Interdependence and public goods; Public provisioning and incentives; Incentives, capabilities and functioning; Targeting and means testing, and; Agency and informational basis*) of this chapter.

Johnson's (2001) ordering of science and technology '...for a knowledge economy, one in which there is within-country capacity for breakthrough research which leads to innovative products and success in world markets (p.1)' prioritises market success behind within-country capacity. This is, however, often contingent on the return of engineering, science and technology graduates to the developing country of origin (pp.15-18). At a more general level, Bradmore (1996) reporting the contribution of Michael Porter to the field of competitive advantage notes the *value chain* concept where '...every aspect of a firm's operations is designed to add "value" to its offering in the eyes of the customer. The "value" may be extended to the customers in terms of lower prices or additional benefits (p.69, emphasis original)'. To gain full competitive advantage firms need to look beyond their own position in the market to see the value chain linkages (p.72). Social opportunities are as much a cause and effect of the markets.

If we pursue the competitive advantage ideal, the need for public policy to support social opportunities becomes mandatory insurance. Sen (1999) further notes-

The efficiency contributions of the market mechanism can hardly be doubted, and traditional economic results, in which efficiency is judged by prosperity or opulence or utility, can be extended to efficiency in terms of individual freedoms as well. But these efficiency results do not, on their own, guarantee distributional equity. The problem can be particularly large in the context of inequality of substantive freedoms, where there is a coupling of disadvantages (such as the difficulty of a disabled or an untrained person to *earn* an income being reinforced by her difficulty in making use of income for the capability to live well). The far-reaching powers of the market mechanism have to be supplemented by the creation of basic social opportunities for social equity and social justice (p.143, emphasis original)

Hence, the market would not exist if not for social opportunities. Sen concludes that 'The wide sharing of these social opportunities made it possible for the bulk of the people to participate directly in the process of economic expansion (p.143)'. This ultimately facilitated the transformation of the context of developing countries to the context of human development.

Sen acknowledged that 'To see development as freedom provides a perspective in which Institutional assessment can systematically occur (p.142)': the institutional assessment in this chapter is located in sections three, five, six and twelve (*Coupling of disadvantages and inequality of freedoms; Need for critical scrutiny of the role of markets; Need for a many-sided approach, and; Financial prudence and need for integration*). The system of Sen's (1999) institutional assessment having biblical (trinity) symbolism and is spiritually linked to Buddhist philosophy as 'there is something to be learned from his speeches on nonextremism (p.112)'. For Buddha, individual enlightenment is attained by taking the middle path; universal enlightenment is more urgent for Amartya Sen (1999) to be following the middle path in respect to market mechanism. The middle path here refers to the role of the state in the operation of careful and determined public action, as Sen admits that 'The overall achievements of

the markets are deeply contingent on political and social arrangements (p.142)'. From the wisdom of Buddha to institutional assessment: there can be no surer push for the need for regulation.

Finally, Sen observes that 'The real problem here is not the need for financial conservatism in itself, but the underlying -and often unargued- belief that has been dominant in some policy circles that human development is really a kind of luxury only the rich countries can afford (p.143)'. This sums up the slant towards anglo-American hegemony that dominates the international market scene. Karen Tremblay (2002) examination of foreign students by the language of the exporter highlights the role of English language training (p.60). Some authors display a decided parochial bent (Green M, 2002; Hayward F, 2000; Miller M, 2002), whilst others simply yield to a pre-ordained market order (Castells M, 2000; Marginson S; 2001; Pimpa N, 2002; Witte J, 2000). Sen's advantage is that he sees beyond the political malfeasance of market mechanism at the social mechanics to probe the ideal of freedom. Simon Marginson (2001) sees the market as a double-edged sword where to-

...enables Australians and South East Asians to engage on a mass scale. At worst Australian universities have become agents for a larger Anglo-American hegemony in which Australia as such has no right of self-determination, except by becoming American on American ground. Australian higher education is both agent and victim of economic globalisation. Australia is for the North but it is of the South. Perhaps only a hegemonic power such as the U.S.A, for whom the national *is* the global, can consistently pursue both neo-liberal globalisation and the national interest (p.23, emphasis original).

Market mechanism for Sen (1999) is no easy equation; neither is it determined by cause and effect relations; neither is it typified as a double edged sword. Most discussion of market mechanism focuses on either the direction of the markets or the condition of the people responsible to the market, or both. Sen follows the middle path, promoting the mediating role of the state. At all levels an integrated market mechanism is exposed: from determining the role of markets, the context –by role, country, development- and finally nature of development. In this way Sen gradually evolves an opinion that the operation of market mechanism constitutes human development. To me this complicates the global view of markets, exchanging the economic value with a broader public value.

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