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TAS

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Productivity Commission
Disability Discrimination Act Inquiry
LB2 Collins Street
MELBOURNE
VIC 8003

Dear Commissioners

Thank you for the opportunity to respond to this inquiry on the *Disability Discrimination Act 1992*. I have had close contact with the operation of the Act, particularly between 1994 and 1999, when I held positions as Disability Discrimination Legal Advocate for Tasmania, Policy Advisor to the Disability Discrimination Commissioner and Principal Solicitor at the NSW Disability Discrimination Legal Centre. I am presently a member of the Tasmanian Anti Discrimination Tribunal and the President of the Guardianship and Administration Board. I write this response based upon those professional experiences, but do not purport to represent the views of the above-named organisations.

Between 1994 and 1999 I also participated in the national network of DDA services that were funded after the Act was passed to ensure that the community made use of and were aware of the existence of the Act. These services, which operate within the network of Community Legal Centres, remain as important today as at the date of the introduction.

Overview

I have the benefit of reading other papers placed on your website. I agree with the sentiment expressed in a majority of papers that the *Disability Discrimination Act* is an important and necessary piece of legislation that makes an important statement about who we are as Australians. The prohibition of discrimination on the ground of disability marked an important step in a process of change for people with disabilities and society generally. The passing of the legislation remains a remarkable achievement in the development of an acceptable social response to disability.

It appears discordant to associate human rights legislation with productivity if productivity is measured according to purely economic terms. Surely a Government that adopts and implements national legislation to prohibit discrimination and vilification does so because it is fundamentally right, and economic productivity is a secondary factor.

A significant role in each of the three DDA related positions I held was community education and often that education was for corporations, local and state Government authorities who required education for liability management rather than attitudinal

change. In education sessions, my colleagues and I expressed the view that when you create accessibility for people with disabilities, you create access for everyone. This continues to be the case.

An implied objective of the Act is 'inclusion.' Unfortunately, the term 'inclusion' has become rather tainted in that many of the larger organisations who adopted the term 'inclusion' have undertaken the task by closing down 'special' institutions but have not taken the next step of funding the necessary support to make the 'inclusion' work. Inclusion, when done appropriately, is probably more expensive than the former option of creating 'special' institutions (schools, institutions etc) however, it is also more productive in creating a just and equitable society.

One of the early disappointments for the disability community was that the passing of the legislation did not lead to increased funding to make inaccessible services and facilities accessible. The passing of the legislation essentially created a chose in action to highlight some areas of deficiency, but could not create services where no services existed or enhance services that were under-funded.

It is interesting to note that age discrimination legislation is being developed. I would like to see more use of the DDA to address very serious issues of abuse and discrimination for people with age-related disabilities such as dementia. While de-institutionalisation has been an accepted concept in disability issues for the past decades, people with dementia are still living in highly restricted and institutionalised environments.

The use of the Act has, however, worked very effectively in exposing beliefs and assumptions about disability that were irrelevant and wrong but had debilitating effects upon people with disabilities and their opportunity for participation in work, education and community life.

Importantly, disability discrimination challenged the community in ways that previous race and sex discrimination law had not. Whereas race and sex discrimination had involved cost mostly in paying damages awards, disability discrimination created costs in changing physical structures, document formats, communication styles, staffing numbers and curriculum plans.

Previous discrimination actions did not have the capacity for such wide scale change. While there was a period of initial rebellion, the longer terms effect of these has gradually been that planners are now building the costs into new projects rather than an expensive 'retrofit.' This is best seen in the built environment and that is due in no small part to the fact that local governments have taken on the responsibility of being proactive in the process of approval of development plans. Apart from individual complainants, there is no other forum or authority where 'policing' of discrimination occurs.

Definitions

The definition of disability is appropriately broad. Prior to the DDA, 'disability' was most often associated with either an intellectual disability or the use of a wheelchair.

The acceptance of a wider category is useful in bringing attention to the areas of need for certain disability groups. It is important that the definition is functionally based rather than a diagnostic basis, as there are many occasions where a disability is evident but medical opinion may vary about diagnosis.

Extension to include addiction may be appropriate as suggested in other papers, but proof of a disputed issue of disability will always come down to the availability of relevant medical or other expert opinion.

Discrimination

The distinction between direct and indirect discrimination often proves to be quite academic. The experience of discrimination for the person with the disability is equally damaging whether it is direct or indirect. The legislative difference in direct or indirect discrimination leads to a false assumption that indirect discrimination is either less harmful or less culpable.

In conducting community education sessions, it was always the most difficult message to assist people to understand because there is arbitrariness about the definitions. As a thumbnail sketch, I would describe direct discrimination as the action as person or organisation takes when they single you out for exclusion or different treatment, but indirect is when that organisation treats everyone the same but omits to cater for a different need created by a disability. These can be no more than a rough guide. The distinction is often irrelevant given that the tribunal ultimately makes the finding upon the evidence received not upon the framing of the complaint, and generally a complainant will use both sections 5 and 6 as a coverall.

Between state DDA services in the community legal centres we found differences between states about when and why complainants would be advised to take a complaint as direct or indirect discrimination. This difference persisted through interpretations given by different State tribunals. We also found that there was a lack of guidance from HREOC decisions. The initial decision in *Scott v Telstra* set out a test that was clear in its terms, yet later decisions did not follow that formula.

One of the difficulties that the definition of indirect discrimination presents is that it introduces the concept of ‘reasonableness’ as part of the complainant’s case. This means that the complainant must prove the unreasonableness of the action of the respondent in the circumstances.

The concept of reasonableness also applies in the defence of unjustifiable hardship, which falls into the respondent’s onus of proof. In the practical application in a hearing, it requires the concept of ‘reasonableness’ to be examined for two purposes. This has resulted in long legal debate in hearings (and in preparation for hearings) whether the terms can be proved and disproved by the same evidence or whether each requires different evidence. This ambiguity has procedural implications for complainants and respondents alike.

As primarily complainant’s advocates, in the DDA services we argued that ‘unreasonable in the circumstances’ centres upon the effect upon the complainant

(much like the *Scott* decision) and that unreasonableness for unjustifiable hardship purposes relates to the respondents circumstances. This argument has not been adopted in later judgments, but no other clear statement exists either.

What amounts to a 'requirement' for the purposes of indirect discrimination is also rich fodder for legal argument. In general, tribunals appear to adopt a strained use of the word 'requirement' which does not fit the general understanding of the term.

It is common for tribunals to cite certain passages from the High Court's *Waters* decision and the *IW v Perth* decision as interpretative authority for finding discrimination where the language of the statute does not really fit the evidence, but the tribunal believes that a finding of discrimination is just. While it is beneficial legislation and the intention of the legislation must be respected, it does hamper the understanding and community acceptance of this legislation that the statutory language falls so far behind the fundamental concepts.

The concept and legal jurisprudence of discrimination must have advanced sufficiently to enable the drafting of a single definition of discrimination that does not resort to these arbitrary distinctions or the straining of everyday language.

Temporary Exemptions

Temporary exemptions, in practice, are anomalous. An organisation that seeks an exemption would in general be better advised to adopt their own measures to redress discrimination, develop a comprehensive action plan and take their chances at defending any potential complaints than to undertake the process of seeking an exemption.

The kinds of organisations who are competent at recognising and attempting a legal response to discrimination are usually the more conscientious organisations. Such an organisation is the kind who might make an application for exemption.

An exemption application is advertised and public submissions are sought. There is no legislative limit to the number of category of submissions that could result. Those responses are then considered and determined in an administrative, not a legal, process.

Why would a public relations conscious organisation want to advertise the fact that they are discriminating and they want permission to continue doing so? If they are successful it is usually on fairly strict and demanding grounds that were not imposed upon them prior to the application. If they are unsuccessful, it clears to path for a wily complainant to then take an action of discrimination against them on those advertised grounds.

More often than not the chances of the particular discrimination for which the exemption is sought may never become the subject for a complaint. If there were sufficient grounds for an exemption, then presumably there would possibly also be a clear defence to a complaint, if not grounds for dismissal under pre-hearing provisions.

Temporary exemptions have the hallmarks of being a necessary element in passing the legislation in 1992, but have little practical effect and give false hope of liability protection for potential respondents.

Action Plans

Action plans are effective as an option for a service provider to assess it accessibility for people with disabilities and to enhance its understanding of the how its operations impact upon people with disabilities. When they are done well, action plans involve consultation with consumers, evaluation of services and programs and opportunities for enhancement. There is no imperative for these processes. The motivation for a good plan comes from the legal reality that the better your action plan, the more likely it is to have a beneficial operation under section 11 should it ever be necessary. Action plans can also provide an opportunity for publicity and a statement of principle and commitment to accessibility.

However, action plans are not accompanied by any process of legal assessment or for compliance with set time lines. While some conscientious companies may amend action plans where targets are not met, there is no process for sanction for a company who does not meet its targets or does not live up to the promise of the positive publicity stunt. Like temporary exemptions, action plans may hold out false promise of protection from liability.

Unjustifiable hardship

Construction of this term has been primarily financially focussed. Little if any consideration is given to what level of hardship would have been justifiable in the circumstances and whether that threshold has been passed.

It is interesting that the term ‘unjustifiable hardship’ when interpreted according to everyday usage would imply that some hardship is assumed, but it is only when that hardship reaches a threshold of being ‘unjustifiable’ that it amounts to a defence. In other words, some hardship is presumed by the legislation to be justifiable.

In practice, in the pre-hearing procedures, conciliations and at times in hearings, ‘unjustifiable hardship’ is often interpreted to include any hardship at all, particularly any financial hardship. Respondents quickly resort to financial calculations compared against organisational budgets and profit margins and unjustifiable hardship appears to be proven for the purposes of dismissing a complaint or encouraging a complainant to settle. Consideration is usually restricted to section 11(c) at those stages.

Sections 11(a) and (b) are given more consideration at the hearing level, but like the confusion with the term ‘reasonable’ appearing in the indirect discrimination definition, the consideration of the factors making up sections 11(a) and (b) do not fall neatly within a complainant proving his or her case nor a respondent disproving a case. Rather consideration of those factors rest with the tribunal making a determination at the conclusion of the evidence. This can have procedural implications.

Effectiveness in Achieving Objectives

The effectiveness of the DDA cannot be measured in the number of successful complaints. Rather, its effectiveness has been in giving a foundation to requests for attitudinal and structural change that is not based upon the good will or charity of the provider.

The fact that adjustments can be demanded under Federal legislation has given the confidence and impetus to the disability movement and freed the community from the restrictions of charity and benevolence that predated the Act. These demands are now often made and met without recourse to the Act.

Some, if not all, local governments and building authorities have now adopted screening processes with respect to the built environment and the compliance of new building projects with the DDA. While this does not guarantee that all new building projects will be DDA complaint, it increases physical and sensory access for people with disabilities.

These processes used to require an individual with a disability to be aware of development applications, make submissions and appeal to service providers to make new service premises physically accessible. Such processes now occur without requiring the intense level of individual effort previously required of people with disabilities.

The process of individual complaints provides a backstop where respondents are intransigent or rights are unrecognised.

The ABS statistics provided show that there is still much work to be done. Not all of that work, and not all of the acclaim for the improvement in the lives of people with disability, is shouldered by the DDA. The implementation of the DDA occurred within a process of societal change that is ongoing. It has provided some tools for meeting the needs of people with disability. Such tools still require the input of resources by key players, such as State and Federal governments.

The complaints process can be gruelling for complainants. The preparation is stressful; processes can be confusing and frustratingly slow. For people with intellectual, cognitive and psychiatric disabilities the stress that is associated with any litigation for any person can be unbearable and has an effect in forcing early or unsatisfactory settlements or withdrawal of complaints.

Legal processes are still underpinned by a requirement for oral examination and cross-examination of witnesses. The primary witness in discrimination cases is the complainant. In other jurisdictions, eg criminal law, the presence of a disability that disturbs mental function is usually a means of highlighting the unreliability of a witness. In discrimination law it is an element of the case. The result is that complainants with psychiatric, cognitive or intellectual disabilities are often intimidated by the process and experience particular distress in reading contrary statements by respondents or assertions that a particular event did not occur.

Competition and economic effects

One of the results of the DDA and similar State legislation is that service providers have recognised a consumer group that they did not previously consider as an independent group.

Equally prospects for education and employment for people with disabilities are markedly enhanced by the presence of legislation that prevents discrimination and exclusion on the basis of disability.

These are values that may not easily correlate to competition or economies but they are important values, which help to define Australia and its people.

I look forward to addressing these issues and others raised by your paper in the hearing.

Yours faithfully

Anita Smith.