

DISABILITY DISCRIMINATION ACT INQUIRY ISSUES PAPER

DEFINITIONAL ISSUES

There is a need to expand the definition of disability to include 'a characteristic imputed to the disability'. Recent cases including the *Purvis v NSW Department of Education* highlight the problems differentiating between the actual disability and characteristics caused by the disability, such as behaviours.

DEFINITIONS FOR DIFFERENT PURPOSES

In Tasmania the Education department has defended some matters by differentiating between "learning differently" and learning disabilities eg dyslexia is not perceived as a disability. In a case I represented the respondent tried to argue "learned differently" was not a disability and therefore was not within the meaning of the Act.

Likewise where the Department defines an intellectual disability arbitrarily for funding criteria purposes they then argue the definition of Intellectual Disability under the Act that the Act does not apply.

TECHNICAL ARGUMENTS LEADING TO LITIGATION.

The use of the terms "not materially different" and "substantially higher proportion" lead to technical arguments that can only be dealt with by the courts, costing time, money resources and the unnecessary delay of the substance of the matters. Where this occurs in education and employment matters the claimant has little chance of recovery of beneficial outcomes. (An example of this is a case finally settled in Tasmania after 4 years. The child was by then at school leaving age)

The doubling up of defences is confusing. Where a claim of indirect discrimination (s6) occurs the onus is on the claimant to prove the discrimination was "not reasonable in the circumstances" effectively constituting a defence to the claim. In addition the respondent can then argue "unjustifiable hardship" (s11) the onus of proof being on the respondent. Effectively the argument is again one of un/reasonableness in the circumstances thereby confusing where the real onus lies, again extending technical argument and litigation.

SUCCESSFUL S11 DEFENCE ARGUMENT SHOULD NOT BE FINAL

Where a respondent is successful in acquiring a s11 defence it effectively means the respondent may continue discriminating. Where possible/reasonable s60 the requirement to submit an Action Plan and s55 Granting of an exemption should be triggered by the decision. This means that the respondent effectively has a temporary exemption while determining the means and timeframe of being able to comply with the requirement to not discriminate.

AREAS OF ACTIVITY COVERED BY THE DDA

Areas of EDUCATION AND EMPLOYMENT should be extended to clearly include Training and apprenticeships.

The Act should also cover Awards, Enterprise Agreements and Industrial Agreements

INSURANCE: s46 makes it lawful to refuse a person with a disability insurance cover where no statistical and/or actuarial data exists if: it is reasonable having regard to any other relevant factors. S46 is an exemption and should therefore function in a restricted capacity. To exempt on "ANY" other relevant factors is too broad and currently insurance companies are making blanket decisions to decline cover if a person has "Autism" or "Depression " without determining the functioning capacity of the individual applicant. The consequence of such is that the legal requirement that an employer MUST have workcover insurance for an employee cannot be satisfied.

LAND: s26 Interest in land by Wills or Gifts are exempt from the Act. However the executor of the estate should not be able to make a decision to discriminate on the basis of disability without being put to prove the reasonableness of the decision. Numerous cases have been referred to me where the executor erroneously decides the person's disability renders them without capacity and refuses to distribute land to the person with the disability.

S23 ACCESS TO PREMISES: should be clearer that there is no unjustifiable hardship defence in the construction of new buildings.

S30 REQUESTS FOR INFORMATION

The Act should make it clear that such requests cannot be blanket questions such as "Do you have a disability?"

The business and government sectors need educating as to the circumstances and methods to use to gather appropriate information.

S31 STANDARDS should not extend defences as is the case with the proposed Education Standards. The standards should go to ensuring the objects of the act not limiting it.

S37 HARRASSMENT IN EDUCATION should extend to students harassing teacher/staff with disability on the basis of the disability

S35 HARRASSMENT IN EMPLOYMENT should read "no person in the workplace is to harass any other person in the workplace with a disability on the basis of the disability"

S39 HARRASSMENT IN THE PROVISION OF GOODS AND SERVICES should read “No person in relation to the provision of goods and facilities should harass another person with a disability on the basis of the disability”

EXEMPTIONS

S47 ACTS DONE UNDER STATUTORY AUTHORITY Should be repealed.

Or

S47(2) the prescribed law should be reviewed regularly or have a time limit

S47 repeal/review

S50 should be reviewed

S52 MIGRATION is too broad. It can apply to Australian Citizens.

S53 EXEMPTION FOR COMBAT DUTIES AND ARMED FORCES. Should not include exemption from Imputed disabilities or administrative duties

S55 COMMISSION MAY GRANT EXEMPTIONS should be in unjustifiable hardship or unreasonable circumstances BUT should only grant where the applicant has forwarded a compliant Action Plan. The Commission should in this case be responsible for investigating whether the Action Plan is compliant with the DDA, and should review.

UNJUSTIFIABLE HARDSHIP

Should not apply to services specifically targeted at persons with a disability. Eg; Where an organization providing such services houses its offices/staff in inaccessible premises.

Impact on organizations can be minimised by the registering and implementation of an Action Plan.

The costs of implementing such plans can be carried:

Government Organisations/Agencies : carry own costs

Large Organisations: carry own costs

Smaller businesses/organizations: Strategic Planning/Budgetary targeting and Government subsidisations

It's appropriate to apply levies on the user sometimes (not just the person with the disability)

ACTION PLANS

It is not clear in the act that Action Plans are not investigated for compliance or reasonableness by HREOC at the time of submission.

HREOC should have the power to do such as:

- ⌘ Organizations are under the impression that the registration of an Action Plan is protection from liability

- ⌘ Organisations do not necessarily have the skills to produce compliant Action Plans
- ⌘ HREOC have the skill/networks in industry and disability communities to determine if an Action Plans will serve to eliminate discrimination in a reasonable way.
- ⌘ Compulsory development, registration and implementation of compliant Action Plans could lead to a decrease in litigation and a more co-operative approach potential between claimants and respondents.