



Productivity Commission Inquiry into the Disability Discrimination Act

Submission by the
Intellectual Disability Services Council
(South Australia)



Government
of South Australia

The Intellectual Disability Services Council

The Intellectual Disability Services Council (IDSC) was established in 1982. It has a Constitution and is governed by a Board of Directors, which is made up of people from a wide range of backgrounds and includes parents of people with intellectual disability. It is a part of the Department of Human Services.

IDSC provides support to people with intellectual disability through planning, developing, purchasing and evaluating services.

IDSC's vision is that people with intellectual disability participate in and contribute to the South Australian community.

One of IDSC's guiding principles is that every person with intellectual disability is a member of the community, and as such is entitled to acceptance by the community to which they and their family belong. The *Disability Discrimination Act* provides one avenue to achieve that principle.

The Intellectual Disability Services Council's Submission

This submission refers to three areas of the Productivity Commission's discussion paper: access to the legal system and costs; employment; and changing community attitudes.

Access to the Legal System and Costs

When the *Disability Discrimination Act* was enacted in 1992, the Commonwealth Government decided to allocate resources to the community legal services sector for the establishment of disability discrimination legal services.

These services were established in each State and Territory, some as "stand alone" services and some attached to existing community legal services. The decision to allocate resources to this sector instead of to State legal aid bodies was based partly on the system proscribed under the Act that gave the Human Rights and Equal Opportunities Commission the power to make orders relating to complaints. It was perceived that people taking matters to HREOC would not always require full representation but could be assisted by the disability discrimination services with advice, information, advocacy and legal assistance to prepare a case. Full legal representation was provided by these legal services in relatively few matters.

Since the amendments to the Act, which removed the decision-making powers from HREOC and placed them with the Federal Court, the preparation of complaints has become more complex and potentially more expensive. Disability discrimination services staff now must advise complainants that there is a possibility of costs being awarded against them.

The issues paper prepared by the Productivity Commission mentions that:

"unless the Court regards a case as frivolous or vexatious, complainants can usually expect to pay only their own costs, even if they lose."

While this statement is largely correct, some complainants will be deterred because of potential costs being incurred by themselves and the potential for further costs to be awarded against them. For people with disabilities, many of whom have very limited means, this would be a major concern in any decision to pursue a complaint in the Federal Court, regardless of the merit of their action. For most people with intellectual disability, the preparation of a complaint to HREOC or to the Court would be difficult if not impossible without legal assistance.

A recent HREOC review of the Federal Unlawful Discrimination Jurisdiction found that:

“where an applicant was unsuccessful in proceedings substantively relating to an application arising out of a complaint of unlawful discrimination, the Federal Magistrates Service and the Federal Court did not order, as a matter of course, that the unsuccessful applicant pay the costs of the respondent. The Federal Magistrates Service did so in 64% of decisions made during the review period and the Federal Court did so in 50% of decisions.”

Such statistics could be a deterrent to many people disabilities, regardless of the merit of their complaint.

Further, a recent article, *Determining Costs in Federal Discrimination Cases*, (Catherine Roberts, Blake, Dawson Waldron, Equal Opportunity Alert, CCH), notes that the Courts have:

“considered a number of factors, including public interest elements in the subject of proceedings. In light of such developments, respondents to discrimination cases need to be aware of when and under what circumstances the Courts may or may not make costs orders against unsuccessful applicants.”

It follows that those seeking to take a discrimination matter to the Courts will now have to determine not just the potential for success of their complaint, but also the potential for an award of costs against them if they are unsuccessful. Sound legal advice is required in making these decisions.

Apart from the disability discrimination legal services, there are three potential avenues for access to legal assistance. The first is the State Legal Aid Commission. There have been no successful applications for legal aid in disability discrimination matters in South Australia in the past financial year. The second is the Commonwealth Public Interest and Test Cases Scheme. Statistical information about the use of this scheme in disability discrimination matters is not available from the Attorney-General's Department. The third is a hardship application under the Human Rights & Equal Opportunity Act. These applications are also determined by the Attorney-General's Department; statistical information about the number of applications is not available.

“Public Interest Cases are those involving questions arising under a law of the Commonwealth the resolution of which by the Courts is, in the opinion of the Attorney-General, of public importance.”
(Guidelines, Commonwealth Public Interest and Test Cases Scheme).

From the above, it would appear there is a problem of access to the Federal Courts by people with disabilities who wish to take a complaint to that jurisdiction. Access to legal assistance seems to be limited. There is anecdotal evidence that medium-to-large private firms representing respondents are refusing to attend any reconciliation process within HREOC and are effectively requiring the complainant to proceed to Court or withdraw.

Such disparity in access to legal support would seem to indicate a culture of exclusive access, which could prejudice the outcomes of matters for complainants.

The Commission may wish to consider how to make the legal playing field more accessible for people with disability.

Employment

The employment paradigm is still fundamental to our society, and it retains its power to impact on people with disabilities. Employment is seen as the means of being “productive” and being seen to be “productive”. It is seen as perhaps the most important way of being a part of society, and as such is a powerful force for conformity. However, it is also the means of escaping, or at least minimising, the poverty trap of living on welfare allowances. Participation in the workforce is a means to many ends; adequate income facilitates a better lifestyle, easier access to the means of transport, greater opportunities for socialising and integration. It is a “self-fulfilling prophecy” as it facilitates its own continuance.

This context should be considered when seeking to understand the import of the employment provisions of the *Disability Discrimination Act* 1992. Firstly, the overall impact of the legislation is that it provides the community with a “backstop”, a statement that, in the seeking and awarding of employment, discrimination is unacceptable. As such, the Act can be seen as fulfilling its object:

“To promote recognition and acceptance within the community of the principle that persons with disabilities have the same fundamental rights as the rest of the community.” (Section 3c)

It can be argued that the Act safeguards against any hindrance of competition. Clauses 15 (4a and b) provide employers with legitimate qualifications in terms of considering applicants with disabilities for jobs. However, to tighten the legislative provisions further and protect all parties, it would be advantageous to define the term “inherent requirements”. Given that employment is such an important life domain, and that fifty three percent of the complaints received under the *Disability Discrimination Act* are in the area of employment, every effort needs to be made to clarify the provisions.

Generally a guiding principle in relation to seeking employment is to avoid having “square pegs in round holes”. This is even more important in relation to job seekers with disabilities, as the disability does not interfere with the person’s ability to perform the tasks required. It is irrelevant to the position and should be seen as such, with merit and the ability to do the job being paramount. Working in the “right” position, there is no reason why a person with disability is any less productive than a person without disability. It is when barriers are encountered over and above this *modus operandi* that people with disabilities, and services and individuals working with them to facilitate employment, see the *Disability Discrimination Act* as a means of reinforcing social justice. As such, it also places disability in a social rather than a medical context.

In addition to Section 3c referred to above, the *Disability Discrimination Act* has the Action Plans provision. Thus, the Act can be seen as proactive rather than merely punitive, and this seems to be a constructive balance. As part of a suite of legislative and administrative reforms, the *Disability Discrimination Act* helps to redefine the social construct of disability. It is a statement that discrimination on the grounds of disability is unacceptable. The Act reflects the needs of all parties; its stipulations and spirit do not and are not intended to restrict entrepreneurial action or competitiveness in the marketplace.

Changing Community Attitudes

The third objective of the *Disability Discrimination Act* is to complement the two other objectives through seeking to change community attitudes and promoting recognition and acceptance within the community that people with disabilities have the same fundamental rights as others. The previous two objectives seek to change behaviour; the third seeks to change community attitudes.

The questions that need to be considered for the review are (page 19 of issues paper):

1. **What evidence can be provided of progress in promoting the recognition and acceptance of the rights of people with disabilities?**

Changing community attitudes towards people with intellectual disability is an integral part of IDSC's vision and it plays an important role in this process, alongside government departments and non-government organisations. On a regional basis, IDSC has numerous programs that aim to enhance the visibility of people with intellectual disability, and address the significant problem of stereotypes and historical attitudes such as institutionalisation and segregation. However, we should ask the question: has there been a general trend towards recognising and valuing diversity in local communities?

During the first year of the *Disability Discrimination Act*, a substantial part of HREOC's work and budget were dedicated to a community education and information campaign. Increased impact has been largely through high profile complaint outcomes such as *Finney v The Hills Grammar School* in relation to access to education. Disability community groups and the network of disability discrimination legal services have further assisted with the process of promotion and recognition of the Act. Public inquiries into promotion of compliance and systemic issues raised during complaints, as well as Internet publishing of submissions by HREOC, have led to increased public awareness.

Other significant moves in terms of changing community attitudes towards people with disabilities in general range from increasing use of teletext and captioning for the hearing impaired, the production of government publications in Braille for the visually impaired, to the Internet and technological changes. Each has led to increased accessibility to information. Transportation such as accessible buses and taxis, electoral access, mobile phones and hearing aids as well as "e-commerce" have all been significant Commission inquiries.

Importantly for women with intellectual disability, the issue of sterilisation and the publication of the commissioned report in 1997 led to negotiated changes to the Medicare Benefits Schedule Book, which included a note to general practitioners that it is unlawful to sterilise a person under the age of 18 without authorisation from the Family Court unless it is to treat malfunction or disease. In 2002 the advocacy organisation Women with Disabilities issued its own report on the matter, and it is noted by HREOC that discussions with relevant Attorneys-General continue.

In South Australia, the *Guardianship & Administration Act* covers consent to such procedures for women over the age of 18.

Action plans and associated standards have also increased, and emphasise the importance of community education in terms of people with disabilities having the same fundamental human rights as others.

In terms of answering the question of valuing diversity, it is useful to look at specific aspects of a person's fundamental human rights.

Access to justice

Are the Courts and Police more aware of the issues when dealing with a person with intellectual disability? One improvement is the creation of the Magistrates Court Diversionary Program. IDSC's liaison with the criminal justice system and the education of Police and the judiciary are still pressing and ongoing issues.

Access to housing and accommodation

Historically, people with Intellectual disability have been cared for lifelong within the context of the parental home and/or institutionalised. Since the 1970s, the emphasis has been on social role valorisation and deinstitutionalisation. This has at times been difficult in terms of the creation of group homes in the community and the attitudes of the community towards such developments. It is argued that further education of the community about the rights of all people to reside in the community is needed. Further, given the reduction in public housing stock, access to affordable housing has been greatly reduced. The third objective of the *Disability Discrimination Act* is an integral part of promoting the fundamental human right of access to affordable shelter, and restricting the discriminatory practices of private rental, as can be seen from complaints under the provision of access to accommodation. HREOC recognises this as a difficult area in terms of the *Disability Discrimination Act*.

Access to employment

HREOC reports that most of the complaints it receives are in relation to employment issues, a large majority of which are dealt with through conciliation. The important issue of creating increased places within open employment has largely been unsuccessful, with HREOC reporting that rates of unemployment and under-employment for people with disabilities continue to be considerably higher than for people without disabilities. The third objective of the *Disability Discrimination Act* is an important part of changing community attitudes and therefore those of business enterprises in terms of promoting the skills and expertise of people with disabilities.

Sheltered employment historically has been the major employer of people with intellectual disability, although social justice and equity issues would suggest that opportunities through open employment and mainstream/generic employment services should be increased. One complaint received by HREOC was from a person who tried to access a mainstream employment agency and was informed by the manager that he needed to access a specialist agency as adjustments to his needs could not be made by that agency. The complaint was resolved through conciliation, and the employment agency agreed to provide resume services. This is one example of how the attitudes of mainstream employment agencies may discriminate against access by people with disabilities.

Access to education

Access to mainstream inclusive education for people with disabilities is an ongoing issue and a draft standard is currently in progress. It could be argued that the third objective of the *Disability Discrimination Act* is an integral part of changing the attitudes of education staff and the general community regarding the value to school communities of the presence of people with intellectual disabilities. There are examples of successful inclusion programs; models such as in Alberta, Canada (Dr Heather Raymond) provide vision for such inclusive practices and could be promoted to create attitudinal change. Further, if the new standards are signed off by the Commonwealth, then the promotion of these standards will be integral to providing information to families about their enhanced rights in terms of the education choices for their children (likely to be June 2003).

Goods and services

The purchase of goods and services is an ongoing issue needing determination in relation to people with cognitive impairment and their contractual rights and responsibilities. People with intellectual disability are often at the mercy of door-to-door salespeople, especially security companies and those promoting mobile phone contracts and rental agreements. Lack of understanding of the terms of contracts and potentially discriminatory sales practices are concerning issues that need further recognition and testing through the complaints process by HREOC.

Sport and recreation

Of recent concern is the exclusion of people with intellectual disability from competing in the Paralympics. Disability sports organisations are currently advocating internationally on behalf of athletes with intellectual disability. It is an interesting note in terms of the effect of the *Disability Discrimination Act* in this regard as it is understood that the matter is international.

HREOC has handled a number of complaints in regard to access to mainstream sporting and recreational activities. Several advocacy groups continue to pursue community inclusion through videos and publicity campaigns.

2. What other influences on promoting recognition and acceptance of the rights of people with disabilities should be taken into account?

Disability sports organisations promote the inclusion of people with intellectual disabilities in mainstream and parallel sporting and recreation programs, thereby increasing the visibility of people with intellectual disability and changing community attitudes through this process of inclusion.

Education-based disability organisations promote the inclusion of students with intellectual disability in mainstream education. It has been found that the positive inclusion of students with intellectual disability can change community attitudes towards people with disabilities.

Open employment agencies seek to provide access by people with intellectual disability into open employment opportunities. Such agencies increase the awareness in the general community that people with cognitive impairment can enhance the productivity of a business, and promote inclusion opportunities for others, as well as changing community attitudes through inclusive practices.

3. How should the effectiveness of the DDA in promoting recognition and acceptance of the rights of people with disabilities be measured?

Attitudinal research strategies could be carried out on a wide scale to determine the number of people who are aware of the existence of the *Disability Discrimination Act*. ABS statistics and measures of social demographics and indicators such as employment and participation in socially valued roles could also be monitored. However, this is a difficult part of the third objective, as attitudinal change is a complex issue determined by a variety of inter-related factors.