

May 16, 2003

Productivity Commission

Disability Discrimination Act Inquiry

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MELBOURNE VIC 8003

By e-mail:

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Dear Sir/Madam

**National Competition Policy Review of the Disability Discrimination Act (Cth)
1992**

The Mental Health Legal Centre welcomes the opportunity to comment on the above issues paper.

If indeed, the DDA has had significant impact on the economics of Government and competition policy, we believe this would be for the benefit of all and money well spent, simply because the objects of the Act promote equality. As the Issues Paper recognizes, there are many benefits to accommodation of people with disabilities. Moreover, one of the key benefits of maximum social participation of people with

disabilities is that it actually dispels people's misconceptions about reduced capacity or increased cost of such participation. This is particularly so in relation to people with psychiatric disability about whom inaccurate prejudices about incapacity or dangerousness abound.

Furthermore the Act, in its current form, allows applications for exemption to comply on the grounds of unreasonable financial harm so in that sense respondents will not experience undue financial loss.

The Objects of the Act are clear and concise and we propose no changes, however, it is standards (or standard-like instruments) that have potential to give the Act clarity and maximally achieve its objectives. We are concerned that the only standard with significant benefit for people with disabilities likely to be implemented is the education standard. We recommend that efforts to establish standards or similar instruments continue in all areas covered by the Act, and that the standards include independent monitoring and reporting procedures. Other more systemic means of achieving the objectives of the Act, such as establishment of "affirmative action" requirements, should also be considered.

In order to ensure the objects of the Act are applied we recommend the following review and changes:

1 Definition of Disability

The Act is concerned more about discriminatory treatment rather than the diagnostic aspects of a disability. The current definition reflects this, for this reason, and in the light of recent decisions by the courts, a new definition may be necessary to give the Act further and wider coverage. We recommend some expansion of the definition to ensure disabilities recognised by other aspects of the law are included.

(a) Substance dependence is a disability which has enormous impact on a person's behaviour, cognition and functioning, people with substance dependence also experience discrimination on the basis of this disability - we recommend inclusion of substance dependency, if it has a disabling impact on the person's functioning.

(b) Behaviour is a disability, though often a feature of a primary diagnosis. Disturbed or socially inappropriate behaviour can and often, results in discriminatory treatment.

There have been Federal Court and Federal Magistrate Court decisions that held that behaviour is not a disability. These cases differentiate between whether the disability caused the behaviour or whether it is direct result of the disability, only the latter to be considered under the Act.

(c) Homelessness is a disability often also a feature of a primary diagnosis which results in discrimination. Both the disability and the discrimination resulting from it, impact on the person and denies them access to goods and services. We recommend its inclusion.

2 Definition of an assisted animal

We support some leniency in the definition that an animal be trained to accompany a person. The training requirement is difficult to identify and assistance from an animal may be provided for other therapeutic purposes less than therapeutic purposes and the Act should reflect this - for example, for people who may be depressed and isolated pets are often recommended as a component of treatment.

3 Application of the Act

The use of the DDA has been limited by a narrow interpretation of the Federal Court adopting a comparative approach in relation to the circumstances of discrimination.

This has limitations - we cannot compare the circumstances of a person with a disability to a non-disabled person. We recommend that the definition of disability discrimination has inherent the right to fair treatment.

The Act should be more proactive in ensuring that there is equality and access. It is not necessary to provide a defense of unjustifiable hardship as exemptions can be applied under the Act. This shifts the onus onto the provider to justify, rather than the person with a disability to make out a complaint. Anecdotally we are advised that many people are reluctant to make a claim for discrimination particularly in employment for fear it could result in an untenable work environment. The concept of unjustifiable hardship as defense for potential respondents and although it has little success it invites hostility.

The Act should apply its principles to other jurisdictions. It is our experience for example that the criminal justice system offers limited opportunities for people with disabilities to have access to adequate treatment and understanding of their disability, we are concerned that they are not entitled to income security if they are deemed to be in prison and cannot therefore avail themselves with rehabilitative services and proper discharge planning. In the Family Court setting it is our experience that people with psychiatric disabilities face discrimination which seriously impacts upon their ongoing role in the family. Too often there is intervention at the acute stage of a person's illness and despite their recovery and appropriate management of the disability they experience ongoing discrimination. Similarly when faced with intervention from child protection services that show a distinct bias against

people with a psychiatric or intellectual disability merely on the existence of a diagnosis.

There is uncertainty about whether a person discriminated against in the provision of goods is able to take action against a foreign manufacturer or producer of a product manufactured or produced overseas. If there is a local agent they can be held responsible under s122 of the Act, however, they may have a defense if they have no contractual prerogative to add, for example, captions to DVD movies, for those with hearing impairments. There is a need for standards to ensure that goods manufactured overseas are accessible.

4 Prohibitions and Exemptions

4.1 Insurance and Superannuation

We are concerned that the exemption relating to superannuation and insurance is far too broad when there is no justification for discriminatory policies. For people with a psychiatric disability, for example, it is not possible to get travel insurance, if the illness is diagnosed prior to travel. We are also aware of issues with income protection and mortgagee insurance where people with disabilities experience often insurmountable problems.

4.2 Lawful discrimination under the Migration Act

The Migration Act provides that discriminatory conduct in migration matters is exempt. Disturbingly there is a high incidence of psychiatric disability in relation to those held in detention as asylum seekers or refugees. It is appalling that these people may be exempted from protection by the DDA. In addition, detention of a person with a disability to a detention facility is imposing an unreasonable condition on that person and may constitute indirect discrimination.

Furthermore, the Migration Act 1958 deals principally with the application for Australian citizenship, residence and visa applications. Among other requirements, visa applicants must pass a medical test as a condition for the grant of a visa. Unsuccessful applicants are not able to make a complaint of discrimination if their visa application is denied on medical grounds.

Those who have been granted immigration status are not able to sponsor family members if unable to support them. For someone on the disability support pension this is impossible, and essentially means they remain in Australia alone, without family support, unable to assist the passage of spouse and children.

5 Prosecution of Offences

The following are the offences under the Act:

- a) Victimisation
- b) Inciting a person to commit discriminatory conduct
- c) Discriminatory advertising
- d) Failure to provide actuarial data or statistical data
- e) Failure to attend a conference
- f) Failure to give information or produce documents
- g) Giving false or misleading information

Since its enactment there have been no prosecutions. There needs to be a review as to why not.

In part the answer might be with the lack of rigor and responsiveness in relation to investigations performed by HREOC and the requirement that the complainant

provide documents. As with many similar complaints bodies much of the work rests with the complainant, for people with disabilities the onus can be overbearing and prevent them from rigorously pursuing remedy. We recommend proactive investigation to assist individuals to thoroughly explore remedies and make an informed decision of options for pursuing a claim.

6 Costs

Prior to the amendment introduced by the Human Rights Legislation Amendment Act 1999, which moved the jurisdiction for hearing matters to the Federal Court, the complaint handling and hearing process at HREOC was free. Fear of an award of costs, against a person with a disability, often on a limited income is a factor which deters many from pursuing their claims. The summary in the Issues Paper as to the current costs position is misleading, to say the least. It is our understanding from HREOC that the Federal Court is awarding costs against complainants in as many as half of the cases before it.

We recommend amendment to reflect that costs do not follow the event but are only awarded in very limited circumstances. This would reflect the application of other equal opportunity jurisdictions, where parties bear their own costs except where the conduct of the case is considered vexatious (See, for example, Section 109 Victorian Civil and Administrative Tribunal Act 1998 (Vic)).

Conclusion

The real impact of the DDA has been its positive advancement of people with disabilities, its promotion and recognition of them as equal citizens and allowed them to more fully contribute and participate in the community. It is difficult to measure this with complaints driven legislation, it requires broad consultation with people with

disabilities, not only those who have required support from the Act, on the impact of the DDA over the past 10 years of its life.

The complaints driven aspect of the Act is powerful but would be further enhanced by a substantial increase in funding to HREOC for education, affirmative action and funding to advocacy organisations.

It is crucial to minimize the extent to which people have to pursue legal action to achieve their entitlement to freedom from discrimination. Some form of guidelines or standards in all the areas in which discrimination is prohibited under the Act must be developed. The standards must be practical but mirror the objects of the Act, but clarify community obligations. As identified in the Issues Paper, the use of exemptions, for example in relation to voluntary standards and self-regulation are likely to distort the reason for developing standards. HREOC or the Courts must continue to have a role in the approval of any standards or guidelines, and in regulation of potential respondents

We oppose proliferation of non-legislative or voluntary guidelines and any form of voluntary self-regulation.

Yours Faithfully,

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Mental Health Legal Centre Inc.

