Disability Discrimination Act Inquiry

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Women’s Health Victoria (WHV) is a state-wide women’s health promotion, advocacy and health information service. WHV works to ensure that all women have access to quality information. The organisation’s key markets are the women of Victoria, service providers and policy makers. Through a clearinghouse of women’s health information the organisation aims to have women’s voices incorporated into health research, education and policy. Part of the clearinghouse process is analysis of relevant policy documents and discussion papers, of which the ’Disability Discrimination Act Inquiry’ is one.

Our comments below arise from our internal analysis and have been forwarded in response to the invitation to comment on the March 2003 Issues Paper. There are a number of issues that we will address in the following submission to the Disability Discrimination Act Inquiry.

1. <u>The definition of ’disability’</u>

a. <u>Objectives and focus of the Act</u>

The Disability Discrimination Act Inquiry Issues Paper states that the objectives of the Act are threefold: eliminating discrimination on the basis of disability; ensuring equality before the law; and promoting recognition and acceptance within the community. In terms of defining ’disability’ in order to limit the scope of the Act, the Issues Paper asserts that the focus of the legislative scheme is on *whether discrimination has occurred,* rather than the nature of degree of the disability.

While we applaud the adoption of the above objectives and agree that it is the reality of discrimination, rather than disability, that should be the focus of the *Disability Discrimination Act* (DDA), we see a lack of correspondence between the objectives of the legislation and the definition of ’disability’ used to determine the scope of its application. Indeed, we submit that the current definition of ’disability’ contained in the DDA inevitably means that the Act will be unable to properly and fully achieve its objectives, as a great deal of disability-based discrimination will be excluded from the protection it affords.

b. <u>Limitations of the current definition</u>

From a traditional, bio-medical perspective on health, the current definition of ’disability’ is very broad, however, this perspective, itself, is outdated as it excludes forms of disability that are not wholly definable by reference to an individual’s physiological or psychological condition. There are, indeed, many types of disability in contemporary Australian society that lie on, or outside, the boundaries of bio-medicine, and the causes and effects of which are rooted in socio-economic and cultural structures.

c. Adopting a social perspective on disability

If the legislative definition of ’disability’ is to properly capture the range of disabilities experienced by individual’s in Australia, it must be formulated from a social perspective on health, which recognises that health issues, including disability, are inextricably related to broader social issues, and that considering and addressing these social issues is critical to understanding health and to achieving positive health outcomes.

Of course, it may not be appropriate to broaden the definition of ’disability’ across the entire legislative and regulative scheme dealing with disability, but as the Issues Paper points out, the definition of ’disability’ adopted for the purposes of the DDA is not, and need not be, the same as the definition(s) used in the Disability Services Act, Social Security Act, or worker’s compensation legislation. On the other hand, however, broadening the definition of ’disability’ adopted in the DDA would enable this particular piece of legislation to better achieve its stated objectives.

If a social perspective on health were to be adopted, the definition of ’disability’ in the DDA would come to include conditions such as clinical depression, substance addiction and obesity. This definition could even come to include chronic homelessness, which, as a social condition, typically incorporates, the elements of poor health, mental illness, substance abuse, and exposure to violence, and, as such, should be considered a severe, multidimensional disability. Although it may appear radical to characterise these and other similar conditions as ’disabilities’, we submit that to do so would be consonant with the notion of disability, and address an area of discrimination that has so far escaped the attention of anti-discrimination discourse and legislation.

d. The notion of ’disability’

A ’disability’ is characterised by the effect it has of *disabling* the individual who experiences it, that is, restricting their capacity to function to some degree. The conditions mentioned above, though they may fall outside the scope of a purely biomedical definition of ’disability’ are characterised by the same effect, viz. the effect of restricting the individual’s capacity to function, whether psychologically, emotionally, socially or physically. It may be argued that, on the basis of a social perspective on health, poverty, a lack of education, or the inability to speak English fluently could be considered ’disabilities’, and that, therefore, the notion of disability then becomes devoid of identifiable content. It is important, in this case, to make a clear distinction between ’disability’ and ’disadvantage’: the former involves an inherent restriction on the capacity to fully function, and the latter only affects a person’s capacity to function as a result of the nature of the socio-economic context in which it exists, that is, one in which a certain amount of money, education, or language proficiency is required. We submit that it would be completely proper to broaden the definition of ’disability’ in the DDA to incorporate all conditions that can be classified in this way, although it would not be appropriate to use the Act to target discrimination based on ’disadvantage’.

e. Unrecognised discrimination

It is widely acknowledged that women and men, of all ages and backgrounds, frequently experience discrimination, in the areas of activity covered by the DDA, on the grounds of conditions such as those mentioned above. Since such conditions are not limited or defined by race or gender, unless they are incorporated into the legislative definition of ’disability’ they will fall through the net provided by existing anti-discrimination legislation.

Furthermore, although all forms of discrimination pose a challenge for society, the discrimination experienced by people who suffer from depression, substance addiction, obesity, homelessness and other analogous conditions, is discrimination of a most insidious nature because it is not *recognised as* discrimination. This carries with it a number of consequences:

- First, because these conditions are not seen as ’disabilities’, discrimination based on these conditions is expressed, and understood, not as discrimination, but simply as the recognition of a personal weakness or failing, that the individual really should just ’get over’;
- Second, because discrimination based on these conditions is not recognised as a specific form of discrimination, ie. discrimination against people with disabilities, it is not seen as reprehensible. Unlike discrimination on the basis of sex, race, blindness, disfiguration, psychiatric illness, HIV-positive status etc., which people clearly see as being unjustifiable and based on prejudice, discrimination on the basis of depression, substance addiction, obesity or homelessness is not widely seen as unjustifiable or prejudicial, but just a fact of life;
- Third, because discrimination on the basis of these conditions is seen as a fact of life, rather than an example of social injustice, there is no attempt to articulate why such discrimination is wrong, and the rights and responsibilities that need to be enforced to correct it;
- Fourth, because people who experience discrimination on the basis of one or more of these conditions do not see themselves as members of a group of people who have experienced discrimination on the basis of their disability, and as members of a group that has rights to equal treatment, their voices go unheard and their experiences are left out of anti-discrimination discourse. Rather, people who suffer from these conditions are in the paradoxical position of being stigmatised and being the victims of discrimination, but neither identifying nor being identified, as members of a group of people who are recognised as regularly experiencing stigmatisation and discrimination.

For these reasons, unless the legislative definition of ’disability’ can be broadened to include the types of disability discussed above, the Act will fail to achieve its objectives in relation to members of large sections of the Australian community, who frequently experience disability-based discrimination.

2. The provision of information

a. Information is critical to the success of anti-discrimination legislation

Although promulgation is critical to the efficacy of any piece of legislation, active dissemination of the content of anti-discrimination legislation, such as the DDA, is particularly important. Indeed, it seems obvious that the extent to which the three objectives of the DDA are achieved will depend significantly on the extent to which the public becomes aware of, and understands, the norms it creates.

b. Incongruity between the objectives and the focus of information dissemination

It appears, from the Issues Paper, that the provision of information about the DDA, and related regulations and standards, is aimed primarily at individuals, institutions and organisations that run the risk of engaging is discriminatory behaviour and, therefore, must ensure that they are aware of the standards they are required to meet and the exceptions they are allowed to make. It is clearly crucial that adequate detailed and up-to-date information is made readily available to such individuals and bodies, but we submit that the same efforts are not being made to make information about the DDA available to the public - both those with disabilities, and members of the general public.

As regards the objectives of eliminating discrimination and ensuring equality before the law, the current focus of information provision is inadequate. The primary legislative mechanism for enforcing the rights conferred, and responsibilities imposed, by the DDA is the complaints mechanism. (Although the Act contemplates self-regulation as being a major means of compliance, it is clear that, failing self-regulation, compliance will depend on complaints being brought under the Act.) Given this, it seems essential that people who come within the legislative definition of having a ’disability’ have a clear and full understanding of the standards of behaviour they are entitled to expect, and the legal rights they are entitled to have enforced. We consider that more rigorous provision of information to disability advocate groups, as well as through the media, is especially important in the case of disability discrimination legislation because the legislative definition of ’disability’ (unlike gender, or even race) is not axiomatic; people will frequently need to be aware of the scope of the legislative definition in order to know if and how they fall within it. This is especially true of people who have a condition that lies just within the margins of ’disability’, and people who would be considered ’associates’ of people with disabilities.

As regards the objective of public education objective, the current focus of information provision is also inadequate. Promoting recognition and acceptance of disability within the community would seem to rest wholly on the extent to which information about the DDA is disseminated through the media, public interest and community organisations, and government agencies. We submit that, not only would most people be unaware of the norms created by the DDA and the kinds of people who are deemed to require its protection, but that most people would also be unaware that the Act exists at all. We are of the view that if rights-creating legislation is to positively alter community attitudes - and we believe it can - it must at least be something that people know exists.

3. The enforcement regime

a. Inadequacies of the complaints mechanism

As mentioned above, the complaints mechanism is the primary means of enforcing compliance with the DDA. We submit that this is an inadequate mechanism for ensuring that the objectives of the Act are realised, and that the individuals are empowered by the legislation. It is inadequate for two main reasons.

First, since the outcome of conciliation of a complaint under the Act (assuming conciliation is ordered by HREOC) is non-binding on the parties, if a complainant is dissatisfied with the outcome of conciliation, the complaint cannot be authoritatively determined except by recourse to the courts. Thus, a dissatisfied complainant may either drop her or his complaint, or have the complaint heard in the Federal Court.

It is well recognised that taking a matter to court is a costly exercise. Despite the reduction in filing fees for discrimination cases, and the fact that complainants can usually expect not to have an adverse costs order made against them, we believe that taking a discrimination complaint to the Federal Court would remain costly, both financially, and in terms of time, energy and emotion. This is especially true, where complainants will invariably be people with a disability, or caring for someone with a disability, and who are thus further limited in their capacity to cope with the experience of seeking redress though the formal civil justice system.

Although the establishment of the Federal Magistrates Service promises to reduce the various costs of having matters heard in the Federal Court system, we do not believe that the magistracy is the proper forum for complaints of discrimination to be heard. Essentially, we believe that the prospect of ’going to court’ would be likely to discourage complainants who are dissatisfied with the outcomes of conciliation to proceed with their claims, and lead them either to accept unsatisfactory conciliation outcomes or drop their claims altogether.

Second, the fact that the complaints mechanism can only be employed by a person aggrieved, or on their behalf, further limits the efficacy of the complaints mechanism. This limitation means that the enforcement of the Act is dependent on individuals being willing to act in response to particular instances of discrimination, and having the resources available to them to do so. For a number of reasons it may be unrealistic and unfair to expect people who have experienced discrimination, especially when they are people with a disability, to carry the burden of responsibility for enforcement of their rights. As discussed above, the various costs of pursuing redress are significant. For many people with a disability, the process of asserting their rights will also seem intimidating, as it does for people who do not have a disability. Further, for a person to assert their rights under the Act, they first have to recognised both that they have experienced discrimination, as defined by the Act, and that they have a means of redress. The fact that HREOC only received 452 complaints of discrimination in 2001-02 may suggest that there are many people in the Australian community who suffer disability-based discrimination but who do not realise either that they have suffered discrimination, according to the terms used in the Act, and/or that they have an avenue of complaint.

In a context in which only the courts can determine complaints, the fact that ’aggrieved persons’, or those acting on their behalf, are the only people who can make complaints constitutes an even greater limitation. Given the above mentioned problems facing people seeking redress through the courts, it would seem imperative, especially in a scheme designed to bring about the elimination of discrimination and equality before the law, that interested persons or organisations be allowed to initiate complaints where they believe discrimination is being practiced or where a person or persons for whom they advocate has suffered discrimination. It is community interest and advocacy groups that are more likely to have the human and material resources to pursue a complaint to the determination stage. They are also more likely to be familiar with the standards and rights created by the DDA and the process available for redress, while being less likely to be intimidated by the process of seeking redress through conciliation and the courts.

b. Alternatives for dealing with complaints, and the need for interested parties to be able to initiate complaints

Given the inadequacies of the current complaints mechanism, we submit that one or both of the following changes need to be made to make that mechanism more effective.

First, a middle stage needs to be added to the current dispute resolution process: between non-binding conciliation and recourse to the Federal Court, we believe that the power to determine complaints of disability-based discrimination should be returned to HREOC. While HREOC should still have the power to order parties to the conciliation table, if conciliation was to produce an unsatisfactory outcome for the complainant, she or he could then request that the Commission authoritatively determine the complaint. If either party was dissatisfied with HREOC’s decision, an application for leave to appeal to the Federal Court could be made, and either granted or denied by the Court according to its assessment of the proposed ground(s) of appeal.

Reinstituting HREOC's power to determine complaints of discrimination would provide complainants, who are dissatisfied with the outcomes of conciliation, with an alternative to the current choice between either dropping the complaint or having it heard by the courts. This alternative would produce an outcome that would carry the legal and moral authority of the Commission, and would be less costly and intimidating for complainants and respondents alike. Further, the option of recourse to the courts would not be removed, but would be reserved for appropriate cases.

Second, interested parties need to be eligible to initiate and proceed with complaints of disability-based discrimination. As mentioned above, interested parties, such as community interest groups and disability advocacy organisations will generally be better resourced and more willing to initiate and proceed with complaints, and better positioned, in the sense of being familiar with the DDA regime and in close and frequent contact with people with disabilities, to identify and respond to particular instances or broad cultures of discrimination.

We agree with that if the power to determine complaints were to be restored to HREOC, it may be inappropriate for the Commission also to have to power to initiate complaints. However, if HREOC did have the power to determine complaints, there is no reason why other interested parties, such as community interest groups, disability advocacy groups and HREOC should not be able to initiate and proceed with complaints. On the other hand, if HREOC were to continue to be denied the power to determine complaints, we believe that the Disability Commissioner should at least be granted the capacity to institute complaints, which HREOC could then submit to conciliation.

Unless HREOC and other interested parties are given the capacity to play a greater role in enforcement of the DDA regime, the objectives of the Act, especially the elimination of disability-based discrimination and equality for people with disabilities before the law, will go substantially unrealised. To exclude the Commission and those people and organisations in society which are most intimately acquainted with the experiences of, and challenges faced by people with disabilities is to unnecessarily restrict the operational scope of the regime, and fetter its capacity to protect people with disabilities from discrimination, empower them before the law, and have a tangible impact on community attitudes.