

1. Introduction

Section 4 of the *Disability Discrimination Act (the “DDA” or the “Act”)* provides the following objects:

- a) to eliminate as far as possible discrimination against persons on the ground of disability;
- b) to ensure as far as practicable that persons with disabilities have the same rights to equality before the law as the rest of the community; and
- c) 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.

1.1 No justification for reducing rights

In the view of the LIV, there can be no justification for reducing the rights granted to people with disabilities pursuant to the DDA on the grounds of misconceptions concerning costs for government or potential respondents or alleged interference with competition. As is highlighted in the Issues Paper, potential respondents, governments - and indeed the whole community - benefit substantially when discrimination is eliminated. Furthermore, in its current form, the Act is limited to only requiring of respondents that which is not unreasonable. In that sense, no changes to prevent adverse economic effects are required.

Indeed, what is apparent is that the DDA and processes pursuant to its provisions need to go further to ensure that benefits to the community from full participation in society are realised. The complaints driven aspects of the DDA are crucial and need to be supported and augmented. This should be achieved through the legislative changes proposed below, as well as restoration of resources to HREOC (if not a substantial increase), together with adequate resourcing for advocacy support.

1.2 Need for Guidelines / Standards

Equally important are measures to minimise the extent to which people are required to pursue legal action to achieve their entitlement to freedom from discrimination. In this context, it seems crucial that some form of guidelines or standards covering all the areas in which discrimination is prohibited under the Act be developed - albeit without entrenching standards which do not meet those of the Act itself. Whilst this may require some care and ingenuity as to the content and legal status of such guidelines/standards, every attempt should be made to find means of clarifying the community’s obligations under the Act, which would obviate the need for legal action.

As the Paper identifies, the use of exemptions, for example in relation to voluntary standards and self-regulation, are likely to be a distortion of the rationale for their existence. Any expansion of the scope for exemptions to be granted, or of the explicit exemptions in the Act, cannot be justified.

HREOC or the Courts must continue to have a role in the approval of any standards or guidelines, and in the regulation of potential respondents. In this context, proliferation of non-legislative or voluntary guidelines and any form of voluntary self-regulation should be approached with extreme caution.

1.3 Need for more systematic measures

Consideration should also be given to other more systemic means of eliminating discrimination not referred to in the Issues Paper, such as affirmative action obligations as apply in relation to areas such as sex discrimination.

More specifically, and consistent with the objects of the Act, the LIV recommends a review and possible changes to the following features of the Act:

- Definition of Disability
- Definition of an assistance animal
- Application of the Act
- Lawful discrimination under the *Migration Act*
- Cost consequences for unsuccessful litigants
- Investigative functions of HREOC, and
- Prosecution of Offences

Each of these features is discussed in more detail below.

2. Definition of Disability

The current definition of disability provided in the DDA¹ is admittedly quite broad. It includes many conditions that might not be commonly considered to be disabilities. The broad legal definition of disability was intended to increase the effectiveness of the law against unlawful discrimination on the basis of anything to do with the working or non-working of a person's body or mind. However the Act is concerned more about discriminatory treatment than the medical technical accuracy of a disability. For the same reason, and in light of recent decisions by the courts, a new definition may have to be examined to give the Act wider coverage. In particular:

- a) It is strongly arguable, and accepted in a range of contexts, that dependence or

¹ Under the Commonwealth Disability Discrimination Act (Section 4), "disability" means:

- (a) total or partial loss of the person's bodily or mental functions; or
 - (b) total or partial loss of a part of the body; or
 - (c) the presence in the body of organisms causing disease or illness; or
 - (d) the presence in the body of organisms capable of causing disease or illness; or
 - (e) the malfunction, malformation or disfigurement of a part of the person's body; or
 - (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
 - (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour;
- and includes a disability that:
- (h) presently exists; or
 - (i) previously existed but no longer exists; or
 - (j) may exist in the future; or
 - (k) is imputed to a person.

addiction constitutes a disability and this could be usefully clarified in the definition of disability. In a decision dated 15 November 2000², the Federal Court said that “opium dependency” is a disability for purposes of the Act. Consequently, concerns were raised whether addiction to any substance may constitute a disability, and under what circumstances a cause of action under the DDA may arise³. In the view of the LIV, it should be clarified that dependence on any substance, whether legal or illegal, is a disability for the purposes of the Act if the dependence interferes with a person’s functioning.

- b) Psychological disabilities may constitute a “disability” within the meaning of the Act. A psychological disability may result in certain behaviour that may become the basis of discriminatory treatment. However, the Federal Court and the Federal Magistrates Court have both held that behaviour *per se* is not a disability.⁴ Even if the behaviour is a manifestation of the disability, it may not be considered a disability under the Act unless it is shown that the behaviour is the direct result of the disability. This appears to be an added burden to the complainant. Emmet J⁵ of the Federal Court commented that “*It would have been possible for parliament to define disability by reference to symptoms that have a particular cause. For example, it would have been possible to define disability as disturbed behaviour that results from a disorder, illness or disease.*”

In another case, the Federal Magistrates Court,⁶ in reserving comments on the issue of whether the manifestation of the complainant’s disability constitutes the applicant’s disability, noted the “*disability/manifestation dichotomy*”. There appears to be a need then for parliament to revisit the definition to clarify this point.

3. Definition of an assistance animal

The Act provides for relief where the discriminator treats the aggrieved person less favourably because the aggrieved person possesses, or is accompanied by an animal trained to assist the aggrieved person.⁷ Currently there is a requirement that the animal

² *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women’s Memorial Club Ltd.* (2000) FCA 1619, 15 November 2000.

³ The NSW parliament has passed legislation to prevent drug-addicted employees from claiming unlawful discrimination due to their disability. Concerns were also raised as to whether addiction to nicotine may constitute a disability.

⁴ See *Alex Purvis v State of NSW (Dept. of Education)* [2002] FCAFC 106

⁵ *State of NSW v HREOC and Alex Purvis*, FCA 29 August 2001, paragraph 38

⁶ *Minns v State of NSW* [2002] FMCA 60, Raphael FM at paragraph 267

⁷ Section 9(1) states that:

For the purposes of this Act, a person (discriminator) discriminates against a person (aggrieved person) with:

- a) a visual disability; or
- b) a hearing disability; or
- c) any other type of disability;

if the discriminator treats the aggrieved person less favourably because of the fact that the aggrieved person possesses, or is accompanied by:

- d) a guide dog; or

be “trained to alleviate the effect of the disability”. A hearing dog for those with a hearing impairment or a guide dog for those who have a vision impairment is an example of an assistance animal that has undergone special training relative to the owner’s disability. The training requirement for the animal seems to exclude an owner who relies on a therapeutic pet where the pet may not necessarily have to be trained in order to alleviate the effect of disability. For instance, a tenant who suffers from depression and who is not allowed to keep a pet by the landlord may not be able to make a complaint, regardless of medical evidence about the need for such an animal to assist with the person’s illness, for example through “coping” benefits. The “training requirement” may also be unreasonable in cases where a training regime for the assistance animal is hard or impossible to identify.

4. Application of the Act

Section 12 of the DDA provides that the Act applies throughout Australia, including in relation to acts done within a Territory. However, there appears to be uncertainty about whether a person who is discriminated against in the provision of goods under Section 24,⁸ is able to take action against a foreign manufacturer or producer of a product manufactured or produced outside the territorial jurisdiction of the Australia.

For instance, a movie in DVD format produced abroad that has no subtitles or captions is not accessible to a person with a hearing impairment. The sale of the DVD without such a facility may constitute indirect discrimination under Section 6.⁹ In cases where the producer has a domestic agent, the complaint may be filed against the agent under Section 9(12)¹⁰ of the Act. In cases where the foreign producer does not have a

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- e) a dog trained to assist the aggrieved person in activities where hearing is required, or because of any matter related to that factor; or
 - f) any other animal trained to assist the aggrieved person to alleviate the effect of the disability, or because of any matter related to that fact;
- whether or not it is the discriminator’s practice to treat less favourably any person who possesses, or is accompanied by a dog or any other animal.

⁸ Section 24(1) states that:

It is unlawful for a person who, whether for payment or not, provides goods or services, or makes facilities available, to discriminate against another person on the ground of the other person’s disability or a disability of any of that other person’s associates:

- (a) by refusing to provide the other person with those goods or services or to make those facilities available to the other person; or
- (b) in the terms or conditions on which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person; or
- (c) in the manner in which the first-mentioned person provides the other person with those goods or services or makes those facilities available to the other person.

⁹ Section 6- indirect discrimination – provides: For the purposes of this Act, a person (discriminator) discriminates against another person (aggrieved person) on the ground of disability of the aggrieved person if the discriminator requires the aggrieved to comply with a requirement or condition:

- a) with which a substantially higher proportion of persons without the disability comply or are able to comply; and
- b) which is not reasonable having regard to the circumstances of the case
- c) with which the aggrieved person does not or is not able to comply

¹⁰ Section 12(9) provides that: The limited application provisions have effect in relation to discrimination by a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth, or by a person in the course of the person’s duties or purported duties as an officer or employee of such a corporation.

domestic agent but the product (the DVD movie) is supplied to the Australian public by a local distributor under a distribution contract, a complaint may be made against the distributor under section 122 of the Act.

Section 122 provides that a person who is aiding or abetting discriminatory conduct is as liable as the person who has committed the discriminatory conduct.¹¹ However, a successful complaint under this provision is unlikely to succeed because the distributor is usually able to rely on the defence of unjustifiable hardship.¹² The distributor under its contract with the producer may not have the contractual prerogative to add additional feature such as captions. Adding captions may necessitate deletion of other features that may be of value to other consumers. If the producer provides a master copy of the movie in DVD format without captions, the distributor obligated to make the product accessible to persons with a hearing disability may be faced with the possible prohibitive costs of captioning and reproducing captioned copies.¹³

Hence there is a need to put in place standards or legislation to ensure that goods manufactured abroad, particularly movies in DVD formats, are accessible for a person with a hearing disability. Currently the Act is not effective in resolving this type of discrimination.

5. Lawful discrimination under the *Migration Act*

The DDA provides that discriminatory conduct in migration matters is exempt¹⁴. The *Migration Act 1958* deals principally with the application for Australian citizenship, residence and any other type of visa. 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.

The current wording of the exemption is very broad and tends to cover areas beyond the policy justification for it. In the view of the LIV, the exemption ought to be reviewed with a view to allowing a complaint:

- a) by a person other than the visa applicant, i.e. the sponsor who is either an Australian citizen or resident; and
- b) where the conduct of an employee or agent of the Department of Immigration and Multicultural Affairs (“DIMIA”) is in connection with provision of a service that

¹² Section 24(2) states that:

This section does not render it unlawful to discriminate against a person on the ground of the person's disability if the provision of the goods or services, or making facilities available, would impose unjustifiable hardship on the person who provides the goods or services or makes the facilities available.

¹³ The Australian Caption Centre received an annual grant from the Department Of Family and Community Services to caption “general release” entertainment videos. This grant allows the captioning of many titles free of charge for Australian distributors however; not every film can be captioned under this grant because funds are limited. The costs to provide captions to a movie either in VHS or DVD is about \$26.00 per minute.

¹⁴ Section 52 of the *Migration Act 1958* provides that - Neither Division 1 nor 2:

- a) Affect discriminatory provisions in the Migration Act 1958 or any regulation made under that Act; or
- b) Render unlawful anything done by a person in relation to the administration of that Act or those regulations.

is merely ancillary to enforcing migration regulations and far removed from the assessment of the applicant's eligibility to a particular class of visa.

For example, it may be said that immigration detention centres are unsuitable to a person who has or may have developed a form of mental or psychological disorder as a consequence of detention. Detaining or compelling a person with a disability to live in such a detention facility is imposing an unreasonable condition on that person and may constitute indirect discrimination.

In such a case, any complaint would not be about the denial of a visa application on medical grounds. However, no action to stop the discriminatory conduct is currently possible because of the express and blanket exemption provided under Section 52 of the Act, which should be reconsidered.

6. Cost consequences for unsuccessful litigants

Prior to the amendment introduced by the *Human Rights Legislation Amendment Act* of 1999 in April 2000, which removed the hearing jurisdiction from the Human Rights and Equal Opportunity Commission ("HREOC") and transferred it to the Federal Court and/or the Federal Magistrates Court of Australia, the complaint handling process and the hearing of complaints at HREOC were essentially cost free. By contrast, the prospect of an unsuccessful application and a corresponding costs order discourages many persons with disabilities from pursuing their claims in the Federal Court. Whilst the courts exercise discretion in awarding costs orders, and there have been Federal Court decisions where the judges have been quite liberal in favour of unsuccessful applicants,¹⁵ there have also been decisions to the contrary,¹⁶ leaving the situation unclear for complainants.

Given that complainants have been deterred by the prospect of costs awards and the jurisprudence has not developed consistently with the view in the Issues Paper that

¹⁵ In the matter of *Ryan v Presbytery of White Bay Sunshine Coast* [2001] FMCA 12, at paragraph 20, the Federal Magistrates Court stated, "Whilst I have a power to award costs, the nature and intent of anti discrimination could be thwarted if citizens were unreasonably inhibited from prosecuting bona fide, even if ultimately unsuccessful, claims". Similarly, in *Tadawan v State of South Australia* [2001] FMCA 25, the Federal Magistrates Court said that these matters were normally considered to be 'no costs' matters as evidenced by the practice of state tribunals and the fact that there was no power in HREOC to award costs.

¹⁶ On the other hand the court can use its powers in relation to costs to discourage unmeritorious claims. *McInnis J in Ball and Morgan Ball v Morgan & anor.* [2001] FMCA 127 (21 December 2001). In this decision, the Federal magistrate rejected previous dispositions on costs and said:

"In my view in the absence of any amendment to legislation which would seek to interfere with the ordinary discretion exercised by a court in the award of costs it should be stated that in the normal course of events costs follow the event. I can see no legislative or legal basis which would support the proposition that there is any need in human rights matters to alter the law applicable to this court by adopting the practice of the state tribunal or indeed to have regard to the fact that the Commission does not have power to award costs. Unfortunately I therefore find that I am unable to agree with the conclusion in relation to costs set out by the Learned Federal Magistrates in the *Tadawan* Decision and the *Ryan* Decision. It is not appropriate for courts to exercise discretion in relation to costs on the basis that it may or may not discourage applicants from making claims. That is a matter for Parliament to decide and if necessary legislation can be amended which, subject to any Constitutional challenge, may direct the court in relation to the issue of an award of costs in human rights applications. In the absence of that legislation as indicated I do not believe there is any need to depart from the normal principles which apply."

"unless the Court regards a case as frivolous or vexatious, complainants can usually expect to have to pay only their own costs, even if they lose the case", is the LIV suggests that the legislation be amended to clarify that costs will not be awarded against complainants in at least the following circumstances::

- a) where there are no material questions of fact and the court was called upon to decide on a question of law;
- b) where the complaint is a representative complaint and the applicant is seeking remedies other than financial compensation,
- c) where the respondent to a complaint does not dispute the discriminatory conduct and relies on the defence of unjustifiable hardship, or
- d) where the respondent refuses to participate in the conduct of investigation by HREOC or its attempt to resolve the complaint by conciliation.

Such a specific provision would allay the fear of costs consequences by complainants and would provide great incentives for persons with a disability to fully utilise the law and realise the objects of the Act.

Alternatively, a similar position as exists in other equal opportunity jurisdictions could be adopted whereby it is made clear that parties bear their own costs except in particular circumstances such as where conduct of the case is vexatious.¹⁷

7. Investigative functions of HREOC

In the view of the LIV, there is a need to review how effective the investigative powers of the HREOC are, particularly in requiring a respondent to a complaint to produce and submit documents or information to HREOC that may be used as evidence in court if the complainant decides to apply for a hearing. HREOC is not meant to be merely a conduit of correspondence between the complainant and respondent to a complaint. A comprehensive and rigorous investigation by HREOC would greatly assist complainants in weighing their options or accepting a compromise. A thorough investigation may disclose vital information that would enable a person with a disability to make an informed decision about whether to discontinue or to pursue a claim in Court.

8. 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 information¹⁸

¹⁷ See, for example, Section 109 *Victorian Civil and Administrative Tribunal Act 1998* (Vic).

¹⁸ Sections 42, 43, 44, 107, 108, 109 and 112 respectively.

There has been no prosecution under the Act since it took effect ten years ago. This could be due to a variety of reasons other than the absence of a complaint under the relevant section. The reasons for the inactivity of these provisions need to be canvassed and identified. The offence provisions may need to set out clearly what needs to be done, the role of the complainant, HREOC, and police agencies if an offence is reported to have been committed.

We would be pleased to discuss any of the above comments in more detail with you, should you require.