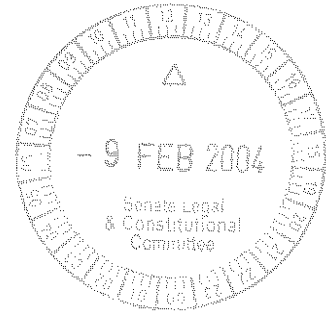


**Submission to the Senate Legal Inquiry concerning the Disability Discrimination Amendment
Bill 2003 (Commonwealth)**

Discrimination against Drug Users –A Retrograde Step

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The Disability Discrimination Legal Advocacy Service (DDLAS) auspiced by the Welfare Right Centre (Brisbane) make the following submission regarding the Disability Discrimination Amendment Bill 2003 Cth).

- Briefly, this bill seeks to remove drug addiction from the protection of the Disability Discrimination Act (DDA) 1992 (Cth). Drug addiction will only constitute a disability where the addicted person is currently undergoing treatment for his or her addiction. Key words such as addiction, addicted person, treatment and service are not defined.

DDLAS (Brisbane) provides representation advice and referrals in all aspects of disability discrimination work. Advice and representation is on behalf of persons and groups of persons with disabilities. There is also some policy, community education and law reform work undertaken by this service.

The 1992 Commonwealth Disability Discrimination Act (DDA) has been drafted very broadly in regards to the definition of disability. Any attempt to fragment certain groups or categories of persons with conditions that may or may not amount to a disability is a weakening of the legislation. Legal argument is then spent in determining whether or not a person has a disability. This is not generally the case at present. Time is concentrated upon determining if there has been direct or indirect discrimination because of the disability and whether or not one of the exemptions (defences) applies to enable unlawful discrimination to be made lawful.

The DDA is an example of equality legislation. It does not bestow positive benefits upon persons with disabilities. Rather, it is aimed at removing barriers to facilitate equal participation (as much as possible) into the community. It is aimed at removing arbitrary and capricious behaviour, practises and attitudes as well as physical barriers to this participation. It is not an example of positive or affirmative action legislation that provides a preference to members of a particular class of persons. The DDA does not for example require that a person with a mental illness be hired ahead of a person without a mental illness. The DDA is designed to prevent less favourable treatment because of the disability.

For example, an employer is ordinarily prohibited from dismissing an employee because of his schizophrenia.

Not all examples of illicit drug use or addiction may fall within the category of a disability. Where there is medical evidence to support the person as having a disability then the DDA should apply to supply core basic human rights avoiding the arbitrary and capricious practises of discrimination.

This is by no means the first example of attempts to exclude politically unpopular conditions from the protection of disability discrimination legislation. The 1990 Americans with Disabilities Act (ADA) is a prime example. One of the enumerated exclusions from protection in the ADA is illicit drug use. This will be discussed later in this submission. Such exclusions may be politically popular with conservative voters but miss the point of Anti-Discrimination legislation and further marginalise an already marginalised group of persons in society.

Purposes of the DDA

The stated objects of the DDA are in section 3 of the Act. They are to eliminate as far as possible discrimination against persons on the grounds of a disability in specific enumerated areas. These areas are work, education, access to premises, provision of goods and services, accommodation, sports, land clubs, existing laws and the administration of Commonwealth laws and programs.

The section goes on to provide that an objective is to ensure as far as practicable, that persons with disabilities have the same right to equality before the law as the rest of the community.

Finally, the last objective is 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.

The right that is protected by the DDA is the right not to be discriminated against because of a person's disability. Where a particular disability that has medical evidence for its recognition as a disability such as the diagnostic and statistical manual of mental illness (DSM4) then the stated objects of the DDA are not being met by excluding particular disabilities from protection. Are the objective of the A met if a user of heroin, dexamphetamine or marijuana could be denied service at a supermarket or bank or admission to a movie theatre due solely to the use or addiction of the illicit substance? A 16-year old apprentice painter who is a user of cannabis or speed has a far worse opportunity to participate in the community if the employer upon learning of the illicit substance usage immediately terminates his apprenticeship. It is likely that the loss of a job or training opportunity will further exacerbate the illicit drug use or addiction rather than make the individual seek treatment for his or her condition or addiction.

Coverage of the DDA

The DDA is designed to prohibit direct or indirect discrimination on the basis of a disability within the specified areas stated within the objects as previously mentioned.

Direct discrimination or overt discrimination may occur where a person is treated less favourably than a person is without the disability is where one of the reasons for the less favourable treatment is the disability. Not allowing a person with a mental illness to eat at McDonald's could be such an example if one of the reasons for the prohibition is the mental illness.

Indirect discrimination occurs where an alleged discriminator imposes a term or condition. The person cannot comply with the term. A higher proportion of persons without the disability can comply with the term than a person without the disability. Finally, it is unreasonable to impose the term. An access to premises complaint is generally one of indirect discrimination. Stairs into a building impose a term that a person who uses a wheelchair will find it difficult to comply with. It may or may not be reasonable to impose such a term based upon the cost of rectification in the form of a lift or ramp.

Once a person establishes the initial case of discrimination it is then up to the alleged discriminator to argue the applicability of one of the defences. The most common defence is that of unjustifiable hardship. This is a defence of cost/benefit. All of the circumstances are to be looked at when determining if this defence is established. Section 11 of the DDA requires one to look at: (a) the nature of the benefit or detriment to all persons (such as allowing mothers with prams and young children to use a lift even though they do not have a disability) the cost of the services or facilities and the financial status of the respondent (a lift may be very expensive when one looks at a small business). The effect of the disability may be to totally bar a person from participation. One also looks at an action plan in the case of a service provider.

When dealing with the DDA issues of unjustifiable hardship are one of the key determining factors. It has not been the case generally that a preliminary question arises as to exclusion of the complaint by eliminating certain categories of persons from coverage. Not all areas of human endeavour are covered by the DDA. For example, a complaint involving one neighbour against another may give rise to a complaint in private nuisance or negligence but would probably not fall within a specified area under the DDA.

Definition of Disability

Disability is defined using the widest possible language in the DDA. It is defined to include any physical, intellectual, sensory, neurological, mental, and learning disabilities. It includes the presence in the body of organisms that cause disease such as the HIV virus or tuberculosis. It includes the loss of part of the body such as the loss of a digit. It includes a disfigurement such as a burn victim. The

disability may be transient minor or trivial. The condition could be presently existing or existed in the past such as polio or exist in the future such as a heart condition or be imputed to exist.

This very wide definition of disability is far more inclusive than either the 1990 ADA or the 1995 British Disability Discrimination Act.

Mental illness is not specifically mentioned but in section 4(g) of the definition of disability it includes, "a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or results in disturbed behaviour."

Drug addiction has been held in certain circumstances to constitute a mental illness within the diagnostic and statistical manual of mental illness as well as World Health and United Nations finding.

The wide definition of disability means that concentration is focused upon whether direct or indirect discrimination has occurred and whether or not one of the defences is established pursuant to the enactment. If drug addiction is to be removed from the DDA there will be expansive legal argument as to whether the person is not an addict or undergoing treatment in an effort to gain coverage of the legislation. This does not appear to be in the spirit of the DDA, which is expansive and inclusive in nature.

The Americans with Disabilities Act (ADA) 1990 takes a far more restrictive approach to the definition of disability. This Act was a piece of comparable Disability Discrimination legislation that was greatly considered during the drafting of the DDA. (See the article by Robert L. Burgdorf Jr. on eof the major authors of the ADA, in 1991 volume 26 Harvard Civil Rights and Civil Liberties Law Review PP 413-522) Burgdorf discusses the definition of disability under the ADA and the exclusions at pages 445-452 of this article.

A disability is defined a physical or mental impairment that substantially limits one or more of the major life activities or a record of such a physical or mental impairment or an imputation of such an impairment.

Physiological conditions or cosmetic disfigurement are incorporated within the definition of impairment.

It is not enough that the impairment simply exist for an ADA complaint. The impairment must substantially limit one or more life activity. These activities include such things as walking, breathing, working, seeing, hearing eating. It was designed that protection should not be afforded to a person with a sore toe or a transient or trivial impairment. This does open the door, however, to legal debate as to how various impairments substantially limit a major life activity.

The ADA (pages 451-453 of the Burgdorf article as above), was passed through a period of political compromise in the USA Senate during a debate that occurred on September 7 1989. Conservative Senators Jessie Helms, William Armstrong, and Gordon Humphry opposed the passage of the Bill without many exclusions from coverage. It was proposed by these persons that paedophilia, kleptomania, manic depression, homosexuality, psycho-sexual disorder, AIDS, tranvestitism, illicit drug use, bi-sexuality, voyeurism, and compulsive gambling. Senator Kennedy spoke out in support of HIV not being excluded from the ADA. Senator Domacini supported manic depression (Bi-polar Affected disorder) and schizophrenia as deserving of protection under the Act. Senator Domacini said that Winston Churchill and Abraham Lincoln had both had these disabilities.

At the end of the senate debate, none of the other group had senators to speak in their favour. Consequently a large number of categories have been excluded from the ADA. These are:-users of illicit drugs, homosexuality and bi-sexuality, transvestism, transsexuality, paedophilia, exhibishionism, voyeurism, gender identity disorder, compulsive gambling, kleptomania, pyromania, and psycho-sexual disorders.

There appears to be an inconsistency with these specific exclusions and the inclusive rights based theory of the ADA. There appears to be no justification for the removal or exclusion of many of the above listed condition that may be a mental disability. The justification is that these conditions are socially and politically unpopular. The individual is seen as either somehow responsible for his or her own condition or else in the case of conditions such as paedophilia they are seen as a threat to society. Perhaps their condition in the minds of the silent majority justifies an ostracism from the community.

It is submitted that this is an incorrect approach. The denial of equal treatment does not confer a benefit but rather prevents disadvantageous treatment because of the disability. It can make an already difficult situation very much worse. The stereotyping of mental illness may be seen as a cause or justification for the removal of certain conditions from the ADA. This simply is a mistake or misguided analysis.

Affirmative Action

The DDA should not be confused with special measure, positive action or affirmative action. Section 45 of the DDA allows such policies to give a preference and not to be challenged by using the DDA against them. They are however, outside the scope of the DDA. This means that if there is an affirmative action policy that operates discriminatorily, the DDA cannot be used as a weapon to challenge the policy or program.

An example of an affirmative action policy might be that a certain percentage of persons with a disability must be hired by an employer (1945 Great Britian Disabled Person's Employment Act).

Another example is that where there is a tie in qualifications then the person with a disability must be hired in favour of the person without the disability.

The DDA does not confer a preference to an illicit drug user. It does not say that where there is a tie in qualifications then the person with the cocaine addiction must be hired in preference to the person without the addiction. The DDA simply prohibits less favourable treatment upon the basis of a disability in certain areas. What chance would a 14-year-old child have if the school is able to say "you are an illicit drug user or addicted to cannabis so you cannot go to school."

Recommendations

The Disability Discrimination Amendment Bill (Cth) 2003 removes drug addiction from the coverage of the DDA. This is unless the addict or user of the illicit substance is undergoing treatment for the addiction. Addiction, addicted person treatment and service are not defined.

It is recommended that this bill be shelved. The theory those persons should be made responsible for their own addiction may apply in certain cases but not in others. A person may not be responsible for his or her addiction. A person may not recognise the need for treatment. Treatment may be unavailable or too costly. More money could be spent in providing treatment facilities rather than removing access to legislation to protect basic human rights.

DDLAS (Brisbane) fully support the submission of Mr Phillip Lynch from Homeless persons Legal Clinic and the Public Interest Legal clearinghouse Victoria (PILCH). DDLAS also supports the submission proffered by DDLC New South Wales. It is for this reason that much of the reasoning utilised in those submission have not been repeated.