

Submission on the draft Human Rights and Anti-Discrimination Bill 2012

Dispute Resolution Mechanisms for Disability Discrimination

This is a recommendation for changes to the dispute resolution processes for persons claiming discrimination based on disability.

People with disabilities are less able to tackle organisations or people who discriminate against them precisely because of their disability. That is, having a disability is inherently a disadvantage and thus people with disabilities are in an inherently disadvantageous position when making a complaint. This is particularly evident when students with a disability make a complaint against a public education provider such as a state school, TAFE college or university. These organisations have extremely large resources behind them. A student making a complaint against a state education provider is up against a billion dollar enterprise which has access to a state solicitor general for advice. Universities also have significant financial capacity and extraordinary intellectual capital. Any conflict resolution process therefore needs to ensure that the very clear capacity differentials are minimised as much as is possible.

Under the current and proposed legislation, a complainant makes a complaint to the Australian Human Rights Commission which then seeks to conciliate the matter. My experience has been that the Commission does not conciliate but in fact mediates. The distinction between mediation and conciliation is that unlike a mediator, a conciliator takes a view on the substantive matter. This distinction is very important because with mediation, the actual complaint of discrimination is not considered. The discriminator can offer an outcome and never have to acknowledge their conduct. This is wholly unsatisfactory for the complainants since the grievance is never considered and dealt with. They feel like they have never been properly heard.

If the matter is not successfully resolved by conciliation/mediation then the complainant must take action in a federal court and does so at their expense.

Taking an action in a court requires intellectual, social and financial capital, something people with disabilities generally lack. The current, and proposed, mechanism is entirely unsatisfactory because the conciliators do not make a judgment call on the alleged discrimination. A powerful party can (and does) simply reject the allegation and can (and does) respond with “take us to court”. This, not uncommon behaviour, is designed in the full knowledge that legal action by an individual is harrowing and expensive and the “take us to court” action is designed to *stop* the complainant from taking the matter to court. The end result of the current and proposed complaint resolution process is that organisations with sufficient capital can stone wall action, and make any attempt at being held accountable nigh on impossible. This outcome means these organisations can avoid the intent of the legislation, that is, they can continue with discrimination.

I propose the following alternative dispute resolution process.

When a complaint is received by the Commission it appoints an arbitrator to resolve the process. The arbitration process should be much as is currently proposed. That is, the rules of evidence

do not apply and lawyers are not allowed to be parties to the arbitration. The arbitrator should seek to find a mediated resolution to the complaint. If mediation is not possible, that is both parties agree to a specified outcome, the arbitrator then makes a decision on the outcome. The possible outcomes probably need to be specified in the legislation. In any case, the arbitrator comes to a conclusion and makes a finding.

I suggest that the finding is then considered by the Commissioner along with any submissions by both parties. The Commissioner then makes a binding finding. Then if either party wishes to appeal the matter, the party is taking on the Commission, not the other party.

The advantages of this recommendation are:

- Respondents cannot use the “take us to court” strategy to avoid being held accountable.
- Complainants will be able to have their matter dealt with at very little expense and in a timely manner.
- Complainants will have their specific concerns heard, acknowledged and dealt with.
- Vexatious parties will have to bear their own costs.
- Parties which accept the outcome will not have to bear any cost.

Associate Professor Guy Hall
School of Law
Murdoch University
21 December 2012