Does the conciliation and complaint process work under the DDA and other Australian anti-discrimination legislation?

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There have been a number of achievements of disability discrimination legislation in Australia that have increased the rights of persons with disabilities. There are however limitations to what has been and can be achieved by a process that is underpinned by a confidential conciliation process. Such a process is designed to obtain a compromise as between individual parties. This compromise being confidential generally will not assist other persons with disabilities who are not a party to the particular dispute. This article focuses upon the objectives of the legislation, the conciliation process with some examples and finally raises alternate models which may assist in better reaching objectives than the current regime.

Objectives of disability discrimination legislation

The Commonwealth Disability Discrimination Act (DDA) has three stated objectives. Paraphrasing them, they are (a) to eliminate discrimination because of a person's disability in certain areas, (b) to achieve equality before the law for persons with disabilities and (c) to recognise that persons with disabilities have the same rights as all other persons in the community. These stated objectives are very similar to those stated in other Australian State and Territory anti-discrimination statutes.

It is possible to rationalise other possible objectives that a lay person with a disability may hope the DDA will do for them. These may be stated as justice, fairness and equality. Commonly speaking, the DDA is intended to enable persons with disabilities to have a "fair go" through the elimination of the barrier imposed by discrimination to more full participation in society.

One will only have met the stated objectives of the DDA and other anti-discrimination Acts when a person's disability no longer proves to be a limitation to fully participate in the community. We appear to be a long way away from such objectives.

The complaint and conciliation process

The DDA and other State and Territory legislation rely upon persons or groups of persons with disabilities coming forward and bringing these complaints to the attention of a Commission. The Commission is required to be independent in its investigatory and mediatory functions. The Commission will expect parties to maintain confidentiality until their matter is attempted to be resolved through a confidential conciliation conference. At the conciliation conference an attempt is made to resolve the dispute as between the parties to forgo the need for a hearing in a court or tribunal. This is an attempt at alternate dispute resolution. Often what one reaches is a compromise, something in between the position of both parties. When parties reach an agreement they bind themselves through entering a written conciliation agreement. This agreement invariably contains the terms that the matter will be kept confidential and that no further action be taken in any forum in regards to the facts the subject of the dispute.

I have been involved in hundreds of conciliation conferences since the early days of the DDA. There have been notable achievements through conciliation during these years.. For example, increases in low-floor buses, significant improved train access for persons with vision and other disabilities, public access for persons with guide dogs for hearing disabilities, access to sign-language interpreters in public hospitals, promotion policy changes in employment in Education , Post-School options programs for children with severe disabilities in education, inclusive seating in theatres for persons with physical disabilities, lifts in shopping centres and many other results.

The pro-active and wide-reaching result through conciliation is more frequently the exception to the rule. The more common result is a confidential settlement that does not affect anybody else except the person who brought the complaint. The common employment situation may resolve with an agreement that provides for the payment of some amount of money, an apology and a reference. The person generally does not even obtain what he/she was mainly interested in achieving through this process, that is, a job. It is very rarely that an employment complaint will have wide reaching effects.

Achievements through the Human Rights and Equal Opportunity Commission have been of significance in the area of the provision of goods and services and will be in the area of Access to Premises. There have not been similar achievements in are covered by the DDA such as Employment, education, accommodation or administration of Commonwealth programs.

The transport standards, increases in captioning for persons with hearing disabilities, improved banking and internet access and the development of an access to premises standard are all significant. The complaint process, conciliation and hearing process has made a difference to the inclusiveness of the whole community in these areas. What can be done in other areas that the DDA and other disability discrimination legislation does not appear to be reaching? Should we be attempting to reach justice, equality and fairness by relying too heavily on the DDA?

Other models to assist in meeting the DDA objectives

The following suggestions are merely a few of the numerous possibilities utilised in other jurisdictions to help to reach the objectives of this type of legislation.

1. **Affirmative action:-**
   This simply means policies, practices or laws to favour persons with disabilities (for example).. It has been called many things in the past such as positive action, special measures or even reverse discrimination. Whereas anti-discrimination legislation is equality legislation designed to remove barriers for more equal participation, affirmative action directly favours a particular group because of the attribute or quality. For example, the 1945 British Disabled Persons Employment Act required employers who had more than 20 employees to keep a register and to ensure that at least 6% of their workforce where persons with a disability. It may be possible for Commonwealth, State and local government as well as large employers to adhere to a similar requirement. (This may be seen as encroaching upon the rights of more qualified workers.) To the extent that such a policy or law impinges upon the rights of others it can be ameliorated. It may be that with all the laudable intention of the DDA over the past 10 years that participation rates for persons with disabilities are actually decreasing in the workforce. Perhaps it is time for mandatory participation or at least laws or policies that give a preference to a worker with a disability when other things are equal.

2. **Contract compliance:-**
   This is a specific form of affirmative action policy or program that has existed for a number of years in the USA and has proved to be particularly effective. It applies as a specific inducement to companies, persons and organisations that wish to obtain lucrative government contracts. The government makes it a condition of the contract that the private employer must engage a certain percentage of persons with disabilities to gain the contract. This is very much a carrot rather than a stick approach and is merely a sub-set of positive action.

3. **A changed role for the Commission**
   The Human Rights and Equal Opportunity Commission and other Anti-Discrimination Commissions in Australia have a totally independent focus and function. The individual conciliators do an admirable job, by and large, within this legislative mandate. This is not the role of Commissions in other jurisdictions outside of Australia. Anti-Discrimination Commissions in the USA, Canada and Great Britain (Equal opportunity commission and commission for racial equality only) are not necessarily independent. Their role may be to look for discrimination and to bring the cases themselves to hearing. In these three jurisdictions the more notable of the discrimination cases brought to hearing are those that the Commissions have brought or supported. Such a change would require legislative amendment. Commission driven hearings may have the

benefit of strategically initiated complaints where the complainant is not worried about the possibility of paying the other side's legal costs if he or she loses in the hearing. This is currently a strong deterrent to proceeding to a hearing. Only a very small percentage of matters ever reach a hearing under all jurisdictions. It has been the experience that the possibility of an adverse cost order is a significant dissuading factor for many persons with disabilities.

Conclusion

This article has expressed an opinion that the complaint and conciliation process associated with disability discrimination legislation may not be fully achieving the objectives of the legislation. In certain areas such as the provision of goods and services or hopefully, access to premises widespread and lasting results have been made. This goes a long way to enabling persons with disabilities to greater participation in the community. However, the very nature of the complaint process with confidential conciliation conferences and one on one confidential agreements have mitigated against widespread results. This has been particularly noteworthy in the discrimination areas of employment and education. A system that may resolve an individual's complaint in his or her employment when resolved confidentially often does not assist another person with a disability in a similar employment setting. Neither does the resolution of an individual employment discrimination complaint improve participation rates in employment generally for persons with disabilities. Suggestions have been made in this article to possibly redress some of these issues.. The proffered solutions included changes to the conciliation structure, HREOC bringing complaints, affirmative action and contract compliance. These are but a few of numerous potential changes to the system. One may also consider removing the confidentiality clause in conciliation agreements or the commission itself changing an individual complaint into a representative complaint of its own volition.