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Abstract

Moira Rayner, Victorian Commissioner for Equal Opportunity, discusses the issue of disability and discrimination and the law in Victoria. She looks at discrimination in education and employment, and instances of both direct and indirect discrimination. **Keyword: Government**

Disability and Discrimination

Moira Rayner

It is timely for me to be talking about discrimination against people with disabilities today.

First, there is a real possibility that the Commonwealth will, following the work done by the Disability Advisory Council of Australia, enact comprehensive federal legislation prohibiting discrimination on the basis of disability or impairment.

There is already a lot of law at Commonwealth, State and international levels, which makes discrimination against people with disabilities unlawful. Four States, and Victoria is one, have disability discrimination legislation. The Human Rights and Equal Opportunity Commission has had jurisdiction over discrimination in employment on the ground of disability since January 1990 but it cannot provide a remedy, as it can for sex and race discrimination, and as the State legislation does provide. Internationally there are guarantees against discrimination to which Australia is a party-in the International Covenant on Civil and Political Rights, the Declaration of the Rights of the Child, the Declaration of the Rights of Disabled Persons, and the Declaration on the Rights of Mentally Retarded Persons.

Secondly, today the High Court delivered its second ever decision on indirect discrimination against people with disabilities in what is colloquially known as 'the MET case'.

You may remember the dramatic events of 1989-1990, which led to this appeal.

In 1989 the Public Transport Corporation (PTC) announced that it intended to introduce 'scratch tickets' and remove conductors from trams in Melbourne. This stirred the relevant unions up considerably. As well, various disability rights groups challenged the PTC's decision, saying that the proposals indirectly discriminated against people with some impairments. In early 1990, during a major public transport strike, the Equal Opportunity Board courageously - in the *Yes Minister* sense of the word - made orders requiring the Government to vary its policy. The Government appealed to the Supreme Court, which overturned the Board's decision, and it is from that decision that the disabled groups appealed to the High Court.

The government had argued that they could not be found to have discriminated because (a) their transport policy did not 'require' disabled people to use trams with or without conductors; (b) financial considerations made it a reasonable policy, even if it did have a disproportionately adverse impact on some people with disabilities, and (c) they had been directed by the Minister to adopt the policy, and since he had the statutory power to direct them in that way it was necessary they comply with that directive, and that they were therefore entitled to claim an exemption under the Act even if the act they were required to do was directly or indirectly discriminatory and would otherwise have been unlawful.

The High Court found that the policy was capable of being discriminatory towards disabled people, and that the requirement that they be able to use public transport on those terms did affect them adversely far more than other commuters. The Court also effectively overruled, again, the decision of Fullagar J. of the Victorian Supreme Court in Arumugam, which had suggested that a complainant of discrimination needed to prove 'conscious' discrimination by the Respondent. The Court said that to interpret the Act in such a way as to allow government to exempt corporations from their duties not to discriminate under the Equal Opportunity Act would lead to an absurd and unintended result, (the Act expressly binds the State) and could not be accepted.

As well, the Court considered the extent to which a complainant's perspective should be used in deciding whether a condition is or is not reasonable. The Public Transport Corporation argued that it was reasonable for them to change the transport system in the way they did because the existing ticket system and the presence of tram conductors was too expensive. They argued that their actions were reasonable on the basis of financial considerations - that is, to the Corporation. The complainants argued that in deciding whether the PTC's action was reasonable, the effect on the complainants ought to be considered as well. For them, the changes meant they would find it very difficult, if not impossible, to use the public transport system. The Court found that the Board should reconsider the case and determine whether or not the conditions imposed by the PTC transport policy were 'reasonable' in all the circumstances of the case. So it isn't over yet.

Where does that leave us?

Discrimination-the present law

Anti-discrimination legislation prohibits only certain types of discrimination.

Firstly, there must be a ground. In Victorian law it is unlawful to treat someone less favourably than someone else because of their having, or being thought to have, an impairment.

This covers present impairments – such as cerebral palsy or measles - past impairments, e.g. a broken leg or a history of mental illness and impairments that are imputed to a person, such as that a person has an intellectual impairment because he or she speaks slowly.

It is also unlawful to discriminate against someone because of characteristics which people who have certain impairments are generally thought to have, e.g. that people with head injuries are intellectually disabled because of their manner of walking or talking.

'Impairment' is defined to mean total or partial loss of a bodily function; the presence in the body of organisms causing disease; total or partial loss of a part of the body; malfunction of a part of the body, which includes a mental or psychological disease or disorder, or a condition or malfunction as a result of which a person learns more slowly than persons who do not have that condition or malfunction, and a malformation or disfigurement of a part of the body.

Secondly, the discrimination must happen in an area of public life covered by law. You can discriminate as much as you like in conversation at the pub, over the kitchen table or in the seminary. Employment, of course, is the most significant major area covered by the legislation - 80 per cent of my complaints are about work.

Last year 1 received 983 informal enquiries and complaints about discrimination on the ground of impairment but more than 22 per cent of my formal complaints were on that ground. So far this year I have had fifty-four compared with thirty formal complaints in the same period last year. Very few of the complaints were about education. Eighty per cent were of discrimination in employment, followed by accommodation and goods and services, one against a qualifying body, and only three in education. This year forty of the complaints so far have been about discrimination in employment, two in education, three in clubs, one in accommodation, and eight in goods and services.

Direct and indirect discrimination

All the anti-discrimination legislation, which applies in Victoria -the Equal Opportunity Act (Victoria), the Racial Discrimination Act (Commonwealth) and the Sex Discrimination Act (also Commonwealth), prohibits two quite separate forms of discrimination.

Society thinks of discrimination as something pretty obvious, where the factor that made the difference is readily apparent. But that's only one sort of discrimination: direct discrimination.
A person is directly discriminated against when he or she is treated less favourably than someone else because of one of the prohibited grounds of discrimination. It need not be the only reason. In Victorian law it must be a substantial ground or reason.

Under all of these laws the discriminator need not have intended to discriminate, but (leaving aside the sometimes difficulty of proving that the real reason was on of the prohibited grounds), identifying direct discrimination is usually quite straightforward.

For example, if an employer were to ask job applicants about their health and to make comments about, say, people with HIV infection or Crohn's disease being unreliable employees, then an unsuccessful applicant who had a disability or impairment but was qualified for the job would have some fairly strong evidence on which to base a complaint of direct discrimination.

Similarly, an employer who closely questioned manifestly disabled, but not apparently fit, job applicants about their sick leave history and then did not offer the job to a person in a wheelchair, would run a very great risk of a complaint of direct impairment discrimination.

Indirect discrimination, however, is quite different. For a start it is usually much broader in scope. Usually the complaint is about an institutional practice, which has implications for a whole class of potential complainants as well as the one who did complain. Indirect discrimination is also subtle. It usually arises from an apparently neutral rule, often embedded within an organisational culture, sometimes to the point of being an unwritten rule or informal practice at odds with written rules or formal structural requirements. It is often perceived as 'fair' because 'It applies to everyone'.

There have not been many indirect discrimination claims because of the perceived difficulties in proving it. This is changing. Lawyers representing particularly disadvantaged people have begun a more sophisticated and targeted challenge to entrenched discrimination. They have become more familiar with the concept, can more easily identify it, and are more willing to take complaints on.

Essentially, indirect discrimination is about blanket conditions, which are applied to 'everyone' but with which some people cannot comply.

The particularly difficult thing about anti-discrimination law is that it is a new area, where conflicts between ordinary principles and new concepts of social responsibility arise all the time.

In many cases the conflict between the demands of 'able' society and the person with the impairment are seen, by the service-provider or educator or accommodation provider or employer to be complete. Yet the Act actually requires able Victorians to accommodate the needs of less or differently abled people, and where conflict arises tries to resolve it in terms of that weasel word, reasonableness'.

Let me look first at discrimination in education.

Discrimination in education

'Educational authorities' - which include all schools, universities and other institutions which provide education or training - are not allowed to discriminate on the basis of disability in students' admission and the terms on -which they are admitted to a course, or the benefits of the education offered to such a student, or to subject the student to any other detriment, including expulsion, because of their impairment.

Education is one of the major areas of discrimination in Victorian society. Parents of children who have disabilities fight a constant battle to have their children integrated, if that is what they want, into the mainstream system. Lack of provision of services is usually given as the reason for governments wishing to deny their responsibilities to provide adequately for all persons who require additional support.

Assuming that the person has, however, surmounted these obstacles and gained an education or training, they face similar problems at work or in attempting entry to the trades, callings or professions of their choice.

Discrimination in employment

The Victorian *Equal Opportunity* Act 1984 makes it unlawful for employers, prospective employers and their agents, and qualifying bodies to discriminate on the ground of impairment in recognising qualifications for work, in offering or not offering employment, the terms of employment and access to occupational training, opportunities for promotion, transfer or training 'or to any other benefits connected with employment' or dismissing a person or subjecting the employee to any other detriment'.

The defence of 'Special services or facilities' which cannot

'Reasonably' be provided

There is a fundamental obligation by an employer or an educator to accommodate the reasonable needs of a person with a disability but it is expressed in the negative, in the form of a defence. If, because of a person's impairment, he or she would require special services or facilities that cannot reasonably be provided, then the school (or an employer) may act in a way which is otherwise discriminatory. Employers may lawfully discriminate against people on the basis of impairment if, having taken into account the work reasonably required of the job, the person would require special services or facilities to do it, and these cannot reasonably be provided in the circumstances.

The discriminator must be prepared to demonstrate that the defence applies. This means that they must document their investigation and decision - making process, which is a step in the process very commonly missed. An employer has to show what the genuine occupational requirements of the job are, and that these are reasonably required of the employee, that he/she needs special services and that they cannot reasonably be provided.

Genuine occupational requirements are those which are necessary for the safe, efficient and reliable performance of the work. These have to be separated from the optional elements. They should be part of the job description, and be the basis of assessing an applicant's suitability.

Special services or facilities cannot reasonably be assessed without at least asking the person who has applied for the job, what they think they need.

The employer cannot necessarily assume that 'reasonableness' can he attributed to any particular thing that the employer does not wish to do or provide.

The defence of a person being a risk to themselves or others

If there is a substantial risk that a student or an employee, because of his or her impairment, will injure themselves, or an unreasonable risk that they will injure others, then the educational authority or employer is entitled to act in a way which is otherwise discriminatory. An educational authority may refuse to allow the

student to participate in part of the educational program for these reasons, though this does not allow the educational authority to expel the student or to refuse to allow him or her access to other benefits.

Whether or not the risk is 'substantial' will depend on the type of the impairment and the nature of the program or work, as will the degree of risk to others and the reasonableness of undertaking that risk.

The risk has to be real, not remote. The risk of injury can, of course, be offset by the provision of special services or facilities, which the employer may be obliged to provide.

All of these overlap with every employer's obligations under occupational health and safety legislation. An employer has a duty to provide a safe workplace, that is safe to all workers including a person with a disability. There is a creative tension between occupational health and safety law and anti-discrimination law, which is resolved by looking at the employer's obligation to make reasonable accommodation of the employee's needs. They do not have to be prioritised!

Special exemptions: education

A decision to exclude or impose conditions on a student's entry to a course of study or training on the ground that they are unable to benefit substantially from the educational program, whether or not special programs or services are provided, can be used. The nature of the programs and the type and extent of the person's impairment would have to be carefully considered before this exception would apply. If the impairment only marginally reduced the benefit the student would derive from the program, then the exception would not apply. Again, this places a heavy onus on a University or College; for example, to demonstrate the steps they had taken to check this out.

An educational authority is permitted to select students with abilities relevant to the educational courses offered. This only applies if the way in which a person's abilities are measured is reasonable. A student who can't write shouldn't, for example, have their mathematical abilities assessed on the basis of a written test.

Indirect discrimination

Now let me turn to indirect discrimination. There are a number of important parts to this. Indirect discrimination is far more widespread than direct discrimination.

(i) Requirement or condition

The first element of the definition is that there must be a condition or requirement, which applies to everyone. If a policy were intended to rid the workplace of all people with disabilities, for example, it would be a directly discriminatory policy. [Styles v. Secretary of the Department of Foreign Affairs (1989) EOC 92-239).

Some sorts of conditions or requirements might be difficult to identify, because they are not express. For example, if students were required to attend all their lectures in a lecture theatre to which there was no disabled access, or if prospective maths teachers were required to pass written examinations, this would be a requirement which he/she must fulfil to avoid failure or not being employed. Whether all potential employees or students can comply that with is a matter of fact.

(ii) Adverse impact on one group of people

The second part of the definition is differential impact. One group of people required to comply must either have more difficulty in complying with the condition or requirement than other groups (Victorian Equal Opportunity Act Section 17 (5)) because they have certain impairments.

(iii) Meaning of 'substantially higher proportion'

The Victorian legislation requires that a 'substantially higher proportion' of other people must be able to comply with the condition.

What is important is to be able to show that more people, percentage-wise or however, are able to comply with the condition than the group described by the prohibited ground. If no one can comply with it, it will not be indirectly discriminatory against any one group of people.

The group you compare with complaining, or allegedly affected, group with must be selected in a way that ensures they were not affected by previous discrimination.

Thus, to compare say actual applicants for jobs rather than all potential applicants would create an unrepresentative group, one affected by past or present discrimination; people might have been deterred from applying for work if a particular, discriminatory condition had been known to apply.

(iv) 'Does not or cannot comply'

As well as needing to show that a significant proportion of people can comply with the condition, the person complaining of indirect discrimination has to show that he or she, and others like him or her does not or cannot comply.

This does not necessarily mean that it is physically impossible for them to comply. It need only be fundamentally impracticable. People with disabilities could use driver - only trams even if some of them would require a permanent attendant so to do. However it was not seriously disputed, in the MET case, that they could not comply with the requirement to do so, in practical terms.

(v) Unreasonableness

The final criterion is that the requirement of condition must be unreasonable. If the condition is reasonable, no matter how many people cannot comply with it, then there is no indirect discrimination.

Assessing reasonableness is a tricky business. Reasonableness can be looked at from two completely different points of view; that of the employer or that of the person complaining of indirect discrimination. In the MET case the Court has now said that you must consider the vantage points of both. Respondents' views about 'reasonableness' - usually put in terms of financial considerations or efficiency - are not necessarily any more valid than that of an individual complainant and it would be dangerous to assume that one will be able so to persuade the court.

Courts do consider:

- Economic efficiency.

- Fairness considerations - in Styles v. Secretary of Department of Trade (1988) EOC 92-239 the court of appeal considered 'a precept of fairness that persons be employed according to the substantive level of their qualification' (the issue was that a substantially higher proportion of men could comply with the

requirement that applicant journalists for London posting preferably be graded A2, though A1 could apply (as Ms Styles did)

- Safety (e.g. industrial safety requiring close fitting or no headgear, which affects Muslim women's wearing of the Veil). May I point out that there is no 'choice' between anti-discrimination law's equal opportunity and occupational health and safety requirements. They neither conflict nor require prioritising, as Worksafe Australia recently suggested, but complement and must accommodate the other

- Customer/client preferences (a matter of corporate style): this has been interpreted strictly in the US - should one reinforce community racism by refusing to employ Aboriginal people?

- Lack of alternative options, (which at least requires an attempt to canvass all available options).

- Industrial harmony.

Let me say something about the latter consideration. It is unwise, if not dangerous, to rely on industrial considerations alone. Discrimination is entrenched and systemic in any society because of the natural human desire to surround ourselves with people just like us.
Anti-discrimination law is required because this is serious antisocial in some areas of public life, such as employment. Left completely to the agreement of existing workers or industrial organisations, the terms and conditions of working environments might, if the individuals were uninformed and unenlightened, amount to direct or Indirect discrimination. They might not only be unlawful-see Kemp v. Ministry for Education (1991) EOC 92-340: Australian Iron and Steel case (op. cit.) - but expensive for the employer. It should be remembered that industrial pressure or lack of support for an individual worker is not a defence to a complaint of discrimination. The employer in Ardeshirian v. Robe River Iron Associates ((1990) EOC 92-299) was severely criticised, and held responsible for the damages awarded by Sir Ronald Wilson, for failing to act on complaints that an Iranian man was seriously racially harassed by fellow-workers - direct discrimination in that case. They had failed to act in his interests because the relevant union exercised its industrial muscle in favour of the discriminators.
The High Court decision may add strength to my view that It is not possible, merely by following a statutory procedure that leads to the creation of an industrial agreement, to make lawful - discrimination what is unlawful under the Equal Opportunity Act even if the Act does not necessarily say so, as the Western Australian Act does.

But it is up to the court to find whether or not a requirement or condition was reasonable in light of its continuing discriminatory effect. That will include the degree of the disparity; the numbers of people affected; the surrounding circumstances (the size, capacity and nature of business of the employer) and its EEO obligations and all the surrounding circumstances.

Conclusion

The High Court decision is too recent for me to say much more about its impact on anti-discrimination law. However it has clearly said that even though the Victorian Equal Opportunity Act is poorly drafted - in my view it is one of the worst pieces of anti-discrimination laws in Australia - it still works. It has been interpreted in the light of the international human rights instruments which created the concept of anti-discrimination law in the first place, and has clearly laid down that governments which enact such laws cannot then purport to exempt themselves from it by administrative fiat.

Anti-discrimination laws do work, even when their administrators' resources and funds are inadequate, even in 'difficult economic times', and they can be made to work very well by interest groups, such as the groups

who sponsored the challenge to the transport policy changes in Victoria in 1989 which resulted in such a success today.

Moira Rayner is the Victorian Commissioner for Equal Opportunity.