

**Disability Employment Practice: An Examination of the Australian Human Rights Commission Complaint Cases**

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### **ABSTRACT**

*Using the lived experiences of people with disabilities this research reviewed 18 years of cases under the Australian Disability Discrimination Act, 1992 (DDA) to look at disability discrimination on the grounds of employment. Some 673 complaint cases and 110 Federal court actions were analysed to assess the prevalence of disability discrimination in employment, and its relationship to types of disability, gender and organisational context. Several discriminatory themes emerged and these are presented. Notably, employers have a great deal of difficulty in understanding key legal concepts that underpin the DDA including: unjustifiable hardship; inherent requirements; reasonable adjustment; direct and indirect discrimination; and what constitutes inclusive organisational practice.*

**Keywords:** employment; disability; discrimination; citizenship;

Employment is a key foundation to citizenship in western nations. Yet, research has consistently shown that people with disability (PwD) are employed at significantly lower rates than the general population. PwD have been seriously underrepresented in paid employment. According to the Australian Bureau of Statistics (2009), 20% of Australians have a reported disability. However, only 53% are employed in the labour force with people with certain types of disabilities (e.g. vision impairment and high-level spinal cord injury) and higher support needs faring far worse. This is in contrast to 81% of people without disability who are in the workforce. Moreover, PwD who are employed are more likely to work part-time (37%) severely curtailing their career opportunities and access to economic resources. The OECD findings on employment rates for PwD identified that Australia had the seventh lowest employment rate, with nearly two thirds of the OECD countries performing better in the employment of PwD (OECD, 2003a). An outcome of the lower level of employment of PwD was that Australia had the lowest average personal income for PwD, at 44% of the income of non-disabled people (OECD, 2003b). While the reasons for lower employment are complex and multifaceted, one consistent finding is that PwD are discriminated against in all facets of social participation. International conventions on the rights of PwD and implementation of nationally-based disability discrimination legislation were introduced to address this issue. How successful has this been? This paper aims to contribute to a broader understanding of the type of disability discrimination faced in the workplace by reviewing the United Nations' (2006) disability initiatives including the *Convention on the Rights of People with Disabilities* and analysing cases brought under the Australian Disability Discrimination Act, 1992 (DDA).

The research is based on a social approach to disability that places the lived experience of PwD at the centre of the research paradigm (Kitchin, 2000; Oliver, 1996). The position of PwD has not been as considered as central to the research process as other areas of marginality (e.g. Hylton, 2005; Meekosha, 2006). Central to the understanding of a social approach to disability is the consideration of the individual and their impairment within the socially constructed disabling environments. As more contemporary understandings of the social model suggest, the consideration of the embodiment of individuals is essential to understanding the complex interplay between impairment, disability and environment and how the disability is constructed (Packer, McKercher, & Yau, 2007; Shakespeare & Watson, 2001; Thomas, 2004). To this end, we have sought to answer three critical questions:

1. How prevalent is disability discrimination on the grounds of employment across all disability discrimination complaints?
2. What was the relationship between disability discrimination on the grounds of employment in respect to types of disability, gender, the entity undertaking the complaints and the industry sector where the complaint originated?
3. What were the emergent patterns of employment discrimination and reoccurring themes to any patterns of discrimination identified in the complaints?

Firstly, we briefly review the approaches to including PwD in employment. Second, this review is discussed within the context of the United Nations (UN) human rights initiatives relevant to disability and employment, and how Australia has implemented the DDA over of its 18-year history (1992-2010). Third, publicly available outcomes of complaint cases (n=673), HREOC hearings and Federal court actions (n=110) brought under the DDA are analysed.

## **DISABILITY AND EMPLOYMENT**

In July 2008, Australia was one of the first countries to ratify the United Nations *Convention on the Rights of Persons with Disabilities* (2006). It was a landmark statement of intent to pursue a society in which PwD have the same opportunities as non-disabled citizens to participate fully in all of life's domains. Paid employment is a key to much of life's opportunities as it opens economic, social and personal doors (Blustein, 2008), which are all social determinants of health (World Health Organization & World Bank, 2011). It is a vehicle for choice and change. Moreover, it is seen as both a right and an obligation in our community.

Obtaining a holistic view of the employment context for workers with disability requires an examination of not only the experiences, expectations and career aspirations of workers with disability but also the knowledge, experiences and attitudes of employers. This requires an examination of both the demand and supply sides of the employment equation. Further, the government's role as both a regulator of disability employment through the Australian *Disability Discrimination Act 1992* (DDA), employment advocate through policy initiatives and coordinator of the promotion of such initiatives also needs to be understood.

On the demand side, recent Australian research studies on employment and disability have tended to concentrate on specific disability groups or specific circumstances (Murphy & Young, 2005; O'Brien, 2007; Shankar, 2005, 2008; Winn, 2007; Winn & Hay, 2009). Not surprisingly, there is universal agreement amongst these studies that, compared to the rest of the Australian community, PWD are underrepresented in employment, have poorer employment outcomes across occupations and generally earn less when employed in similar occupations regardless of their access to higher education and anti-discrimination legislation. This is irrespective of the sub population group and the plethora of short-term job support start up positions that have been offered to these groups over the last decade (employment outcomes are measured at 13 or 26 weeks). The dimensions of the demand side of the employment equation should not stop at the acquisition of a job. It should also consider the sustainability of employment and the opportunity for careers. In addition to the advantages of employment identified above, the sense of a career contributes to positive identity development, feelings of satisfaction and purpose in life (Blustein, 2008).

International studies (Wilson-Kovacs, Ryan, Haslam, & Rabinovich, 2008 in the UK) and (Fabian, Ethridge, & Beveridge, 2009 in the USA) have started exploring career barriers experienced by PwD from a social constructionist perspective. The major career barriers reported are transportation, lack of job and career information, fear of losing social security income and health benefits, fear of illness and relapse, employers' inadequate knowledge of disability and lack of physical and technological resources. In the UK studies, employees with disability tended not to receive the same career outcomes as their non-disabled peers. These career outcomes included promotions, training opportunities, acting opportunities,

mentoring and increased wages. Nonetheless, some PWD do get beyond base camp and pursue rewarding and successful careers.

In the UK Wilson-Kovacs, et al., (2008) found that the difference in the approach of successful professionals with disability to career barriers was that they perceived these as risks to realising their potential not as risk for failure. Consequently, they took risks themselves, which emerged as an essential element in their professional development and career progression. Even so, all too often, the career successes of professionals with disability are viewed as the result of diversity quotas or are judged on the basis of disability rather than the expertise of the individual (Bell & Heitmueller, 2009; Ferguson, 2010). There are no comparable Australian studies that explore the career experiences of workers with disability. However, 48% of all cases heard by the Australian Human Rights Commission involve disability discrimination and, of these disability discrimination cases, employment cases were the largest proportion (Darcy & Taylor, 2009).

On the supply side, while the disability discrimination cases provide an insight into employers who discriminate against PwD, this in itself does not provide an understanding into the supply side perspectives on employing PwD. A great deal of research has focused on employer perceptions of the imposition of disability discrimination legislation and their attitudes towards employing PwD particularly in the American context of the *Americans with Disability Act* (ADA) of 1990 (Hernandez, 2000). This research suggests that employers feel threatened by the imposition of disability discrimination legislation and deliberately camouflaged their attitude towards PwD where they are able to make public statements that are 'politically correct' while privately excluding PWD from employment or certain types of employment (customer service positions and senior management) (G. A. Ross, 1994; G. F. Ross, 2004; Schultz, Milner, Hanson, & Winter, 2011). Other employers openly embrace disability employment due to labour market shortages and a belief in equity or corporate social responsibility programmes (Luecking, 2008).

## **HUMAN RIGHTS AND AUSTRALIAN DISABILITY DISCRIMINATION LAW**

The rights of PwD did not receive formal international recognition until the United Nations' *Declaration on the Rights of Disabled Persons* (1975). Following from this the United Nations' (1976) declared that

1981 would be *the International Year of Disabled Persons* (IYDP). The IYDP was seen as a watershed event for the rights of PwD in many countries. In Australia the IYDP was marked by many initiatives, and importantly the emergence of a disability political movement that for the first time had been able to organize around a focal point (Clear, 2000, pp. 54-55, 81). Following from the IYDP the United Nations declared that 1983-1992 was the *Decade of Disabled Persons*. This decade saw many initiatives by member states to address their particular disability issues.

Following this, the United Nations General Assembly passed a resolution *The Standard Rules on the Equalization of Opportunities for Persons with Disabilities* (1993). The resolution adopted a social approach to disability, calling governments to provide for the equalization of opportunities for PwD in all aspects of their lives. The Australian government became a signatory to the United Nations' *Convention for the Rights of People with Disabilities* (2006, 2008). Article 27 of the Convention specifically identifies the rights of PwD to work and employment. The Convention has become the international framework under which nations implement human rights for PwD. In Australia, the *Disability Discrimination Act, 1992* (DDA) has been the way that the Australian Commonwealth government implements its international disability rights commitments since 1st January 1993.

### **Disability Discrimination Act, 1992**

The DDA was the first disability specific legislation in Australia to provide protection for all Australians against disability discrimination. The premise of the DDA was that disability discrimination happens when a PwD is treated less fairly than someone without a disability. The key objective of the DDA is to 'to eliminate, as far as possible, discrimination against persons on the ground of disability...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' (Section 3). The DDA uses a similar functional loss list to define disability to that of the Australian Bureau of Statistics (2009). However, it does state that people cannot be discriminated against because of a disability they 'have now, had in the past, may have in the future or are believed to have'. The Human Rights and Equal Opportunity Commission (HREOC - from 2008 known as the Australian Human Rights Commission) interpret this section of the Act with a more social approach to

defining disability under access categories. The DDA implicitly makes it unlawful to discriminate against PwD in employment (DDA Section 3).

There are four main mechanisms to changing discriminatory practice under the DDA: education; complaint cases, HREOC hearings and Federal court actions; disability standards; and disability action plans. Central to the objectives of the DDA is the ongoing education of the public about disability discrimination. Under Section 69 of the DDA, people with a disability have the right of complaint when they believe they have been discriminated against. Ninety five percent of complaints brought to HREOC are dealt with through staff investigation and conciliation (Hastings, 1995, 1997) and conciliated outcomes may take the form of: payment of damages; job reinstatement or job promotion; an apology; changes in policies or practices; and/or some other outcome.

If complaints cannot be resolved through conciliation then the PwD can ask for the complaint to go to a HREOC hearing (pre-2000) or have the complaint heard by the Federal Court of Australia. The advantage of a Federal Court decision is that it is binding on the parties whereas a HREOC ruling is not (Hastings, 1995). Thus, an analysis of complaint cases and Federal court actions can provide insights into how well the legislated approaches are working.

### DATA TREATMENT METHOD

The AHRC complaint cases and Federal Court actions are brought under the Australian *Disability Discrimination Act 1992* [Comm] (DDA). These data are part of the management information system of AHRC, where PwD have been empowered by the DDA to make complaints if they feel they have been discriminated against because of their disability. Due to the confidential nature of complaint cases, the research can only access those outcomes made publicly available on the AHRC website complaints register (1998–2010). The textual description was first read as qualitative data and the cases prepared as quantitative data for entry. The data was organised into: year; type of disability/dimension of access (defined by DDA); industry sector; business type (defined by ABS); category of discrimination (defined by DDA); entity bringing case (defined by DDA); gender; and outcome and compensation (defined by DDA). The quantitative analysis involved frequencies, cross tabulations and Chi-square tests for independence; the qualitative analysis utilised an interpretive approach to analyse reoccurring themes

affecting PwD's employment and involved a constant comparison (Glaser & Strauss, 1967) of the complaint case circumstances, the spirit and intent of the DDA and social approaches to disability (Barnes & Mercer, 2010; Oliver, 1996).

## EMPIRICAL FINDINGS AND DISCUSSION

This section presents information about the sample with an overview of complaint cases lodged across all areas of human rights responsibilities in Australia. Second, is a statistical analysis of the employment complaint cases, which outlines group difference across key variables. Third, the reoccurring themes from the complaint cases are presented together with discussions of implications for citizenship.

### The Sample

Disability discrimination as a proportion of complaint cases lodged by sex, race, age and administrative issues is by far the largest category comprising 42% of the workload of the AHRC (Australian Human Rights Commission, 2010). Of all complaints cases across the AHRC workload, employment accounted for 58% of all complaint cases and 36% of all complaints under the DDA (see Figure 1).

### Figure 1: Proportion of HREOC Complaints Cases by Act

Figure 2 shows the number of DDA complaint cases from 1996-2010, with approximately 11,200 complaint cases lodged within that period, an average of 802 per year. Approximately 35% of all complaints made were successfully conciliated to an outcome with the remainder being terminated due to not being deemed disability discrimination, terminated for other reasons or voluntarily withdrawn. Some of the complaints cases not conciliated may have proceeded to either HREOC inquiries (pre 2000) or Federal Court actions (post 2000 see *Brandy v HREOC [1995]*). The most common reason for termination of a complaint was that it was trivial or misconceived (22%) or that there was no reasonable chance of conciliation (15%). Of these complaint cases, just under half of each year are for employment, followed by goods/services/facilities (25%), and access to premises (7%) (Human Rights and Equal Opportunity Commission, 2007).

## **Figure 2: Disability Discrimination Act – number of complaint cases**

Some 673 complaint cases together with some 110 HREOC hearings and Federal court cases were publicly available and included in the database for the analysis. Of these cases, some 138 were primarily employment related. The following analysis is based on these complaint cases and the recurring themes of the complaint cases is supplemented with the HREOC hearings and Federal court actions (HREOC, 2005).

### **Data Analysis**

As Table 1 identifies, there were statistically significant relationships between the types of discrimination by all but gender. The Pearson coefficient (P) value is significant if less than  $< .05$ . The phi or Cramer's V coefficient value indicators the effect size using Cohen's (1988) criteria of small, medium or large effect taking into account the degrees of freedom. The entity taking the action and the sector where the discrimination occurred were both significant to the 99% level and regarded have a small effect, where disability type was significant to the 99% level and regarded to have a large effect.

**Table 1: Test for Independence based on Employment & All Other Discrimination**

With regard to entity, there were more individuals with disabilities than associates or organisations taking employment cases at a much higher proportion than other cases due to the individual nature of employment cases as opposed to the collective nature of organisational cases. The sectoral relationship with that the cross tabulation showed that there were a higher proportion of cases against the Commonwealth government than the private sector or other levels of government. This is supported by the Commonwealth Disability Discrimination Commissioner, Graeme Innes, who identified the deplorable decline in the employment of PwD at the Commonwealth government level (Woodley, 2011). The most significant relationship both statistically and the affect factor is that of disability type. Simply put there is a much higher relationship between the type of disability and the likelihood of being discriminated against in employment. The two groups with the highest proportion of bringing employment cases as opposed to other types of discrimination cases were people with mental health issues and those with HIV AIDS.

## Reoccurring Themes

The discriminatory themes that emerged from the complaint cases and Federal Court actions included: disability type; access to premise; disability discrimination as a result of workplace injury; selection of new employees; integration of assistive technology; perception of cost of disability inclusions; and inflexibility organisational workplace practices and protocols.

### *Disability Type*

People with mental health issues and those with HIV AIDS had a higher proportion of employment discrimination than other types of discrimination. This involved discrimination in the selection process or discrimination when disability was acquired at work or acquired by an individual because of an accident or medical condition outside of the workplace. Yet, as an overall proportion of complaint cases Figure 3 identifies the people with mobility, vision, other, hearing and learning disabilities constitute a greater number and proportion of cases. What becomes evident is that the discriminatory practices context is different for each of these groups.

### **Figure 3: Disability Type/dimension of access for employment**

#### *Access to premises*

For people with mobility and vision impairment, a great deal of the discrimination involved direct and obvious exclusion from premises due to the lack of basic physical access inclusions (e.g. pathways, kerb cuts, ramp, etc.) incorporated into a *continuous pathway*. A *continuous pathway* is defined under the Australian Standards for access and mobility as:

An uninterrupted path of travel to or within a building providing access to all required facilities. For non-ambulatory people, this accessible path shall not incorporate any step, stairwell or turnstile, revolving door, escalator or other impediment which would prevent it being negotiated by people with a disability (Standards Australia, 2009).

It is these basic physical access requirements that still make up the bulk of complaint cases. Many PwD are frustrated by the lack of accessibility of much of the built environment or in the case of people who are blind or vision impaired, wayfinding systems that allowed their independent and dignified navigation. For people with mobility disabilities, the three most common omissions of access are physically being

able to get into the place of employment, parking and toilets. Accessible parking is essential given the general lack of accessibility of public transport, the extra space required to transfer from car to wheelchair or to ingress or egress from side or rear loading vehicles.

#### *Disability discrimination as a result of workplace injury*

The two most common human resource management issues related to a person requiring a disability due to a workplace injury or discriminatory selection processes for new employees. Systems of workplace occupational health and safety are at issue with some 28% of complaint cases from workers who acquired a disability and were systematically discriminated against and forced from their jobs or not allowed to return to their job after injury. The other types of discrimination involved being overlooked for promotion, denied access to training and not being considered for other work development opportunities. These cases identified a lack of understanding of the DDA concept of the "inherent requirements of the job" and "workplace adjustment" or "workplace redeployment". Further, together with the selection of new employees, many organisations first reaction to an employee with an injury that requires adjustment or in the selection of new employees was to invoke "unjustifiable hardship".

#### *Selection of new employees*

A fifth of the complaint cases involved people who were rejected for employment by organisations. Most cases involved employers directly communicating that the applicant's reason for being unsuccessful was due to the disability. The circumstances involved everything from the perception of the applicant's ability, the likely cost for making workplace adjustments, that the employee did not perceive that a person with disability fitted with the organisation's public image and that the employer believed it would upset other employees to have a colleague with a disability. We can only imagine how many other PwD were rejected as employees but the responses were "camouflaged" by political correctness so that the individuals involved had no recourse under the DDA. Camouflaging by managers has been noted in the literature (G. A. Ross, 1994; G. F. Ross, 2004; Schultz, et al., 2011).

*Integration of assistive technology*

Part of the reasonable adjustment process and understanding the inherent requirements of the job, is the use of assistive technology by PwD. For existing employees who acquired a disability or in the selection of new employees, the integration of assistive technology into the workplace was one area where there was variable workplace practice by organisations. Sometimes this involves the likely cost of the assistive technology even though the people involved already on their own assistive technology for use in the workplace. In other circumstances, this involved workplace protocols and procedures particularly around computer technology. The outcome of such cases was that workplace protocols were undertaken to verify the compliance of the software with the organisation's IT department and once approved, the person was employed. There were a variety of other assistive technology issues that people who have hearing impairments where hearing augmentation systems, captioning or sign language interpreters were required.

*Perception of cost of disability inclusions*

Closely linked to all previous sub themes, is the perception of the cost of disability to the workplace. Even though a person with disability was the best candidate for a job, they were excluded because of the perception of the cost of disability inclusions to the organisation. For those who had this reason clearly communicated to them, the complaint cases gave an opportunity for the individual together with their representatives to negotiate through the Australian Human Rights Commission with the organisation. The outcome of such negotiations was a clearer understanding that the perception of cost was much higher than the actual cost, that there were external government funding schemes to alleviate the higher costs of workplace adjustment and that the circumstances for "unjustifiable hardship" were mostly overestimated by organisations.

*Inflexibility organisational workplace practices and protocols*

Lastly, the DDA together with a carer and family responsibility legislation/policy in all states of Australia requires employers to accommodate family caring responsibilities where it is reasonable to do so. Under the complaint cases, there were a series of examples where the disability discrimination was proven due to an inflexibility of workplace practices and protocols. Rather than looking for solutions under

"reasonable accommodation", employers chose to apply strict practices and protocols that would deem to deliberately discriminate either directly or indirectly against the individuals involved. For example, a person was directly discriminated against because of their disability where she was redeployed to another position without discussion after acquiring a disability where she could still carry out the inherent requirements of the job. Where indirect discrimination involved a police officer who was indirectly discriminated because he was posted duties that would make it impossible for him to provide the care required for this child with a disability. In all cases, the action of the employer was regarded as disability discrimination because of the inflexibility of workplace practices and protocols, with the outcome involving changes in practice and protocols and/or compensation for loss of income.

## CONCLUSION

In conclusion, employment constituted the largest proportion of disability discrimination complaint cases. It was noted that there were statistically significant differences in the proportion of discrimination based on disability type, the entity bringing the discrimination and the industry sector where the complaint originated. While mobility, vision and hearing made up the greatest number of employment complaint cases, it was people with mental health and HIV AIDS who were proportionally the most discriminated. The discrimination was more pronounced at the Commonwealth government level. In examining the complaint cases and Federal court actions, there emerged a series of themes to disability discrimination in employment. Yet, what was most revealing about the analysis was that the vast majority of complaint cases and Federal court actions showed a lack of understanding about key DDA concepts by employers. Specifically, employers clearly did not understand that it was illegal to discriminate against a person via either "direct or indirect" grounds. Many cases of disability discrimination were due to a lack of understanding of the "inherent requirements" of a job. Rather than assisting a person who has had a workplace injury to be redeployed employers chose to terminate their employment even when a "reasonable adjustment" could be made to the workplace, practices, protocols or their job description. Adjustments to the workplace or practices or protocols were regarded as having a "high cost" even though estimates had not been undertaken. Many employers regarded any adjustment as an "unjustifiable hardship" even though legal precedent provides clear guidelines as to what constitutes this circumstance. The complaint cases could be interpreted that organisations were inflexible and unaware of inclusive organisational practice for disability and access. This is even though the DDA has devoted a great deal of time to the education dimension through the Australian Human Rights Commission, occupational health and safety considerations, and the significant investment in open employment services. The length of the paper does not allow an examination of recommendations but the data source suggests that there is a great deal needed to improve the workplace environments for employees with disability.

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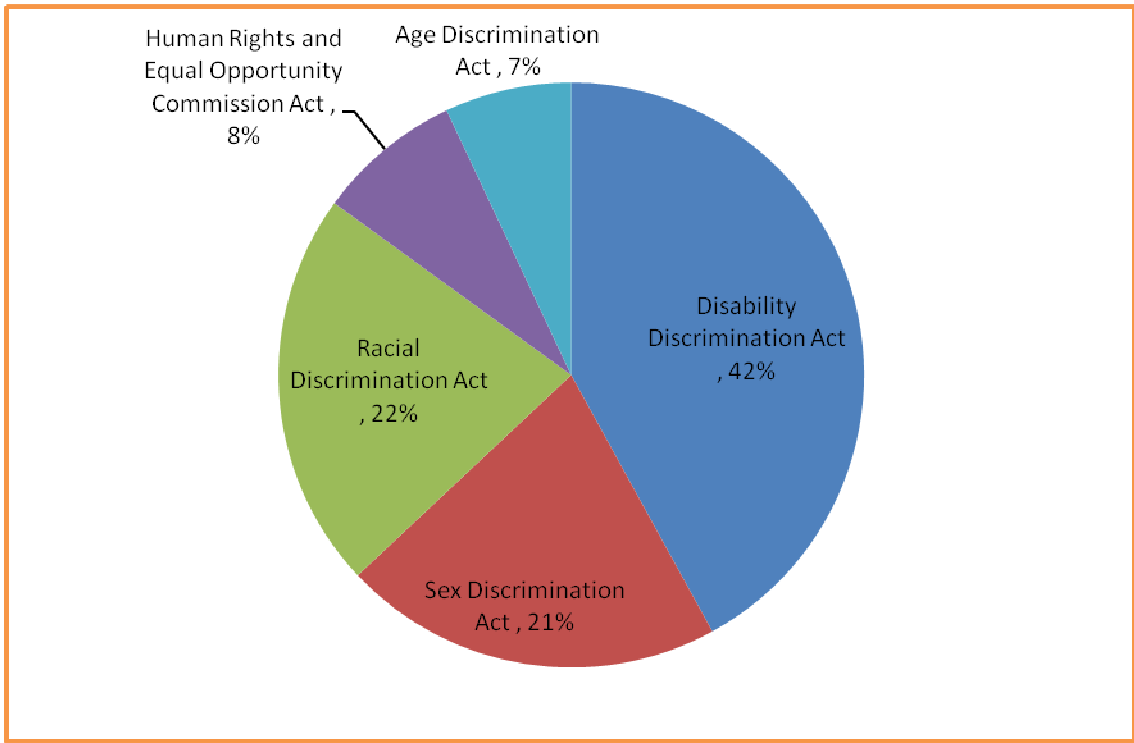
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## Case Law

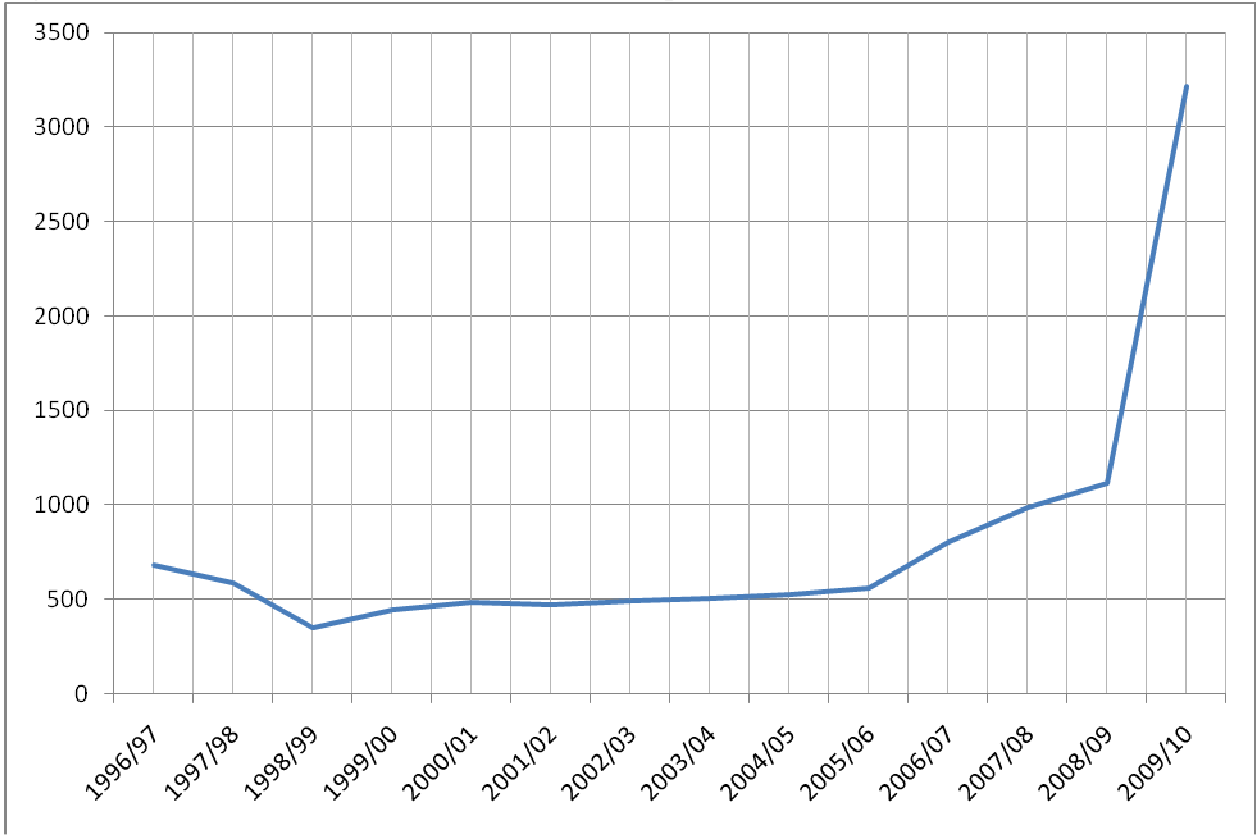
*Brandy v Human Rights and Equal Opportunity Commission [1995]*, PLPR 19 (High Court of Australia).

Figure 1: Proportion of HREOC complaints cases by act



Source: HREOC 2009/10

Figure 2: Disability Discrimination Act – No. of Complain Cases



Source: HREOC Annual Reports

**Table 1: Chi-Square Test for Independence based on Employment & All Other Discrimination**

	N	df	P	Phi	Cramer's V
Gender	634	1	.333	.038	.038
Entity	665	2	.006**	.124	.124
Sector	613	2	.002**	.125	.125
Disability	682	7	.000**	.353	.353

Note: \* <0 .05 \*\* < 0.01;

**Figure 3: Disability Type/dimension of access for employment**

