

Indirect Discrimination and the Disability Discrimination Act 1992 (Cth): *Scott v Telstra Corporation Limited*

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In March 1995 the Human Rights and Equal Opportunity Commission held a public inquiry into complaints lodged against Telstra Corporation Limited (Telstra) by Mr Geoffrey Scott and Disabled Peoples International (Australia) Limited.² The complaints were made under the *Disability Discrimination Act 1992 (Cth)* (the DDA). They alleged that Telstra discriminated against people who had a profound hearing loss by failing to provide them with access to the telecommunications system. The matter was of interest for several reasons. It was the first representative complaint to be run under the DDA. It was the first hearing against a corporation under the DDA in relation to the provision of services and therefore the first case to discuss the definition of “services” under the DDA. The discussion in the decision of the concepts of reasonableness and unjustifiable hardship is also of interest. These concepts arise in many situations under the DDA and therefore an analysis of them is very useful in relation to many complaints which might be lodged.

Background

The deaf community had been demanding access to the telecommunications network for some time. Peak bodies such as Disabled Peoples International (Australia) Limited (DPI) and the Australian Association of the Deaf (AAD), who later took over the complaint from DPI, had been negotiating with Telstra to try to reach an agreement as to how people who could not hear could get affordable access to the telecommunications system.

Mr Scott lodged his complaint in May 1993 after he applied to Telstra to rent a telephone typewriter (TTY) and was refused. DPI decided to lodge a complaint on behalf of all Australians with a profound hearing loss after its negotiations with Telstra were proving unproductive. The DPI thought it was necessary to lodge a representative complaint along with Mr Scott's individual complaint as Telstra could have settled Mr Scott's complaint simply by buying a TTY for him. The issue would then have remained unresolved for others who could not use TTYs due to hearing loss.

People who are deaf or have a hearing loss which prevents them from using a standard voice telephone can use TTYs to make telephone calls. TTYs have a keyboard, screen and in some cases a small printer attached, about the size of a cash

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² (1995) EOC 92-717.

register roll. The TTY is connected to a telephone line. TTYs are used by typing the number and conversations are carried out by typing messages which appear on both parties' screens. A printed message also can be created. The message is carried via the same telephone lines used by standard voice telephones, that is, the same telecommunications system.

If a person with a TTY wants to call a person who has a standard telephone or vice versa, a relay service is used. The caller phones the relay service which has both a TTY and standard phone. If the caller is using a TTY, the relay service receives the call on a TTY and dials the number of the person who is to be reached on a standard phone. The TTY caller sends their message by typing it to the relay service which then reads the message to the intended recipient. The relay service then types the recipient's response to the TTY caller.

A standard TTY costs between \$500 and \$800 depending on whether or not it has a printer attached. The price of a standard voice telephone is about \$100 from Telstra but other retailers sell telephones for even less. Further, standard voice phones can be rented from Telstra for approximately \$30 per year, so there is no obligation to purchase a telephone in order to be able to use Telstra's telecommunications system.

The question of "service"

A major issue for determination was the nature of the service supplied by Telstra. The complainants argued that Telstra provided the following service: "Access to a telecommunications system whereby people can communicate through the transfer of messages by means of guided electromagnetic energy."

Telstra argued that it was not part of its business to provide access to the telecommunication system through goods or facilities that it did not already supply. Telstra maintained that it provided two distinct services: one was the provision of a "telephone line, the other was the provision of a standard voice telephone". The provision of TTYs by Telstra would constitute a third service. Telstra argued that the DDA did not impose an obligation to provide a new service to avoid discrimination, it merely imposed an obligation to provide its existing services in a non-discriminatory manner so long as this did not impose an unjustifiable hardship on the service provider. The President agreed with this latter argument of Telstra. It became important, therefore, to ascertain the exact nature of the service that Telstra supplied.

In support of their argument, the complainants brought evidence that, under the *Telecommunications Act* 1991 (Cth), Telstra is obliged to meet what is called a "universal service obligation". The universal service obligation refers to the provision of a handset in order to access the telephone service. Further, it was clear from Telstra's evidence that Telstra supplies customer premises equipment, including standard voice telephones, which are a means of accessing the telecommunications system. The complainants argued that to claim that providing TTYs is a different service from supplying standard voice telephones and that the only relevant service provided by Telstra is the provision of standard voice telephones is merely

defining Telstra's service so narrowly so as to avoid discrimination. The High Court in *Waters v Public Transport Corporation*³ had clearly said that this strategy cannot be used to avoid allegations of discrimination. This would be similar to arguing that a service provided in a building that was only accessible by steps was only meant to be available to people who could climb steps and therefore did not discriminate against people who use wheelchairs.

The complainants also produced evidence from the DDA itself and a speech of Senator Tate — when amendments were introduced to the DDA regarding the telecommunications system — to support its case that the service provided by Telstra was covered by the Act and broad enough to be defined in the terms put forward by the complainants. The definition of services in s 4 of the DDA states that services include "services relating to telecommunications". Senator Tate (who was at that time the Federal Minister for Justice) said that amendments to the DDA would mean that:

a person who considers that he or she has been discriminated against on the grounds of disability, in this case severe deafness or a speech impediment which prevents them from ordinary and normal use of the telephone, would be able to ... lodge a complaint if a facility had not been provided to enable that communication to take place across the telephone wires.

The President agreed with the complainants that the service offered by Telstra included the provision of access to the telecommunications network. He held it was "unreal for the respondent to say that the services are the provision of the products ... it supplies, rather than the purpose for which the products are supplied, that is, communication over the network. The services are that which enables communication over the network to take place." The President also relied on the evidence regarding the definition in the DDA itself and comments made by Senator Tate in reaching his conclusion as to the service provided by Telstra.

This decision indicates that a broad interpretation of the nature of services provided is to be taken under the DDA and this is in line with interpretations under other discrimination legislation. The actual day-to-day practice of the respondent was important in this interpretation and was not overshadowed by technical theoretical arguments as to what the nature of the service was.

Discrimination

The complainants argued that Telstra's failure to supply TTYs could be seen as both direct (s 5 of the DDA) and indirect discrimination (s 6 of the DDA).

³ (1992) EOC 92-425.

Direct Discrimination

A case of direct discrimination was put as follows. Telstra treats the class members and Mr Scott less favourably than those without the class members' disability because it fails to supply the class members and Mr Scott with:

- (1) access to the telecommunications system that it supplies to non-class members, and
- (2) equipment, services or facilities to access the telecommunications system that it supplies to people who can use a standard voice telephone.

This less favourable treatment is due to the class members' and Mr Scott's disability, that is, because they require equipment to access the service other than that currently provided. Further, it is less favourable treatment in circumstances which are not materially different, but where the class members require different accommodation from people without the disability of the class members. (Section 5(2) of the DDA states that circumstances are not deemed to be materially different because of the fact that different accommodation is required by a person with a disability.)

The President did not investigate nor make a finding in relation to whether this was a case of direct discrimination because he found that Telstra had indirectly discriminated against the complainants.

Indirect Discrimination

Once it was accepted that Telstra provided a service which included access to the telecommunications system, it was easily established that a requirement or condition was imposed in relation to the use of that system. The requirement was that to access the system provided a person had to be able to use a standard voice telephone (the only means of access provided). The use of this telephone requires a person to be able to hear sound travelling through it — something that the class members and Mr Scott could not do. (The complainants brought expert evidence from an audiologist as to the hearing levels of people with a profound hearing loss and established that the majority of them would not hear intelligible speech over such a telephone.) The President accepted that a substantially higher proportion of people without a profound hearing loss could use a standard voice telephone.

Whether the requirement was reasonable was then considered. Until this case, it was not clear what distinction should be made between making an assessment as to whether a requirement or condition was reasonable in relation to establishing indirect discrimination and determining whether the defence of unjustifiable hardship could be made out. The defence of unjustifiable hardship involves a balancing of pros and cons of providing a non-discriminatory service including the cost involved and the benefits and detriment accruing to both parties from the provision or non-provision of the service. It was arguable that these are the same factors to be considered when assessing the reasonableness aspect of indirect discrimination. In effect, this would mean that if a complainant successfully established indirect

discrimination, it would be difficult for a respondent to establish unjustifiable hardship.

However, in his judgment, the President clearly stated that evidence produced in support of an unjustifiable hardship argument would not be used to counter arguments as to the reasonableness of the requirement. He thought to do that would make the defence a nonsense and, in effect, reverse the onus of proof in relation to unjustifiable hardship. This is because the complainant would have had to raise all the relevant elements in an argument as to reasonableness in indirect discrimination. This would have to be done before the issue of unjustifiable hardship arose.

The only factors that were taken into account by the President in relation to reasonableness were the impact of the requirement on the class members and the fact that there were statutory obligations imposed on Telstra in relation to the provision of its service which the President found Telstra ignored. He stated that “[i]t was the blanket refusal to supply a TTY under any circumstances which, given its statutory responsibility, was unreasonable.”

The President expressly stated that financial considerations, specifically stated to be relevant to an assessment of unjustifiable hardship, were not relevant in this case. It appears that this was partly because Telstra did not argue that cost was a consideration in its decision not to supply TTYs.

The President stated that whether financial circumstances are relevant to an assessment of reasonableness depends on the precise nature of the requirement. He also noted that there was no evidence of an attempt by the respondent to supply the TTYs and to recover the excess cost imposed by this service. This indicates that the cost element was not a relevant factor in the decision not to supply TTYs in the past. Thus, there might be situations where the past actions, or inaction, by respondents prevent them from successfully arguing that elements such as cost were relevant to the reasonableness of requirements or conditions imposed by them.

The complainants were successful in their argument that Telstra’s failure to provide a service amounted to indirect discrimination and was a breach of s 24(1)(b), (that is, discrimination in the terms and conditions on which Telstra provided its service to Mr Scott and the class members) unless Telstra could make out a defence of unjustifiable hardship.

Unjustifiable Hardship

The President rejected outright Telstra’s argument that the benefits to the class members of having access to the telecommunications system were not relevant to the assessment of unjustifiable hardship. Section 11 of the DDA lists some, but not all, of the factors that can be taken into account in assessing unjustifiable hardship. The benefits to accrue to either party are one factor, others are: any detriment imposed on either party, the effect of the disability, the costs in eliminating the discrimination and the financial circumstances of the respondent. The President held that the magnitude of any difficulty with which the respondent would be faced should be assessed from the position of the respondent and an objective bystander.

The onus is on the respondent to establish an unjustifiable hardship would be imposed by providing a non-discriminatory service. This accords with defences in other discrimination legislation which require respondents to prove any defences to discrimination. In this case, the financial circumstances of Telstra and the cost of supplying TTYs were a major consideration in relation to the question of unjustifiable hardship. Much of the evidence regarding financial details was suppressed due to its commercial sensitivity, however, it is clear from the details given in the judgment that to supply TTYs to class members who could not obtain them from any other source would cost Telstra approximately \$5,600,000.

This decision shows that the cost of supplying a service cannot be looked at in isolation in assessing unjustifiable hardship. Although the figures were suppressed, the overall profitability of Telstra was relevant to their ability to bear this cost. However, of further significance to the practical interpretation of factors to be considered in an assessment of unjustifiable hardship is the fact that the time period over which the cost might be imposed upon a respondent and any income that would be received from the extended service should be considered in determining the overall financial impact on it. In this case, the fact that the uptake of TTYs was likely to occur over a gradual period spread the impact of the cost on Telstra. Further, the supply of TTYs meant there would be more subscribers to Telstra's service and therefore Telstra's revenue from its service would increase.

The enormous impact access to the telecommunications system would have on the lives of Mr Scott and the class members was also a very important factor for consideration in the assessment of unjustifiable hardship. The complainants called witnesses to give evidence of how reliant our society was on the telecommunications system and the impact access to the system had had on those class members who did have access to TTYs (by purchasing them themselves) as opposed to those who did not have access. The evidence given by these witnesses was quite detailed and influential in relation to both the assessment of the reasonableness of the requirement imposed by Telstra and unjustifiable hardship. The President noted that access to the telecommunications system through TTYs gave class members "spontaneous, interactive and confidential access to social relationships."

Importantly, the President made it quite clear that the possibility of having to provide other services in an accessible manner was not relevant in assessing unjustifiable hardship of supplying the service in question. Thus Telstra could not rely the hardship that could arise "from potential and unproved liabilities". This is an important point as it prevents respondents from muddying the issue of cost by arguing that there will be some sort of domino or floodgate effect if it supplies one of its services in a non-discriminatory manner. This is an argument that is often attempted by service providers and can create confusion when assessing cost impacts.

The defence of unjustifiable hardship was not made out. Thus the complainants were successful in making out their case of discrimination.

Remedy

A later hearing was held in relation to the remedy sought. At that time, the parties reached an agreement as to remedy. The significant terms of the agreement were that Telstra would supply a voucher for the value of \$600 to purchase a TTY to each class member who did not qualify for a TTY under another scheme. If more than one class member lived in the same household only one of them could qualify for the voucher.

Although Telstra initially lodged an appeal against the President's finding on liability, it later withdrew it. It has also extended the class to whom it will provide vouchers for the purchase of TTYs to all those with a severe hearing loss as well as those with a profound hearing loss.

It should be noted that the President made some pointed comments in relation to Telstra's reaction to the complaints and its responsibilities under the DDA. He found that Telstra "had failed to take seriously the impact that the enactment of the DDA could have on its operations". Evidence of this was its failure to investigate the feasibility of supplying TTYs as opposed to a blanket refusal to do so. He went on to note that "[e]ven the making of the complaint in this matter failed to stir the respondent from its lethargy and intransigence".

These comments indicate that there is a responsibility on service providers to be proactive in assessing the accessibility of their services and whether they meet the responsibilities imposed upon them by the DDA. Telstra's failure to do this might well have placed the complainants in a strong position had they sought financial damages against Telstra for the effect of the discrimination on class members. Given the number of class members, such damages could have amounted to a very significant expense for Telstra.

Representative Complaint

DPI's complaint was a representative complaint which prevented Telstra settling the matter and avoiding a determination of the matter as it could have done if a limited number lodged the complaint. It also allowed evidence to be drawn from a variety of witnesses to demonstrate the breadth of the impact of the lack of access to the service on different people with different lifestyles.

The representative complaint also allowed a peak organisation to bring the complaint and therefore the burden of running the case was not placed on individuals who can lack the emotional and financial resources and time to run successful complaints.

The possibility of further representative complaints being made (for example, on behalf of all those with a severe, as opposed to profound, hearing loss) might have been influential on Telstra's decision to extend the provision of vouchers to all with a severe hearing loss.