

Anti-discrimination legislation – A critical analysis of the effect on employment of disabled persons

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Extended Abstract

The catalyst for organisational diversity or changing discrimination practices within organisations, is in part the passage and enforcement of relevant legislation. Laws may be regarded as one type of coercive pressure placed on organisations (DiMaggio & Powell, 1983). To this end, Harris (2004), suggests that there are three broad reasons why organisations may comply with laws, and these are (i) because it is the law; (ii) because there is a moral justification for doing so; and (iii) because it is seen as useful (for example there are good business reasons to comply). Notwithstanding this, there are also other environmental factors which might precipitate changes within organisational practices, these include mimetic pressures (i.e. organisations model their policies on other organisations), normative behaviours, i.e. organisations comply with social norms and expectations (DiMaggio & Powell, 1983). In practice, organisations may implement non-discriminatory policies, because such action would be beneficial to the business for example, by contributing to competitive advantage (Dickens, 1999); expanding the organisation's market share (McNair, 2006); broadening diversity such that the organisation's products and services appeal to a wider range of clients/customers (Claes and Heymans, 2008; Duncan, 2003). Additionally, non-discriminatory practices could contribute to the enhanced reputation of the organisation as a good place to work, increase organizational performance and allow for more efficient decision-making and problem-solving (Allard, 2002; Singh et al. 2002).

The types of organisational change which are likely to result from the passage of legislation, could be categorised as follows: (i) setting the agenda as regards the aspects of equality considered important; (ii) the establishment and coverage of equality policies; (iii) collecting data and monitoring organisational policies and practices to detect and address inequalities (Dickens and Hall, 2006). This may result in the bureaucratisation of fairness into the decision making process, the institutionalisation of fair procedures and monitoring of the implementation of non-discriminatory practices (Dickens and Hall, 2006). Notwithstanding this, not all organisations will respond to the enactment of the anti-discrimination legislation by making the same changes, as such there is a continuum of the extent to which change which is likely to result. Consequently, there may therefore be no change at all, where organisational managers are content to maintain the status quo; change may be the minimum required adjustments to policy and practice; changes may be made to selected policies and practices; and finally there may be comprehensive and proactive changes made within organisations (Goss and Adam-Smith, 2001; Kirton and Greene, 2006).

The purpose of this paper is to critically analyse the efficacy of anti-discrimination laws which prohibit discrimination in employment, on the grounds of disability. Disabilities may be broadly categorised as physical and mental, to ensure equality, some jurisdictions have enacted legislation to protect the rights of disabled persons and to ensure that they are not discriminated against. Developed countries, such as the United Kingdom, Canada and Australia have such legislation and in these jurisdictions, disabled persons are protected. In the case of the United Kingdom, an individual is determined to have a disability according to clause 6 of the Equality Act, 2010, if they have a physical or mental impairment and the impairment has a substantial and long term

adverse effect on his/her ability to carry out normal day to day activities. This definition is consistent with that used across the other indicated jurisdictions. Extant literature purports three (3) models of disability, namely social, medical and moral models. The framework which will be used in this paper to analyse disability is the social model. According to this model, “disability, is a social construct and problems reside in environments which fail to accommodate people with disabilities” (Olkin, 2002:133). One of the challenges associated with creating legislation and regulations to protect the disabled, is the wide range of disabilities which exist, differing in “severity, stability (temporariness) and type” (Woodhams and Danieli, 2000: 404). As a consequence the legal protections for the disabled will need to be flexible enough to be appropriate for a wide range of needs. However, this may result in costly requirements being imposed on organisations, but not necessarily in business related benefits.

Further, the range of other legally protected characteristics normally have (both anecdotally and empirically) positive attributes associated with them for example arguments exist in favour of retaining: (i) older workers (in part, to reap the benefits of their experience and organisational knowledge); (ii) women (to appeal to the female demographic and to get a different perspective), however, there is no generally agreed upon benefits which are expected to be realised by the organisations who hire disabled workers. In fact, the requirement anti-discrimination legislation (of the jurisdictions under considerations) to make reasonable accommodation, may necessitate costly changes to the work environment which organisations may not be willing to expend in the short term, without quantitative evidence to support the potential benefits of such resource outlays (Woodhams and Danieli, 2000).

There is no single measure of effectiveness of legislation. In the absence of an instrument to measure the effectiveness of the legislation, compliance with its mandate, principles and general directives are used to determine the extent to which organisations observe or are in compliance with the responsibilities and requirements, dictated by the legislation. Assessing tribunal and court cases allows an examination of the efficacy of the legislation, as it indicates that types of actions still being taken by organisations or their failure to take action as required by the legislation. As the interpretation of legislation is largely the domain of legal justices, this analysis will also allow insight into the precedents which are set and likely to be followed in subsequent cases and as such, it would be prudent for future claimants and litigants to take into account.

Compliance with the legislation, i.e. both the letter and the spirit of the law, may also be interpreted as legislative efficacy as the legislation could be seen to be achieving its goals (thus this should not be interpreted to mean that if an organisation is in contravention with a clause or section the law has failed). Whilst there does not currently exist, a single measure of legislative effectiveness, a decrease in the number of cases being filed could be indicative of a decrease in discriminatory organisational practices. However, this quick and dirty approach is replete with pitfalls and any changes to employment levels which are observed after such a comparison, may or may not be attributable to the anti-discrimination legislation. Thus it would be inappropriate to analyse efficacy, solely on the basis of this method because it lacks rigour and fails to consider the complexity of the environment in which organisations function, and the effect which each element could potentially have on organisational practice (Bennington and Wein, 2002; Hornstein et al., 2001; Loretto and White, 2006; Smedley and Whitten, 2006).

In order to analyse the efficacy of laws, the method chosen was to critically analyse the laws making discrimination on the basis of disability illegal in the United Kingdom, Canada and Australia. In addition, this paper also analyses the factors influencing the outcomes of employment related discrimination disputes, adjudicated within the courts or tribunals of the identified jurisdictions. In her review of the optimum approach to enforcing anti-discrimination laws, Sternlight (2004) identified factors which make discrimination cases challenging, including but not limited to the complexity of discrimination law, society's need to deter future wrongdoers, the extent to which the compensation awarded is adequate, access to resources to have their interests suitably represented and a speedy fair process. This paper provides an assessment of whether and to what extent discrimination legislation has achieved its objectives, with respect to disabled persons. There is a paucity of articles examining this issue, which makes this paper timely. Notwithstanding this, the paper does not attempt a comprehensive review of the substantive legislation, but rather is concerned with the implementation of the law within the three identified jurisdictions (UK, Canada and Australia) and the extent to which it is enforced, primarily through the courts and employment tribunals.

As one of the most recently prohibited grounds of discrimination, by examining the judicial decisions, this paper facilitates an understanding of the way in which tribunals/courts interpret and apply the law, which would be helpful for employers and employees. It also illustrates the self-enforcing nature of the law, the exceptions and burden of proof guidelines, which have an impact on the extent to which the law is effective in achieving its objective of non-discrimination. Given the relatively short period of time, since the enactment of the anti-discrimination legislation on the basis of disability, the findings from this research study may be regarded as an assessment of the

short term position. It is important to note that the law requires equality of opportunity, which does not necessarily equate to equality of outcome. However, the passage of such legislation on its own is unlikely to be sufficient, to exert enough pressure on organisations to ensure the reduction and/or elimination of discrimination in the organisation, where required (Dickens, 2005). Relevant changes in human resource practice is more likely to be achieved as a consequence of a combination of factors, including enforcement, coercive pressures, education, moral suasion, punitive measures, mimetic pressures and clear business benefits.

The American experience of the success of anti-discrimination legislation suggest that ambiguity and weak enforcement could invariably result in minimal changes in organisational practice (Neumark, 2001). Evidence from this jurisdiction suggests, that where monitoring and enforcement improved, such that organisations were required to make changes to discriminatory practices, to the extent that affected employees were no longer disadvantaged, a shift was seen. In short, there were observable improvements in the policies relative to the previously discriminated workers and the incidence of discrimination declined (Hepple et al., 2000). Research which has examined the efficacy of anti-discriminatory legislation has not found unambiguous evidence that legislation consistently reduces the incidence of discrimination in fact.

Where the effects of legal regulation are considered collectively, it has been suggested that large organisations appear to comply with legislation in a more systematic and comprehensive manner than do smaller organisations (Brown et al., 2000) where organisations have limited knowledge of discrimination legislation, its impact may be limited because of this lack of knowledge but also because of the supposition that the legislation is not relevant to their organisation (Edwards et al.,

2004; Marlow, 2003). Furthermore, the extent of the impact of the legislation appears to be influenced by the competitive nature of the market, thus “where conditions are benign, regulations can be absorbed, but in other circumstances employment regulations can exacerbate competitive pressures” (Edwards et al., 2004:245). These examples suggest slow, incremental adjustments made to organisational HR practice, over time subsequent to the enactment of anti-discrimination laws. In addition to this, perhaps more fundamental changes made in relation to organisational practice, compared to a greater level of policy changes after the initial enactment of the legislation. Further challenges to the efficacy of the legislation may be said to be related to the individualistic nature of the legislation, this is because its implementation relies not on monitoring and enforcement of the law, but on the “courage and resilience of the individuals to pursue a *discrimination (sic)* claim” (Kirton and Greene, 2006:146). Such an approach to enforcement invariably makes it difficult, for anti-discrimination legislation to effect changes as it relates to eliminating discrimination (Dickens and Hall, 2006).