

DISABILITY ACTION INC.

16'h of April 2003

Helen Owens
Productivity Commissioner
LB2 Collins Street East
Melbourne VIC 8003

Dear Commissioner

Please find attached a brief submission to the Inquiry into the Disability Discrimination Act.

Unfortunately, time and resources have prevented us from making a more comprehensive submission to the inquiry however, we hope to participate more fully in relation to later consultations and papers.

This submission only responds directly to four of the terms of reference (although there is some overlap). We have commented where the terms reflect our direct experience of the DDA and its operation.

Although much of what we write is critical of the DDA we want to be clear that we believe the DDA is a powerful tool in the elimination of discrimination against people with disabilities as long it is seen as one instrument for change.

Yours sincerely

Gary Sawyer
Executive Officer

2.3 EFFECTIVENESS IN ACHIEVING ITS OBJECTIVES

The DDA does have its limitations. The first object of the Act is to eliminate discrimination on the basis of disability. Clearly, the DDA can not do this on its own and in isolation. The DDA can be a tool for the elimination of discrimination in certain areas. Access to premises is an example of an area of discrimination where the DDA has been of great value. Access issues are usually clear, concrete and legally unambiguous (or more likely to exhibit these characteristics). The Human Rights and Equal Opportunity Commission's conciliation processes allow complaints to be resolved without resorting to time consuming and expensive legal action.

The DDA is limited in relation to more complex issues of inequality where a direct comparator for discrimination is difficult to find. The comparator for discrimination in the DDA is the treatment received by people who do not have the disability in similar circumstances. As noted above this is simple when it comes to physical access and steps versus flat entrances. It is much more nebulous when it comes to broader quality of life issues.

A person with a significant intellectual disability will not have the same life expectations as a person without a disability. They are much less likely to live independently and have access to recreation, employment, education and social participation because of their disability. In some cases, the DDA may well be a tool for eliminating discrimination where the access issues relate to a direct comparator of a person without the disability. For example, a mainstream school does have to provide support to a person with a disability to access the curriculum because there are children in the school who do not have a disability who can access the curriculum. There is a direct comparator.

Unfortunately, lack of access is often the result of inadequate funding of support services from State or Commonwealth governments. The person with an intellectual disability who cannot access social and economic participation for want of adequate support services cannot use the DDA as they do not have a comparator of a person without a disability. State and Commonwealth governments do not fund similar services for people without disabilities and service providers do not provide similar services to people who do not have a disability. There is not a comparator for this type of inequality of access. If the comparator was the quality of life of the average Australian or the life expectations of the average Australian then there might be a meaningful comparator.

In this way some of the most fundamental inequalities that are experienced by people with disabilities are not and cannot be covered by the DDA. It is apparent to Disability Action that one of the ways this issue can be dealt with is to bind the crown to the Commonwealth and State Disability Services Act's. It is our understanding that if the respective governments were bound by their respective DSA's they would be bound to the outcomes of the Acts and that this would go some way to eliminating these inequalities. In South Australia, the previous opposition party gave a commitment to bind the crown to the State DSA during the last State election. Now in government they have made no moves to do so.

2.4 COMPETITION AND ECONOMIC EFFECTS

There is no doubt that the DDA contributes to the reduction of discrimination against people with disabilities in Australia. The reduction of discrimination in turn enhances the social capital of the nation and contributes ultimately to growth in the Gross National Product (GNP). The reduction in discrimination can aid GNP in a number of ways. The enhancement of the economic and social participation of people with disabilities contributes on both the supply and the demand side of the economy. Greater participation of people with disabilities in training, education and

employment directly affects the productive capacity of the nation. Better access to premises, transport and the implementation of universal design contributes to the demand side of the economy with larger numbers of people able to participate in social and recreational pursuits. Such is the potential market of people with disabilities that the Tourism Queensland has identified disability as a potential untapped tourism market. Tourism Queensland is working with tourism operators, local government and accommodation providers to encourage accessible environments because it is good for business. Accessible environments not only allow and encourage people with disabilities to participate. Accessible environments and universal design is good for everyone.

2.6 REGULATIONS, STANDARDS & OTHER INSTRUMENTS.

Voluntary Action Plans

Most discrimination is systemic and deeply rooted in society. It is usually not the result of conscious acts by individuals or organisations to treat people with disabilities unfavourably because they have disabilities. Discrimination is usually the result of entrenched and endemic social attitudes and practices. Disability Action has observed that DDA Action Plans have been a valuable tool for facilitating attitude change and changing discriminatory practices. In South Australia most local government authorities and State government authorities have developed a DDA Action Plan, are in the process of developing a plan or are committed to develop a plan.

The development of a DDA Action Plan requires an organisation to spend focused time on considering how organisational practice and attitude might lead to discrimination. The very act of reflecting on organisational practice and attitude can lead to a raising of consciousness and attitude change. Disability Action has also found Action Plans can be useful benchmarks for holding organisations accountable and for resolving complaints as part of an advocacy process.

A caveat to the above is that Action Plans can, and in some instances do delay the removal of discriminatory practices and attitudes. The existence of an Action Plan can sometimes be seen to be evidence of non-discriminatory practices. It is the implementation of Action Plans that is the critical factor in implementing change. For many organisations, Action Planning is nothing more than a risk management strategy.

Given that our experience is that Action Plans have been an effective tool for facilitating change in local and state government we would like Action Plans to be mandatory for organisations beyond a certain size. This is particularly important given that at the end of 2002 only 253 Action plans had been lodged with HEREOC. Of these only 25 were lodged by private businesses.

2.7 COMPLAINTS

Many of the limitations of the DDA relate to the complaint-based nature of the DDA.

Firstly, the onus and burden of proof is with the person that believes that they have been discriminated against. Given that the complainant is more likely to be a vulnerable and disempowered person, they would be easily deterred from making a complaint. Furthermore, the discrimination has to be provable within the law. Discrimination does occur but proving it in law and within the rules of evidence is difficult and beyond the resources of most people.

Secondly, making a DDA complaint can be very time consuming and expensive. Further to this, there are inadequate resources in the community to assist people with DDA complaints. In South Australia, there is only one dedicated DDA legal service (with less than two full time equivalent staff). This service is stretched to capacity. The Legal Service Commission does not run DDA cases. While there are two advocacy services that can assist with making complaints,

they cannot represent complainants in court. Adelaide is not large enough to have an active pro bono legal network or clearing house.

Thirdly, the inadequacy of resources to assist complainants is more critical now that complaints need to go to the Federal Court for enforcement. The cost of taking a complaint to the Federal Court not only involves high costs but the risk of costs being awarded against complainants. The costs and risks associated with the Federal Court action is just too great for most complainants and many respondents are aware of this.

Fourthly, the costs and risks associated with Federal Court action means that there is not adequate case law on many aspects of the DDA such as "unjustifiable hardship" to give clarity to the DDA.

Lastly, as time goes by respondents are getting better at defending DDA complaints without the concomitant improvements for complainants. This is exacerbated by the inadequacy of resources to assist complainants.

On a positive note, the threat of a DDA complaint remains a powerful tool for resolving complaints and many respondents will respond to complaints without resorting to a formal complaint process through the Human Rights and Equal Opportunity Commission.