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National Disability Advisory Council

Preliminary Submission to the Productivity Commission Inquiry into the Disability Discrimination Act

INTRODUCTION

The National Disability Advisory Council (NDAC) has been established by the Commonwealth Minister for Family and Community Services to provide consumer focused advice on issues affecting people with disabilities, their families and carers. In addition, NDAC has a role to facilitate consultation between the Commonwealth Government and consumers, families, carers and service providers within the disability sector. As a reflection of those functions, the Minister has appointed, as a majority of NDAC's members, individuals who have a personal experience of disability with the remainder being carers or service providers. NDAC's vision is that "*people with disabilities, their families and carers are valued and equal participants in all aspects of life*".

Consequently, NDAC welcomes the opportunity to provide a response to the Issues Paper prepared by the Productivity Commission in respect to its Inquiry into the Disability Discrimination Act 1992 (DDA).

This response has been prepared by the Rights and Access Working Group of NDAC and has not as yet been formally considered by the full Council. Until then, these comments should be taken as preliminary comments only and should not be construed in any way as being part of any formal advice to the Minister. Should any additional matters be considered appropriate following the consideration of NDAC they will be advised to the Productivity Commission.

These comments give consideration to the operation of the DDA in the following areas:

- The value of the DDA;
- Definition of disability;
- DDA standards;
- Education and public policy;
- Complaints;
- Action plans;
- Human Rights and Equal Opportunity Commission (HREOC); and
- Economic impact of the DDA.

DISABILITY DISCRIMINATION LEGISLATION

NDAC believes that it is important to acknowledge that particular groups in our society face added disadvantage. For people with disabilities, this disadvantage can impact on almost every aspect of their daily lives from health care, education, accommodation, recreation and employment.

In recognition of this fact the passage of the Commonwealth Disability Discrimination Act over a decade ago was a vitally important event. That legislation not only recognised the existence of discrimination, it declared that it would not be tolerated in a civilized society and established a foundation for creating a more equitable community.

As a result of this legislation at the national level, other jurisdictions within Australia have passed complementary legislation thereby strengthening the commitment to removing the barriers to equality of opportunity.

As such, NDAC sees the legislation as critical to removing discrimination and of meeting its vision that people with a disability will be “valued” and become “*equal participants in all aspects of life*”.

It is the firm view of NDAC that the DDA must be retained and even strengthened so as to meet the Council’s vision. Even though NDAC submits later in this response that the DDA can have positive economic benefits for Australia, it is also of the view that its social and human benefits justifies the legislation as a responsible and necessary commitment to society.

WHAT IS DISCRIMINATION?

There has been continuing concern expressed throughout the disability sector that the existing terms of the DDA cannot deal with more complex and indirect forms of discrimination. The DDA is particularly limited in relation to those issues of inequality where a direct ‘comparator’ for discrimination is difficult to find. The ‘comparator’ for discrimination in the DDA as it is currently drafted, is the treatment received by people who do not have the disability and who are in similar circumstances to those with a disability.

This form of comparison is simple to make when it comes to issues such as physical access to buildings, and determining the impact between steps versus ramps. Such comparisons, however, are much more difficult to make when it comes to many of the broader quality of life issues.

For example, a person with a significant disability may not have the same life opportunities 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 for such people where issues of access arise and where they can relate to a direct ‘comparator’ of a person without the disability. However, in many areas that comparison cannot be easily made and in remote areas may not exist.

Lack of access to things like recreation or other forms of social participation is often the result of inadequate planning by government agencies or a lack of adequate funding of support services. In those instances, the person with an intellectual or similar disability who cannot access social and economic participation for want of adequate support services cannot use the complaints mechanism of the DDA as there is no direct ‘comparator’ to 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, however, the comparator was the quality of life of the average Australian or the life expectations of the average Australian, then there may be a basis for action under the DDA.

Without some fundamental change to the way in which the legislation sees discrimination, many of the greatest inequalities experienced by people with disabilities are not and cannot be covered by the DDA.

DDA STANDARDS

A key objective of NDAC is to contribute to the development of appropriate standards under the DDA and to monitor their effectiveness.

Council supports the DDA standards as a mechanism for preventing discrimination and acknowledges the positive impact on both the business and wider community. It is of concern,

however, that after a decade of the operation of the legislation, only one standard is in place, although others are soon to be finalised. A more streamlined approach needs to be developed so that the rights of all sectors of the community can be protected. The initial development of standards together with their review and update must be undertaken more effectively and in a way which fully involves people with disabilities.

In addition, NDAC believes that some examination needs to be undertaken regarding the feasibility of a 'regulatory body' to independently oversee the implementation and compliance of DDA standards. Of major concern is that the burden of proving non-compliance should not sit solely with people with disabilities and their families, carers and advocacy groups. The ability, for instance, for HREOC or a government agency to take action for non-compliance with a standard should be considered.

The relationship between Federal legislation and State equal opportunity legislation also needs to be investigated. There has been some confusion or perceived overlap of responsibility that may have led to some State/Territory equal opportunity bodies giving a lower priority to disability discrimination in their area of responsibility, believing that it is covered adequately by the DDA. Confusion often arises over the jurisdiction in which a complaint should be lodged and whether action in one jurisdiction precludes action in another. Greater clarity over the relationship of Federal and state legislation needs to be achieved.

Nevertheless, there is broad support for the DDA principles throughout the disability sector and there is the frequently expressed view that they should be the subject of some cross-jurisdictional declaration.

EDUCATION AND PUBLIC POLICY

A key aspect of NDAC's Strategic Plan 1999-2003 is to *"improve public awareness and understanding of the needs and abilities of people with disabilities, their families and carers"*. This, NDAC believes, can be achieved through:

- *Community awareness of the needs of people with disabilities, their families and carers;*
- *Community understanding of the barriers to their enhanced quality of life; and*
- *Positive attitudes and actions within the community to eliminating these barriers and provide opportunities for persons with disabilities to exercise their abilities.*

NDAC is critically aware that many people are still not aware of the DDA even after a decade of its existence. This is especially so in the work place. There is also a great deal of ignorance and apathy about disability issues with many unknowingly engaging in discriminatory practices. With a better understanding of discrimination and the impact which certain action and opinions might have on people with a disability, many people will change their behaviour. A co-ordinated community education program by HREOC and the other State/Territory equal opportunity bodies would have a major impact on discriminatory behaviour.

Even though NDAC believes that community education programs are an essential tool in overcoming discrimination, it holds the view that the excessive use of confidentiality agreements by HREOC and the courts when settling claims and complaints, constrains the effectiveness of those education programs. Precedent can be a forceful mechanism for community education but it is denied in many circumstances.

Again, NDAC is concerned with the disparity that exists between people with disabilities in metropolitan areas where there is a level of access to resources and basic supports under the DDA and those in rural and remote areas where those supports are either limited or non-existent. Access the benefits of the DDA still do not arise equally throughout Australia either because of the centralisation of services in major cities or the added cost of compliance with the DDA by business or the community or in the making of complaints.

Despite some of the difficulties already noted the DDA can still be a highly effective tool for the elimination of discrimination if it is understood and used appropriately. Access to premises is an example of an area of discrimination where the DDA has been of great value because these access issues are usually clear, concrete and legally unambiguous. The appropriate use of the DDA's conciliation processes allows complaints to be resolved without resorting to time consuming and expensive legal action. The need for better community education to demonstrate how the legislation might work in the interests of all parties is necessary to overcome the view that the DDA is only about costly obligations for one group.

COMPLAINTS BASED LIMITATIONS

When making a complaint under the DDA, the onus and burden of proof is with the person that believes they have suffered discrimination. Given that the complainant is more likely to be a vulnerable and dis-empowered person because of their disability and/or economic limitation, it takes real courage to make a DDA complaint.

Making a DDA complaint can be very time consuming and often extremely expensive. As complaints frequently are the responsibility of an individual with a disability, they have to collect evidence, lodge it with the appropriate agency and be prepared to spend time in conciliation or formal hearings, often at their own cost. That cost is measured both in time and money. They are often confronted with an experienced legal team acting for the respondent but frequently have very little assistance from community legal services. There is also a very real fear that in initiating a complaint there is the distinct possibility of ending up before the Federal Court with all its inherent costs and legal requirements. The cost of taking a complaint to the Federal Court not only involves high initial costs but also the risk of costs being awarded against complainants. The fear of these costs and risks is quite effective in 'frightening off' a number of complaints that should otherwise be lodged.

There are some resources in the community to assist people with DDA complaints but they are quite limited and often difficult to access. In South Australia, for instance, there is only one dedicated DDA legal service (with less than two full time equivalent staff) and the S.A. Legal Service Commission does not conduct DDA cases. Again in South Australia, there are two advocacy services that can assist with making complaints but they cannot represent complainants in court. While circumstances differ from state to state, the general perception is that there is insufficient support and that this acts as a significant barrier for people wishing to make a complaint.

Limited Federal Court action which might flow from the fear of the costs and risks, can often mean that there is not adequate case law on many aspects of the DDA such as "unjustifiable hardship". This results in a lack of clarity with the DDA and allows for misconceptions to develop.

Lastly, as time goes by respondents are getting better at defending DDA complaints without the concomitant improvements for complainants. This relates in part by the inadequacy of resources to assist complainants in prosecuting their actions.

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

ACTION PLANS

Most discrimination is systemic and deeply rooted in society. It is usually not the result of a conscious intention by individuals or organisations to treat people unfavourably because of their disability. Discrimination is usually the result of entrenched and endemic social attitudes and practices. NDAC has observed that DDA Action Plans have been a valuable tool for facilitating

attitude change and changing discriminatory practices. Many local government authorities and state government authorities have either developed DDA Action Plans, are in the development stages of a plan or are committed to develop a plan. Similar trends are seen with Commonwealth Government agencies and the tertiary sector. The disappointing result is in the development of Action Plans in the private sector. It is interesting to note that of the 257 plans lodged in 2002 only 26 came from the business sector.

The development of a DDA Action Plan requires an organisation to spend time on considering how organisational practice and attitudes might lead to discrimination. This process by itself can often lead to a raising of consciousness and attitude change. 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, in some instances, 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 and not the mere evidence of a plan.

Given the experience that Action Plans have been an effective tool for facilitating change in many sectors, a strategy that facilitated the adoption of these Plans by all major employers and organisations should be explored.

DDA IS GOOD FOR BUSINESS

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 impacts on the productive capacity of the nation. Better access to premises, information, transport and the implementation of universal design, on the other hand, contributes to the demand side of the economy facilitating greater participation in social and recreational pursuits. For example, such is the potential market of people with disabilities that Tourism Queensland has identified disability as an untapped tourism market. Tourism Queensland is working with tourism operators, local government and accommodation providers to encourage accessible environments because it opens new markets. Accessible environments not only allow and encourage people with disabilities to participate, as universal design is good for everyone. Best practice in tourism is not just limited to Queensland with most states moving forward.

HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION (HREOC)

HREOC has been important in dealing with disability discrimination and should be commended for its work. NDAC, however, believes that the work of HREOC needs to be strengthened in two critical areas – the application of its power to undertake inquiries into areas of possible discrimination and in the monitoring of Action Plans.

NDAC sees the use of HREOC inquiries as providing a real opportunity to highlight areas for action to remove discrimination and to make specific recommendations to both government and private agencies. NDAC would welcome the more frequent use of the inquiry power that could drive the process of change.

NDAC would also see merit in HREOC monitoring the implementation of Action Plans that are lodged with it. This would not be in a “policing” role but as a process of education and counselling.

CONCLUSION

The Disability Discrimination Act is a valuable legislative tool in facilitating equality for people with disabilities. While much has been achieved, the pace of reform and the change in community attitudes has been slow. There is, for instance, greater community recognition of the need to remove discrimination on the grounds of sex than on disability. This is in part because people with disabilities are often the victims of discrimination, which in turn excludes them from access to information and the opportunity to participate effectively. This review and a program of reform that could flow from it is welcomed by NDAC and the wider disability community.

The Council would like to take this opportunity to encourage the Productivity Commission to continue to consult widely with people with disabilities, their families and carers throughout the inquiry process. Such a high level of consultation must be seen to have occurred if the findings and recommendations of the inquiry are to be successful.

NDAC looks forward to the Draft Report in September 2003 following which it will again consider whether an additional submission is required.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian Spicer', with a stylized flourish at the end.

IAN SPICER AM
Chair

22 August 2003