

# **National Disability Advisory Council**

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## **REVIEW OF THE DISABILITY DISCRIMINATION ACT (DDA) 1992**

### **RESPONSE TO THE DRAFT REPORT**

The National Disability Advisory Council (Council) has reviewed the Commission's draft report of October 2003, on the DDA and makes the following observations.

In doing so, however, it should be noted that Council is a Ministerial advisory body and provides direct advice to the Minister for Family and Community Services. When the Commission's final report has been published, Council may provide direct advice to the Minister on some or all of the Commission's findings and recommendations. Consequently, any comments made by Council in response to this draft report should not be taken in any way as reflective of any advice that might be developed at a later stage.

### **OVERVIEW**

The Commission is to be complemented on the draft report, both as to the extent of the review as well as the general scope of its findings and recommendations. The report also discloses an excellent understanding of disability issues and the role of legislation in overcoming discrimination.

Its conclusion that the legislation has made a positive contribution to lessening discrimination is, in general terms, correct - as is the finding that much remains to be achieved. This must not be taken as meaning that satisfactory progress is being made in eliminating discrimination. For those who experience a personal disability, the existence of disability discrimination legislation for a decade in Australia should have provided greater outcomes. Consequently, among people with a disability there remains a degree of frustration and concern. This is especially so in those very marginalised groups such as those with a psychiatric disability, those with a dual diagnosis of disability, people with a disability in Indigenous or culturally diverse communities and those living in remote locations.

While the community can be encouraged by the progress in some areas, the Commission should be careful not to create an environment of satisfaction with the achievement of the objectives of the DDA.

Nevertheless, this review provides an opportunity to both update the DDA as well as promote a greater commitment to its objectives by governments and the wider community.

The findings that the areas of employment and education are critical is welcomed but there is a concern that the Commission had little comment (and possibly few submissions) on the operation of the DDA in providing appropriate health care services to people with a disability.

Other areas of disadvantage that would be worthy of the Commission's attention are aged care services for people with a disability, the over representation of people with psychiatric or intellectual disabilities in the criminal justice system and the barriers to appropriate sport and recreation facilities.

While the findings with respect to rural and remote areas, people from non-English speaking backgrounds and indigenous people with a disability are particularly welcomed, the Commission is encouraged to provide some specific recommendations as to how the DDA might more effectively work to remove disadvantage that clearly exists.

While the Commission's findings on the economic and competitive effects of the DDA are well supported, more emphasis could be given to the economic advantage flowing from the expanding role of people with a disability as customers. As programs become more effective in moving people with disabilities into employment, there will be a consequential increase in their disposable income thereby expanding their importance as customers for goods and services. Even those with limited income are significant consumers of many products and services such as technology, transport, health and recreation, each of which adds to the nation's economic strength.

Examples of commercial benefit flowing to businesses supplemented by the experience from other countries such as the United Kingdom would add strength to the report. The Employers Forum on Disability in the UK could provide some useful material on this aspect.

## **COMMENTS ON FINDINGS AND RECOMMENDATIONS**

The draft findings and recommendations of the report will find broad support, however, some may raise issues for clarification or suggest further development. The following comments will draw the Commission's attention to some of these issues:

### **Draft Finding 5.5**

Is it possible, from the information before the Commission, to conclude that where discrimination has been reduced that economic benefits have flowed to the provider or the good or service? If not, it would be useful to recommend further research on this issue?

#### Draft Finding 5.8

There would be agreement that the DDA had been successful in reducing levels of discrimination in some areas but not “overall”. Comments made in the “Overview” section above are relevant to this issue.

#### Request for information – page XLV

An accommodation standard under the DDA would provide a benefit for people with a disability. Experience with other standards has disclosed that the process in developing a standard can have an enormous impact on both sectoral and community awareness while the adoption of the standard would provide greater certainty for both the accommodation provider as well as the person with a disability. The Disability Service Standards may be applicable in some cases but a series of minimum standards of design and maintenance together with standards for rental contracts could remove significant disadvantage. In addition, a standard might provide a minimum standard for support where appropriate. To operate effectively, such a standard would have to apply to private rental housing as well as publicly funded accommodation.

#### Draft Finding 6.4

The general belief is that equality before the law for people with a cognitive disability is not achieved. This is born out by the over representation of people with an intellectual/cognitive disability in prisons as noted in draft finding 6.5. Consequently, there would be concern with the conclusion drawn in this finding that arrangements “*appear to be working appropriately*”. In the body of the report an observation is made that there is no evidence to suggest that arrangements for protecting the rights of people with cognitive disabilities are “*inappropriate*”. Nevertheless, it is difficult to suggest that they are appropriate given the lack of research in this area. There would, therefore, appear to be very strong support for draft Recommendation 6.1 from which more informed conclusions could be drawn.

There would also be concern that the issue of “*practical limitations*” impacting on equality before the law is not the subject to a more detailed consideration by the Commission. It would be the generally held view throughout the community that the right to equality before the law is one of the most fundamental rights of all citizens. A re-worded draft Finding would appear to better support the important Draft Recommendation 6.1.

#### Draft Recommendation 6.2

While the thrust of this recommendation would have general support, the issue of access appears to be limited to physical access and voting assistance. It would appear that access should also apply to information about the election and the right to vote as well as access to a ballot paper, each in an accessible format. The Commission also discussed in the full report the issue of electronic voting but this issue has not found its way into a finding or recommendation. It would appear that this is one area that would provide ‘access’ to many and could be the subject of further consideration.

### Draft Finding 7.3

The positive impact on public awareness of disability issues through HREOC inquiries is vitally important. The ability for HREOC to expand its inquiry role, especially in conjunction with other bodies such as the State and Territory anti-discrimination bodies could be encouraged as is proposed in Draft Finding 7.12.

### Draft Finding 7.4

It is recognised that confidentiality is a major factor in encouraging parties to settle complaints through conciliated agreements. Consequently, there is the need to balance this positive outcome with the need to use the outcomes of conciliated agreements to promote community awareness and to publicly establish forms of precedence. The Commission might give consideration to recommending that HREOC be given the power to publicly report the general terms of an agreement without the parties being named. This would embrace the conclusions in Draft Finding 11.7.

### Request for Information – page XLVII

The information sought by the Commission is very important and it is hoped will be provided by those businesses that are seeing people with disabilities as customers. This may also be supplemented by information from other countries (see comments in ‘Overview’ above). A reference in the findings, however, to the benefit to the economy of people moving from the disability support payment to employment is also relevant. The reduction in the cost of a payment together with a contribution to taxation receipts through employment and consumption could be quite significant. It may be useful if the Commission could develop a specific Finding on the issue as it was considered briefly in the body of the report.

### Draft Finding 8.2

It would be helpful to note that disability standards would not only assist in identifying the costs of compliance but may also provide an opportunity to negotiate a process where those costs can be introduced over time.

### Draft Finding 8.6

There is a difference between costs incurred by an employer providing a job for a person with a disability and the cost to meet the needs of a customer who has a disability. Whether these costs should be shared might differ substantially. It is assumed that this Finding refers only to employment, so the concept of sharing costs in the way suggested would have support.

### Request for Information – page LI

The issues of harassment and vilification have been of concern to people with disabilities and it is surprising that few submissions and comments were made on the subject. It is recognised that there may be significant constitutional barriers to developing a legislative response to these matters but, if it is possible, the making of harassment illegal in all areas covered by the DDA as well as embracing a similar approach to racial vilification would clearly have some support.

#### Draft Recommendation 10.1

There is concern among people with disabilities about the defence of “*unjustifiable hardship*” and the way in which it has been used. Consequently, an extension of its application as proposed by this recommendation would not be welcomed. The belief that it works as a barrier to change and retard innovation is a widely held view. Some see it as providing comfort to those discriminating against people with disabilities by allowing them to hide behind an “*unjustifiable hardship*” defence in the belief that they are then excused from doing anything to remove the discrimination.

As an alternative to the recommendation in its present form, has the Commission considered making the defence of *unjustifiable hardship* subject to a periodic review? It is understood that in some circumstances, HREOC has granted the defence for a limited period only.

Another alternative would be to allow this defence to be subject to the Commonwealth agency or any other respondent, putting in place an “action plan” designed to remove the discrimination over time. This would require the respondent to take some action that might then be reviewed by HREOC from time to time.

#### Draft Recommendation 10.3

As has been noted by the Commission in its report, access to insurance and superannuation has been a “*significant issue*” for people with disabilities for many years. The arguments proposing the recommended change to the DDA are compelling and could proceed, however, it may be useful to suggest that HREOC undertake a further full inquiry into access to insurance and superannuation.

#### Request for Information – page LV

Consideration might be given to having conciliated agreements registered with the Federal Court with appropriate rights to apply to have the agreement enforced with appropriate penalties. This would not be unlike the registration of conciliated or negotiated agreements under the various provisions of industrial relations legislation.

#### Request for Information – page LVII

The Commission’s review in the body of the report on representative complaints is very informative and is captured in Draft Finding 11.12. The fact that there is confusion and misunderstanding on this issue is a compelling argument for further legislative clarification. The Commission makes a strong argument supporting the proposition that representative complaints should be allowed but restricted to organisations with a particular connection.

Consequently, it would appear appropriate to seek to develop criteria that allowed only those disability organisations to take actions that can demonstrate they are broadly representative of a disability or sector, have members who claim to have experienced discrimination or who might be effected by any outcome. In order to be allowed to “stand in the shoes” of its members an organisation may be required to demonstrate their connection to HREOC or the court before being granted leave to proceed or be recognised through some registration process.

Some guidance could be obtained from the way in which registered trade unions can act on behalf of their members in industrial matters before the Industrial Relations Commission.

Request for Information – page LXI

The notion of “*reasonable steps*” for employers has some attractions for people with disabilities even given the limitations suggested by the Commission. Affirmative action programs have been used to address other areas of disadvantage, such as the employment of women, with some success. The requirement to ‘report’ on the implementation of the program was limited to large employers and enforced by the naming in Parliament of those who failed to do so. Some guidance might come from an examination of this program.

The ultimate objective, though, would be to get all employers to adopt ‘action plans’. The Commission might explore a means through which a voluntary ‘action plan’ instituted by an employer might be seen as meeting the objective of affirmative action plan.

## CONCLUSION

The above comments on some of the draft findings and recommendations are provided as for the information and consideration of the Commission. However, they should not be seen as derogating from our original conclusion that the issues that effect people with disabilities have been both understood by the Commission and efficiently considered in the report. Neither should any of these comments be taken as indicative of a final view of the National Disability Advisory Council. As stated at the outset, Council reserves the right to develop its position only after the presentation of the Commission’s final Report which will be in the form of confidential advice to the Minister for Family and Community Services.

Yours sincerely



Ian Spicer AM  
Chair