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# **AED Legal Centre**

## **Submission on the Review of the National Disability Advocacy Program**

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with input from the AED Committee**

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## Introduction

The Association of Employees with Disability Inc. welcomes the opportunity to make a submission to the Review of the National Advocacy Program (NDAP).

AED Legal Centre (AED) is a legal advocacy program established by the *Association of Employees with Disability Inc.* The Centre provides free legal advocacy to people with disability in the areas of education and employment.

The Centre is a member of the Federation of Community Legal Centres of Victoria and we are funded by the Department of Social Services (DSS) through NDAP.

AED's main objective is to protect and advance the rights of people with disability who experience difficulties and/or discrimination in employment or education *because of their disability*.

## Our mission

Through a human rights framework AED seeks to achieve the following objectives:

- ▶ to promote, advance and enhance the rights of persons with disability by increasing their access to legal advocacy and anti-discrimination law;
- ▶ to prevent abuse, discrimination or the negligent treatment of persons with disability in employment, education and training;
- ▶ to achieve equal rights for employees with disability in respect to wages and working conditions;
- ▶ to educate persons with disability on their industrial, employment and other rights so that they can make informed choices; and
- ▶ to educate employers, trade union officials and members of the general community about the employment and educational barriers faced by persons with disability.

## What we do

- ▶ Provide legal representation at the *Australian Human Rights Commission, Federal Court of Australia, Fair Work Commission, Victorian Equal Opportunity and Human Rights Commission, Victorian Civil and Administrative Tribunal, Magistrates Court and Federal Circuit Court*.
- ▶ Advocate workplace solutions on behalf of employees with disability;
- ▶ Educate employees with disability about their rights and employment law – so that they can make better informed decisions;
- ▶ Draft complaints of discrimination or unlawful dismissal;
- ▶ Assist employees on how to disclose their disability to employers

## What we achieve

Our clients achieve protection of their rights, empowerment, improved mental well-being, better self-esteem, and/or financial compensation for pain and suffering.

## Overview

AED supports the vision for the NDAP articulated in the discussion paper; however, we do not think that this vision will be achieved unless there is a commitment towards realistic funding levels and more appropriate allocation of resources. In our experience there are significant costs differentials in the delivery of different advocacy models.

## Definition of legal advocacy

We believe that the current definition of legal advocacy needs to be clarified. We are aware of NDAP funded generalist disability advocacy agencies that claim they do legal advocacy when in fact their work involves referral to a *probono* lawyer for guardianship; mental health matters and other legal issues. They do not employ a legal practitioner, nor do they represent clients through the legal process.

Legal advocacy in the area of disability:

Seeks to uphold the rights and interests of people with disability on a one-to-one basis by addressing legal aspects of instances of discrimination, abuse and neglect.

Legal advocacy is undertaken by a legal practitioner, to provide legal representation in the justice system, pursue positive changes to legislation and advise people with disability about discrimination and human rights.

Legal advocacy should only be undertaken by lawyers working in legal services which are regulated by legislation.

In Victoria the legal profession is regulated by the *Legal Profession Act 2004*.

Legal Practitioners may:

- provide legal representation for people with disability as they come into contact with the justice system;
- pursue positive changes to legislation for people with disability; and
- assist people with disability to understand their legal rights.

## The additional costs of providing legal advocacy

In our experience, there are additional costs in representing people with disability in the state/federal justice system, namely (but not limited to):

- ▶ Wages and salaries for legal practitioners – obviously the wages need to be at least comparable to wages offered in other community legal centres that are funded by different means if we are to attract legal practitioners with the relevant qualifications and experience;
- ▶ Professional development and training;
- ▶ Practising certificates;
- ▶ Professional indemnity insurance;
- ▶ Membership of professional organisations i.e. the Law Institute of Victoria (LIV); the Federation of Community Legal Centres (FCLC) ; the National Association of Community Legal Centres (NACLC);
- ▶ Court application fees;

- ▶ Drafting documents such as complaints; applications; court documents;
- ▶ Preparation for hearing i.e. Particulars of Claim; Witness Statements; Court Books;
- ▶ Court appearances and instructing barristers;
- ▶ Medical Reports;
- ▶ Documentation: faxing, printing and photocopying;
- ▶ Perusal of documents received from respondents;
- ▶ Legal research;
- ▶ Legal letters; and
- ▶ Additional time to allow the client to understand the processes.

### **Risk Management**

The burden to fundraise to bridge the gap between government funding and the actual costs of running the legal service coupled with the inability to fund an additional lawyer while the Principal goes on holidays has been identified as an OH&S risk during the last NACLC Accreditation audit and is an area of concern for the AED governing body.

We also do not have access to computer programs such as those in other CLCs' funded under different programs that assist in documentation. All of our documents are drafted from scratch or from other precedents that we have created. This obviously takes more time to prepare documents as required.

## Questions

**1.1** How do people with disability, their families and carers benefit when agencies are funded to provide only one or two models of support?

People with disability, their families and carers can benefit from one or two advocacy models if those models are implemented within a human rights framework. They also benefit from getting access to advocates who have knowledge, skills and experience in specific advocacy areas.

It is a more efficient way for the government to allocate resources and measure outcomes, because one can directly pinpoint which service does what.

In addition the National Standards for Disability Services (NSDS) which apply to all NDAP funded advocacy agencies feature elements that address Rights, Participation and Inclusion, and Individualised Outcomes. Compliance with the requirements of NSDS should place all advocacy agencies in a good position to respond to individual needs irrespective of the model of advocacy support provided.

**1.2** What are the drawbacks?

- Systemic advocacy may not yield positive outcomes in a short period of time. It often takes an extended period of time for there to be a result from systemic advocacy. With the work that we do with individuals often results in an outcome for others affected by the same issue/s.
- Not everyone will be able to benefit from the service, particularly if someone who needs support lives outside the agency's catchment area.

**1.3** How do we value and support the various models of advocacy while ensuring equitable access to individualised, fit-for-purpose advocacy, regardless of location?

This can be achieved by funding specialist advocacy services and generalist advocacy services on a statewide basis where the specialist service runs outreach programs and is centrally located for easy access by all forms of public and private transport. AED is a state-wide service. We travel to our clients when they are unable to come to our centrally based office and attend on site for meetings and court requirements. We ensure where at all possible that courts, commissions and tribunals travel to accommodate the client's needs.

Specialist advocacy services also support and work in collaboration with generalist services as a secondary point of consultation where the need arises for specific knowledge, skills and expertise that the generalist service is not able to provide.

## Questions

### 2.1 How do we improve access for:

- people with disability from Aboriginal and Torres Strait Islander communities and their families?

- ▶ Advocacy agencies should develop policies and procedures to promote accessibility by Aboriginal and Torres Strait Islander across services and activities of the organisation
- ▶ Advocacy agencies should have processes in place to identify, understand and monitor existing and emerging legal and social needs of Aboriginal and Torres Strait Islander communities within the catchment area
- ▶ Advocacy agencies should undertake formal consultations with Torres Strait Islander communities, families, people and organisations.

- people with disability from culturally and linguistically diverse communities and their families ?

- ▶ Advocacy agencies should develop policies and procedures to promote accessibility by people with disability from culturally and linguistically diverse communities and their families
- ▶ Advocacy agencies should have processes in place to identify, understand and monitor existing and emerging legal and social needs of people with disability from culturally and linguistically diverse communities and their families
- ▶ Advocacy agencies should undertake formal consultations with people with disability from culturally and linguistically diverse communities, their families and organisations

- people with disability in rural, regional and remote locations?

- ▶ Advocacy agencies should develop policies and procedures to promote accessibility by people with disability in rural, regional and remote locations
- ▶ Advocacy agencies should have processes in place to identify, understand and monitor existing and emerging legal and social needs of people with disability in rural, regional and remote locations
- ▶ Advocacy agencies should undertake formal consultations with people with disability in rural, regional and remote locations

- people who are very socially isolated including those with communication difficulties and those in institutional care?

- ▶ Advocacy agencies should develop policies and procedures to promote accessibility by people who are very socially isolated including those with communication difficulties and those in institutional care
- ▶ Advocacy agencies should have processes in place to identify, understand and monitor existing and emerging legal and social needs of people who are very socially isolated including those with communication difficulties and those in institutional care
- ▶ Advocacy agencies should undertake formal consultations with of people who are very socially isolated including those with communication difficulties and those in institutional care

## Questions

**2.2** What are the strategies or models that have worked? What are the strategies that do not work?

Establishing a level of trust is imperative.

For people with disability from culturally and linguistically diverse communities it's often very important to work with and recognise the strong links they have with their families.

We have experienced a level of scepticism with refugees and more recent arrivals who have had bad and traumatic experiences with government and government agencies in their country of origin.

There is sometimes apprehension about interpreters out of fear that the information given to advocates may not be kept confidential. This is particularly so where the interpreter is known to the person with disability. The availability of interpreters is small especially at the level we require for the interpretation of legal matters.

## Questions

**3.1** What mechanisms could be used to ensure information on systemic issues gets to the right people and organisations?

Peak bodies for disability organisations are essential and useful, as disability advocacy groups across the board generally face common issues.

While the data collection system is essential, resources can be driven away from already under-resourced disability advocacy organisations in collecting information. It is important to strike a healthy balance between collecting data for essential purposes (e.g. monitoring that government funding is spent in the most efficient manner) and over-collecting information.

**3.2** How can we help disability advocacy organisations work with a wide range of other organisations with similar aims, such as:

- disabled people's organisations (DPOs)
- the Australian Human Rights Commission
- Ombudsman organisations
- aged care advocacy organisations
- state disability advocacy organisations
- peak bodies?

At the moment the allocation of resources is prioritised towards assisting individuals with individual advocacy and legal representation. Networking and collaborative efforts should be encouraged through more adequate NDAP funding.

## Questions

- 4.1** What steps or organisational structures should be put in place to ensure conflicts of interest do not arise, or are minimised?

The best way to minimise conflict of interest is to avoid that conflict of interest in the first place. We believe that this is critical to preserve the independence of advocacy. Consequentially, organisations that provide NDIS funded services should not be allowed to provide advocacy. Further no service providers should provide advocacy across the board.

- 4.2** How do we avoid gaps between supports provided by the NDIS and advocacy funded by the NDAP?

The very nature of advocacy is distinct from support services. We believe that NDIS is likely to generate a much greater demand for advocacy and this demand should be offset by increased funding through NDAP.

- 4.3** What policies and strategies do we need to protect the rights of people with disability?

Australia is a signatory of the Covenant on the Rights of Persons with Disability (CRPD). This document forms a good reference for the development of a human rights framework to protect the rights of people with disability in Australia.

We also need to revisit the *Disability Discrimination Act 1992* as well as State legislation to ensure that the rights of people with disability are protected by laws that ensure equality within our society.

## Questions

### 5.1 What forms of legal review and representation do people with disability need most?

#### Understanding and improving access to justice

People with disability need legal representation and access to the justice system but this is not recognised in the current NDAP funding models. In our view there are only three true NDAP funded legal advocacy agencies across Australia. There are another two that are paid a percentage of their funding under the legal advocacy umbrella but are not in fact providing legal advocacy. Instead they are providing (as are many other advocacy organisations) access to justice through support.

NDAP should recognize that people with disability are one of the most marginalised groups in our society when it comes to getting access to justice. Not only are they the group that report the most legal issues but as a group they show a prevalence to report multiple as well as more complex issues.

In the disability sector there is a need for legal advocacy which requires lawyers who are qualified and skilled in working in a disability specific context. People with disability are in desperate need of legal services, particularly in the areas of criminal law, mental health, employment, education and access to government services (like public housing etc). It is not appropriate that our current system requires Legal Aid to pick up the overflow because there is not enough resources funded under NDAP to cover the need. Whilst VLA does an excellent job, they work under completely different pressures that we believe are not suited to the needs of people with disabilities.

#### Funding legal advocacy

The need for the adequate funding of legal advocacy is a necessity that falls both within and outside the NDIS.

The Australian Human Rights Commission's recently released report *Willing to Work* about employment barriers for people with disability and older people found a worrying prevalence of disability discrimination in the community.

Commissioner Susan Ryan said people with disability experienced a significant level of discrimination in employment. "People with disability are more likely to be unemployed than people without disability and to have longer periods of unemployment". "People who are willing to work but are denied the opportunity are also denied the personal and social benefits of dignity, independence, a sense of purpose and the social connectedness that work brings". "Many highly skilled individuals are being shut out of work because of underlying assumptions, stereotypes or myths associated with their age or their disability."

Clearly, people with disability should receive legal assistance in seeking redress from all forms of disability discrimination at work. This assistance should include information, legal advice, supports and legal representation in the justice system.

#### Legal advocacy and the NDIS

The continual flow of information and reports on the "difficult birth" of the NDIS has given cause for reflection on the continuing need for legal advocacy in the new NDIS landscape.

## Questions

### 5.1 What forms of legal review and representation do people with disability need most? (cont.)

The following case study illustrates the necessity for legal advocacy.

A recent case reported in Victoria Legal Aid News involves a young woman with spina bifida, scoliosis, renal failure and a degenerating bone disease in her hip, who was refused the same level of support from the NDIS as was previously being provided through a Victorian Government package. As a consequence of significantly diminished funding, her established therapy regime was considerably decreased leading to the degeneration of her condition, leaving her immobile and unable to care for her young child and unable to engage with the community.

This young woman had no knowledge of how she could challenge this decision - she contacted the Rights Information Advocacy Centre - the senior lawyer took on her case and mounted an appeal with the Administrative Appeals Tribunal. The NDIS legal team argued that the efficacy of the chiropractic treatment being sought was not proven, citing academic articles to support their argument. However, the Tribunal considered the 'lived experience' of the woman, and upheld her appeal.

This case clearly illustrates the same story across sectors of the difficulties vulnerable members of our community often face when attempting to obtain the necessities for an inclusive life and the vital role of advocacy in this process - A story not often told.

This young woman may still be languishing on her couch - immobile and detached from her community, had it not been for the involvement of the Rights Information Advocacy Centre. Effective legal advocacy improves and changes people's lives.

Assuming that the current work undertaken by NDAP funded agencies remains the same then there will be a significant NDIS related caseload that will need to be funded. We believe this increased caseload should be funded by NDAP legal representation to preserve the barrier of a conflict of interest.

This review presents an opportunity to revisit the historical way funding levels have been determined and replace it with a more transparent, appropriate and equitable formula based primarily on advocacy models provided, service level and number of clients assisted.

#### Advancing disability advocacy

We further recommend that a national peak-body like DANA be funded to provide communication, networking and connectivity with the sector as well as providing resources and professional development.

## Questions

### 5.2 What barriers prevent people with disability from accessing justice?

#### Access to justice

Specific barriers in getting access to justice and obtaining legal assistance as experienced by people with disability have been documented in a study by (Schetzer, L. & Henderson J: 2003).\*

#### **People with disabilities**

- ▶ fear of retribution
- ▶ communication difficulties with legal practitioners
- ▶ poorly resourced specialist services
- ▶ lack of knowledge of available options for legal assistance
- ▶ lack of autonomy to make decisions to seek legal assistance
- ▶ lack of awareness that action may have been taken against them
- ▶ reliance on others to access legal assistance.

#### **For people with an intellectual disability:**

- ▶ lack of financial resources
- ▶ lack of awareness that legal advice or representation may be necessary
- ▶ difficulties in communicating with legal practitioners
- ▶ lack of understanding by legal service providers as to the nature of intellectual disability
- ▶ negative stereotypes of people with an intellectual disability
- ▶ lawyers failure to acknowledge the capacity of their intellectually disabled client to give instructions
- ▶ fear of retribution.

#### **For people with a physical disability**

- ▶ physical access to legal advisers

#### **For people with sensory disabilities**

- ▶ lack of access to AUSLAN interpreters
- ▶ inaccessibility of many legal information websites.

#### **For people with psychiatric disabilities**

- ▶ communication barriers

#### **For people with acquired disabilities**

- ▶ issues of prejudice, low self-esteem, fear of discrimination and retribution, and communication problems

#### **People with multiple disabilities**

- ▶ were identified as being particularly vulnerable, with few specialist legal services available to assist such people.

\* Schetzer, L. & Henderson, J 2003, Public consultations: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW, Access to justice and legal needs vol. 1, Law and Justice Foundation of NSW, Sydney

## Questions

### 5.3 What models of legal advocacy are most effective?

In Victoria there are two NDAP funded legal advocacy models, both of whom are recognised as community legal centres. However, we are aware that there are some generalist disability advocacy agencies that claim to perform legal advocacy. Often this involves referring people with disabilities to *probono* lawyers for guardianship matters or assisting clients who have a mental health disability fight an involuntary treatment order. We work with a number of generalist disability advocacy agencies who refer clients to us for resolution of their legal matters but remain involved to support the client through the process. They do not claim they are doing legal advocacy.

For the purposes of a new NDAP, it is important that the definition of legal advocacy is revised and replaced by one that recognises that legal advocacy should only be undertaken by legal practitioners whose profession is regulated by legislation.

Community legal centres have expertise in advocating for vulnerable and voiceless Australians. Disability specific community legal centres have expertise in advocating for vulnerable and voiceless Australians who have the additional complication of having a disability. Legal advocacy is an effective means to assist people with disability who have legal issues. It is also a way of working in cooperation and collaboration with localised disability advocates who have an in-depth knowledge of the client and his/her circumstances.

Statewide legal advocacy services should be funded to provide consultation by assisting disability advocates in dealing with their clients through the use of their specialist skills, knowledge and expertise.

There should also be recognition that the use of technology in the conduct of advocacy can be limited. In our experience client meetings and court/tribunal attendances only work if they are conducted in person, face-to-face.

We also recommend that legal advocacy be funded both at the individual and systemic level as a way of promoting policy and law reform.

### **The tendering process**

We have strong reservations about the possibility of having to apply for funding under an open tender process once the NDAP Review is completed. This in turn is creating anxiety both for us and for the wider advocacy sector.

There are several reasons why we believe an open tender process is not the best option for this particular program.

1. Staff in this sector don't have the skills and expertise in writing tenders
2. Writing tenders will be time-consuming detracting from our work in servicing clients.
3. Employing a professional tender writer would cost money putting further pressure on our overstretched resources without a guarantee that the tender will be successful
4. The current funding process has ensured over the years the development of a vigorous and vibrant advocacy sector. An open tender process runs the risk of undermining the specialist skills and expertise that advocacy agencies have developed over the years by possibly funding new players such as large welfare organisations.

### **The tendering process (cont.)**

5. There is the potential to lose skilled disability advocates from the sector if organisations funded through NDAP presently are defunded in the future. Many people working in this sector have been working in the area for many years. Their experience is not able to be passed from one to another. The loss therefore will be difficult to replace and will mean that for people with disability the loss of appropriately qualified and experienced advocates to represent them and therefore a lowered chance of resolution.

#### **Recommendation 1:**

We recommend that a new definition of legal advocacy be adopted:

Legal advocacy should:

Seek to uphold the rights and interests of people with disability on a one-to-one basis by addressing legal aspects of instances of discrimination, abuse and neglect. Legal advocacy should only be undertaken by legal practitioners working in legal services which are regulated by legislation.

Legal Practitioners may:

- provide legal representation for people with disability as they come into contact with the justice system;
- pursue positive changes to legislation for people with disability; and
- assist people with disability to understand their legal rights

#### **Recommendation 2:**

A new NDAP should recognise the additional costs involved in providing legal advocacy and representing people with disability in the courts

#### **Recommendation 3:**

We recommend that all current models be funded and that generalist and specialist advocacy models work in collaboration and consultation with each other.

#### **Recommendation 4:**

We recommend that the funding made available under NDAP be significantly increased to take into account an increased demand for advocacy emerging from NDIS.

#### **Recommendation 5:**

We recommend that a national peak-body like DANA be funded to provide communication, networking and connectivity with the sector as well as resources and professional development.

#### **Recommendation 6:**

We recommend that NDAP fund legal advocacy services to redress the barriers that prevent people with disability from accessing justice.

#### **Recommendation 7:**

We recommend a legal advocacy model such as specialised community legal centres with knowledge and expertise in legislation and disability.

#### **Recommendation 8:**

We recommend continuation of the current funding process beyond 30 June 2017. The current funding process has ensured over the years the development of a vigorous and vibrant advocacy sector.