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National Human Rights Consultation Secretariat  
Attorney-General's Department  
Central Office, Robert Garran Offices  
National Circuit  
Barton ACT 2600

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### **Submission for the National Human Rights Consultation**

The Disability Discrimination Legal Service Incorporated (“DDLS”) is an independent, community organisation that specialises in disability discrimination matters. It is a not for profit incorporated association that provides free legal service to people with disabilities. It also provides community legal education and undertakes law and policy reform projects in the areas of disability and discrimination.

A committee of volunteers manages the service. The DDLS Management Committee includes people with disabilities. Many people with disabilities, volunteers and students contribute their efforts to the work of the DDLS. The DDLS works as an active member of the community legal sector and the disability advocacy sector.

The DDLS endorses the submission by the Human Rights Legal Resource Centre and make the following submission, specific to the issue of discrimination on the basis of disability.

- 1. *Is there a need for better protected human rights in Australia? If change is needed, how should the law be changed to get better human rights***

## **A. The urgent need for better protected human rights in Australia**

Currently anti-disability discrimination laws in Australia are defined and enforced generally by equal opportunity legislations of each state and the federal Disability Discrimination Act 1992 in consonance with the Human Rights and Equal Opportunity Commission Act 1986.

Australia is a signatory and has ratified the *United Nations Conventions on the Rights of Persons with Disabilities* ("the Convention") which provide, among others that

- a) People with disabilities are entitled to non-discrimination (Article 3(b)), 'full and effective participation and inclusion in society' (Article 3(c)), and accessibility (Article 3(f)).
- b) Under Article 4(e), Australia has an obligation to take all appropriate measures to ensure that private enterprises do not discriminate against any person on the basis of disability.
- c) Article 5(3) requires Australia to 'take all appropriate steps to ensure that reasonable accommodation' is provided to persons with a disability.
- d) Australia has also undertaken, pursuant to Article 4(g), to promote the availability of assistive technologies.

Without a doubt, state and federal legislations, aims to ensure equal if not, equitable rights for all and provide remedies for those who become victims of discriminatory conduct, and systems or policies simply on the basis of their disabilities. However, these laws not only differ invariably<sup>1</sup> but also create dilemmas<sup>2</sup> for aggrieved parties who struggle with the nuances of jurisdictional differences, formality of proceedings, threat of costs consequences and history of non-progressive case law in certain state jurisdictions.<sup>3</sup>

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<sup>1</sup> Under the Victorian Equal Opportunity Act (EOA), permitting discriminatory conduct is not unlawful, whereas under the DDA, the same conduct is considered included in the offence of "aiding or abetting" discriminatory conduct.

<sup>2</sup> An aggrieved party may have to choose between the costs associated jurisdiction of the federal court in contrast with state tribunals and the lesser protection of rights under state laws. For instance, under the EOA 'club' means a social, recreational, sporting or community service club, or a community service organisation-

- (a) that occupies any Crown land; or
- (b) that directly or indirectly receives any financial assistance from the State or a municipal council.

This definition is much narrower than the definition under the *Disability Discrimination Act* (DDA) (Commonwealth), which provides that "club" means an association (whether incorporated or unincorporated) of persons associated together for social, literary, cultural, political, sporting, athletic or other lawful purposes that provides and maintains its facilities, in whole or in part, from the funds of the association

<sup>3</sup> *Hay v Dubbeld (Anti-Discrimination)* [2005] VCAT 642 (15 April 2005) - Mr Hay was a person with a Human Immune and Hepatitis virus status. Mr Dubbeld refused to provide body art services to him because he has Hepatitis C. Finding that the discriminatory conduct was not unlawful, the Tribunal held that: "...the fact that some tattooists would be willing to undertake the task does not mean that it is unlawful for other tattooists to refuse..." and concluded that "Mr Dubbeld has established that it was reasonably necessary for him to refuse to provide his tattooing services to Mr Hay in order to protect

Moreover, Victoria and the ACT has a charter of Human Rights, albeit miles away from the overriding effect of the American and Canadian versions, however, the authority of the federal courts to give due regard and apply their provisions in federal court proceedings is doubtful. In the same manner, whilst the federal Standards for Accessible Public Transport 1992 and the Disability Standards for Education 2005 are of national application, DDLS is unaware of decisions made by state anti-discrimination tribunals that apply those standards succinctly in their determination of state law based complaints of disability discrimination.

Hence, the gap in the substance and implementation of existing legislation clearly illustrates that there is a strong and urgent need for a national definition and approach for the protection of human rights in Australia. The examples cited here are symptomatic of the shortcoming of the legislative perspectives in either political level that have prevailed in the last three decades. Inclusive mindset as well as present and continuing advancement in assistive technologies ought to replace the notion of “the inequality we had to have”. DDLS joins the clamour of community based organisations that the time is now ripe for a national human rights charter.

## **B. The Model of National Charter of Human Rights**

DDLS recognises the challenges involved in adopting the American or the Canadian model (which enjoys constitutional imprimatur) for Australia and defer to the outcome of an experimental period. Assuming that the Federal parliament reaches a consensus on the contents and operation of a national charter, we would support a referendum for appropriate constitutional amendments and anticipate that an equal protection clause in the constitution is the most effective means of eliminating discrimination.

Drawing from our casework experience, in 2003, DDLS represented a deaf client who challenged the failure of the Health Insurance Commission to shoulder the costs of Auslan interpreters incurred when attending medical and specialist medical appointments. This practice has the net effect of making medical appointments more expensive to a person simply on the basis of deafness. The Health Insurance Commissioner agreed that whilst the practice may have been discriminatory, the payment of fees incurred for Auslan interpreters could not be the subject of a Medicare refund because it is not included as an authorised payment of professional services under the Health Insurance Act 1973.

This caused DDLS to reconsider issuing proceedings because the Australian Human Rights Commission had suggested that the respondent may not have acted

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*his health. This is because the provision of the service would have carried a real, albeit low, risk of Mr Dubbeld becoming infected with Hepatitis C; Mr Dubbeld was not highly trained and had an incomplete understanding of the transmission of infectious diseases; although the service was no doubt important to the complainant, there was no substantial public interest in the tattoo being provided; and a judgment as to what is “reasonably necessary” must take account of the varying risk-taking profiles of tattooists.”*

unlawfully because the *Disability Discrimination Act* has no general overriding power over other federal statutes.

The facts of this case are almost identical to the case of *Eldridge v British Columbia*<sup>4</sup> The applicants in the said case were successful because the Canadian court ruled that where sign language interpreters are necessary for effective communication in the delivery of medical services, the failure to of the *Medicare Protection Act*, S.B.C. 1992, c. 76 to provide them constitutes a denial of s. 15(1) of the *Canadian Charter of Rights and Freedoms*.

Recently, the Federal Court of Appeal of Canada<sup>5</sup> has also confirmed the decision of the Canadian Transportation agency that allows person with disabilities to travel by air without having to pay for a second seat to accommodate their disabilities, whether for themselves or their attendant. In contrast, in Australia, the Disability Standards for Accessible Public Transport which was presumably enacted for the benefit of people with disabilities provide specifically that “all passengers must be prepared to pay fare.” Yet, following a complaint that we lodged against a country train service provider, we have received advice from the Legal and Policy Unit of the Australian Human Rights Commission, that such express provision under the Transport Standards means that passengers with a disability are liable for the fare of his or her carer.

We are obviously hopeful that whilst the road is long and maybe winding, the development of a national charter of human rights would follow overseas jurisdictions that have elevated the status of anti-discrimination law to an enforceable level that is yet unseen in Australia.

## **2. Should the Human Rights Act specifically recognise the disadvantage, vulnerability and rights of some groups of people?**

In 2003, the Australian Bureau of Statistics estimated that one in five Australians (3,951,000 or 20%) had a disability. At least 810,500 of those surveyed, indicated a need for mobility assistance. This rate was the same for males and females. The rate increased with age, reaching 81% for those aged 85 years. This means that a large section of the population face access and mobility issues within their own communities because of their physical or sensory impairments.

DDLS submits that those who have “less in life” should have more in law. People with disabilities for a variety of reasons have different and specific needs that are actually imposed not so much by their disabilities but by the fact that contemporary society is designed for people without disabilities. This means that providing “special protection” to people with disabilities is in a true sense only providing what is their right as equal members of a social and political community.

## **3. Other experiences or ideas on human rights in Australia**

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<sup>4</sup> (1997) 3 CSR 624.

<sup>5</sup> Council of Canadians with Disabilities v. Air Canada and West jet, FCA 10 January 2008

## Disability Vilification

Vilification, as defined in the *Racial and Religious Tolerance Act 2001* (Vic), is conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of another person or class of persons.<sup>6</sup> The conduct may occur within or outside of Victoria<sup>7</sup> and the motive for engaging in such conduct is irrelevant.<sup>8</sup> It is also irrelevant whether or not the perpetrator made an incorrect assumption about the person or class of persons.<sup>9</sup>

Vilifying conduct diminishes the dignity, self-worth and integration of persons of diverse backgrounds to the community.<sup>10</sup> Accordingly, anti-vilification legislation has been enacted in other jurisdictions to varying degrees.<sup>11</sup> For example, the federal *Racial Discrimination Act 1975* (Cth) prohibits vilification on the grounds of race, and the *Racial and Religious Tolerance Act 2001* (Vic) prohibits vilification on both the grounds of race and religion. However, Tasmania is the only Australian jurisdiction that currently prohibits vilification on the basis of disability.<sup>12</sup>

The failure to provide for adequate measures dealing with vilification on the ground of disability means injurious treatment of people with disabilities can currently take place without redress. This (1) lowers the self-worth of the individual(s) targeted and creates social exclusion; and (2) makes the community generally a less pleasant place to live by failing to send a message that tolerance and a respect for difference is expected.

It is noted that there is a tension between anti-vilification laws and freedom of speech. For example, it has been suggested that both constitutional provisions dealing with freedom of speech and international obligations under the *International Covenant on Civil and Political Rights* may restrain the Commonwealth Government from enacting anti-vilification laws.<sup>13</sup> Despite this tension, it is desirable that an appropriate balance be struck between these competing concerns. Neither unrestrained freedom of speech nor extreme anti-vilification laws is consistent with human rights.

In accordance with Victoria's *Human Rights Charter*, "special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary – (a) to respect the rights and reputation of other persons; and (b) for the protection of national security, public order, public health and public morality."<sup>14</sup> Allowing the vilification of people with disabilities both disrespects the rights of those people and lowers the standard of

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<sup>6</sup> *Racial and Religious Tolerance Act 2001* (Vic) ss 7-8.

<sup>7</sup> *Ibid* ss 7(2)(b), 8(2)(b).

<sup>8</sup> *Ibid* s 9.

<sup>9</sup> *Ibid* s 10.

<sup>10</sup> *Racial and Religious Tolerance Act 2001* (Vic).

<sup>11</sup> *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1998* (Tas).

<sup>12</sup> *Anti-Discrimination Act 1998* (Tas).

<sup>13</sup> See, eg, *Western Aboriginal Legal Service v Jones* [2000] NSWADT 102 and Carolyn Evans, 'Religious Freedom and Religious Hatred in Democratic Societies' (Conference Paper, 2006)

<[http://www.law.monash.edu.au/castan\\_centre/events/2006/conf-06-evans-paper.html](http://www.law.monash.edu.au/castan_centre/events/2006/conf-06-evans-paper.html)>

<sup>14</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15.

public morality. It is desirable that an extension of anti-vilification laws should include vilification on the basis of disability.

The operation of anti-vilification law in other jurisdictions should not be ignored. Problems encountered in those jurisdictions should not be repeated in Australia.

## Education

Education is an issue which substantially impacts on the quality of a person's life across a number of areas. The absence of an education or the lack of support to pursue their education has been shown to have tremendously negative, interrelated ramifications for the individual involved, particularly to those with disabilities, including: poor self esteem; bullying throughout school by their peers; victimisation by teaching staff; an increased chance of psychological illness and depression, family break up, psychological illness experienced by siblings and parents; reduced choices at later stages of their education, reduced access to employment; and poor socio-economic outcomes which in turn affect access to the basic goods and services such as health care, accommodation, and recreation.

Whilst not all of these factors are operative on each individual that seeks support for their disability or disabilities in Victoria's school system, those working in the field have observed these patterns emerging. This is supported by numerous pieces of research affirming the contention that the damage done to children with disabilities and their families from struggling with the education system can be severe and lifelong.

The system for supporting children with disabilities in Victorian public schools is the Program for Disabilities ('PSD'). The Victorian Civil and Administrative Tribunal ('VCAT') has now twice found that the PSD is flawed and has criticised its ability to support children with disabilities critically mentioned in two disability discrimination cases (*Beasley v State of Victoria*,<sup>15</sup> *Turner v State of Victoria*<sup>16</sup>).

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<sup>15</sup> [2006] VCAT 187, especially at [184].

*Second, although it has not been necessary for me to make detailed findings about the PSD program, there is a substantial body of evidence before me about the program, including evidence from Mr. Claridge, some reports and two confidential exhibits. This material raises a number of shortcomings of the program including –*

- *how individual students with disabilities' educational needs are assessed for the program's purpose;*
- *the appropriateness of the method by which a level of funding is then allocated;*
- *the adequacy of that funding and of the total budget of the program;*

*whether the program has led to inconsistencies in funding and expertise across the system;*

- *whether other strategies might be more effective to meet the educational needs of students with disabilities; and*
- whether the circumstances in which the original funding models were adopted still apply."*

<sup>16</sup> [2007] VCAT 873, especially at [504]-[544].

*. "Fourth, my findings indicate that there are a number of serious shortcomings in different aspects of the PSD, particularly the language disorder category of that program. There seems to be an urgent need for comprehensive and expert review of the program. I would urge the government to undertake that review."*

Despite such findings, and the alarming number of discrimination cases being lodged against the Department of Education and Early Childhood Development (“DEECD”) arising out of the struggles of students with disabilities there is no clear indication that the DEECD has any intention of improving the program. The reduction of their capacity to participate in the productive work force equates to a reduction of the economic welfare of Australia. This state of affairs is inconsistent with the spirit and the substance of Australian discrimination legislation, the new Victorian Charter of Rights and Australia’s status as a signatory to the UN Convention the Rights of Persons with Disabilities.

## **Access to Premises**

Until 1993, only local councils were able to issue building permits in Victoria. Since 1993, private building surveyors have also had the power to issue building permits<sup>17</sup>. One of the consequences of this delegation of authority that impacts on the quality of life of people with disabilities is the lack of local government policing of inaccessible business premises. Access to Premises Standards have been developed and drafted but have no compulsion until it becomes law. The current draft is far from ideal.

Non compliance with even the basic requirements of wheelchair access undoubtedly have been encouraged by the inaction of a government authority that have existing administrative machinery to effect accessibility policy until precise legislative incentives or penalties become available. It is quite anomalous that local governments which derive revenues from local business appear concerned only with compliance with town planning requirements. Whilst many city councils have launched various types of actions to enforce their by-laws and zoning requirements, none has taken legal or administrative action against the owner of a building or proprietor of a local business without adequate access facilities.

In contrast, local governments in New South Wales have been held legally responsible for inaccessible premises because the power to issue building permits remained with the local councils, hence, a building constructed without adequate disability access was held to be a discriminatory conduct for which the city government was deemed to have aided or permitted under section 122 of the *Disability Discrimination Act*<sup>18</sup>. The clear advantage of tasking local governments to ensure accessibility of premises is that instead of people with disabilities or advocacy organisations who usually don’t have the resources to battling with business proprietors, local governments bears the onus of enforcing anti-discriminatory policies and consequently becomes the lead agency under the pain of potential legal liability and financial exposure.

## **UN Convention on the Rights of Persons with Disabilities (“UNCRPD”)**

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<sup>17</sup> *Building Act 1993*, Building Regulations 2006

<sup>18</sup> *Cooper v HREOC and ANOTHER* (1999) 56 ALD 387

The DDLS, along with many other people with disabilities, disability service and disability advocacy groups, greeted the UNCRPD with much excitement. While the content of the UNCRPD is to be aspired to in terms of the protections of human rights for people with disabilities, it poses problem to those people with disabilities who wish to use it. Currently, many parts of the Convention provide superior protections to people with disabilities compared to domestic anti-discrimination laws.

The question again however, is are people with disabilities going to make submissions to the United Nations in order to address human rights breaches. In particular, are they going to spend years exhausting domestic remedies which then enables them to make submission?

Discrimination and/or poor treatment of people with disabilities is not something that one can allow to continue to occur for lengthy periods of time. The effects of discrimination and/or poor treatment can have lifelong psychological effects. It can have profound practical effects that can change the course of a person's life.

Discrimination in the Victorian education system has affected children in the following ways:

- mental health issues for children and their parents;
- lack of sufficient education to allow tertiary study;
- reduced employment opportunities;
- reduced economic independence, and increased reliance on government.

Currently, complaints under domestic anti-discrimination legislation can take between 1-2 years from the date of complaint to finalisation. To add another year or perhaps more to that already substantial period makes any attempt at timely redress impossible. The only outcome after such a long period of time is damages – one cannot afford to continue in the discriminatory environment for many reasons.

Therefore, the UNCRPD is on one hand a beacon of light to those that are looking for a set of guidelines or standards as to how people with disabilities should be treated. On the other however, it is similar to other human rights legislation in its practical use requires ordinary people to overcome hurdles that they often view as insurmountable and unwieldy.

## **Summary**

We can only assume that the Secretariat has received many examples from a variety of individuals and organisations of human rights issues that remain unaddressed by current legislation. The DDLS can look back over the last decade and note that discrimination against people with disabilities continues to be a significant problem – in particular in the areas of education and employment.

The human cost of discrimination and/or poor treatment can sometimes be left out of the debate, even through submissions such as ours. It cannot be stressed enough that the fight for human rights is something which has significant emotional and

financial cost for the individual. Such treatment can leave an indelible imprint on people's lives and their futures.

DDLS and other Community Legal Centres are mostly working to ameliorate the effects of discrimination or poor treatment, after that treatment has occurred. Litigation to uphold human rights should be seen as the last option for people with disabilities or other disadvantage. A federal human rights Act that can set robust and far reaching standards for human rights and be used through cost free investigatory mechanisms would immediately mitigate the burden on those whose human rights are breached.

Australia is a wealthy country - recently fighting its way back from having an international reputation that did not reflect well on our obligations to create and maintain equality within our society for all. The DDLS recognises that we have a unique opportunity through these consultations, to achieve something that could have a profound affect on Australian society for years to come.

We wholeheartedly endorse the notion of Australia taking its rightful place domestically and internationally, by showing its commitment to all Australians through a federal human rights Act.

Please do not hesitate to contact us if you require further information.

Yours sincerely

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