

**THE DISABILITY DISCRIMINATION LEGAL SERVICE INC  
(DDLS) SUBMISSION TO THE HUMAN RIGHTS  
CONSULTATION COMMITTEE**



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## 1. WHAT IS THE DDLS?

The Disability Discrimination Legal Service Inc (DDLS) is a statewide independent community legal centre that specializes in disability discrimination legal matters. We provide free legal services in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The DDLS works actively towards the eradication of disability discrimination and facilitates and promotes justice for people with disabilities (PWD) through community legal education sessions to professional and community groups to raise disability awareness and provide information on the *Disability Discrimination Act 1992 (Cth)* and the *Equal Opportunity Act 1995 (Vic)*. We also undertake community development research projects to investigate and challenge current social, economic and legislative issues affecting PWD in the community.

## 2. WHY IS THE DDLS INVOLVED?

The definition of disability under the *Disability Discrimination Act 1992 (Cth)*<sup>1</sup> as well as the *Equal Opportunity Act 1995 (Vic)*<sup>2</sup> is fairly broad. Briefly, it can and does include physical, intellectual, sensory and psychiatric disabilities. Not all disabilities are visible or obvious and creating awareness and access is one of the DDLS's aims.

According to the Australian Bureau of Statistics, approximately 20% of the Victorian population (986 941 people) has a disability.<sup>3</sup>

The significant demographic of people with disabilities in Victoria alone justifies the involvement of the DDLS in the consultation process for the Charter of Human Rights. The voice of PWD in the consultation process must only be enhanced by the submissions of the DDLS, which is a community legal centre with broad experience in issues faced by people with disabilities.

In the experience of the DDLS, disability rights in Australia are far from firmly entrenched. The Federal Government in 2003 sought to amend the *Disability Discrimination Act 1992 (Cth)* (DDA) to remove basic protections from discrimination from already vulnerable persons with disabilities, namely people with a drug dependency. Despite the defeat of the Bill in Parliament, the Attorney-General, sections of the media and the public expressed the view that the amendment was justified and

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<sup>1</sup> *Disability Discrimination Act 1992 (Cth)* section 4

<sup>2</sup> *Equal Opportunity Act 1995 (Vic)* section 6

<sup>3</sup> Australian Bureau of statistics "Disability Ageing and Carers: Summary of Findings Australia" (2003) at p19 [http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/Lookup/978A7C78CC11B702CA256F0F007B1311/\\$File/44300\\_2003.pdf](http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/Lookup/978A7C78CC11B702CA256F0F007B1311/$File/44300_2003.pdf) as at 14/7/2005

acceptable, regardless of the stripping of human rights involved in the Bill's provisions.<sup>4</sup> Judging by attempted changes to the DDA, the rights of PWD are insecure as far as the Commonwealth Government is concerned. The rights of people with a disability are by no means ensured at the Victorian Government level either. The Victorian *Equal Opportunity Act 1995*<sup>5</sup> places onerous time restrictions and does not allow for representative complaints. This severely hinders many people with disabilities in accessing their rights. A Charter of Human Rights would go a long way to addressing some of these issues at a State level.

We submit that although rights might be insecure at one level of Government, it is still possible to secure those rights at another level of Government. The Charter of Human Rights is an opportunity to enshrine in Victoria the human rights of PWD in Victoria. The provision of a basic level of rights recognition for people with disabilities is the chief motivation of the DDLS in writing this submission.

We embrace this opportunity to debate the need for '**Human Rights in Victoria**'. However, the scope and depth of the DDLS submission is regrettably curtailed because of the unfortunate brevity of the consultation period. The DDLS has limited hours, limited staff and limited resources to deal with a project of this size, complexity and importance. The DDLS makes the following submission, conscious of the lack of proper time to prepare its submissions. As such, we have elected to comment on the following question and state our arguments accordingly. We do wish to point out that this is by no means an exhaustive paper, and therefore we invite responses to or questions regarding our submission.

### **3. WHAT RIGHTS SHOULD HAVE THE PROTECTION OF THE CHARTER OF HUMAN RIGHTS?**

#### **A. ARGUMENTS FOR INCLUDING THE RIGHTS OF PEOPLE WITH DISABILITIES IN THE CHARTER**

The Charter of Human Rights must make provision for the rights of PWD. While basic human rights, civil and political rights and social and economic rights are very much interrelated and presumably extend to PWD in common with other human beings, there are special reasons for ensuring the existence of specific provisions that concern people with disabilities.

#### **1. Historical origins**

Historically, people with disabilities played a part in events that gave rise to the modern concept of human rights. Human rights first crystallised at the Nuremburg International

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<sup>4</sup> 'The Productivity Commission Review of Discrimination', *The DDLS Advocate* Vol 4 Issue 1, 4; available at <<http://www.communitylaw.org.au/ddls/>>.

<sup>5</sup> *Equal Opportunity Act 1995* (Vic)

Military Tribunal in the form of allegations of 'crimes against humanity'.<sup>6</sup> The Tribunal was a response to the Fascist policy in Nazi Germany to eradicate undesirable humans, defined as including people with disabilities.<sup>7</sup> The prosecution of such atrocities as 'crimes against humanity' inspired 'the active concern for human rights' after World War II.<sup>8</sup> Since PWD were a focus of Nazi atrocities, it is arguable that they should be specifically provided for in the Charter, an instrument only made possible by the human rights legacy left by the Tribunal.

## 2. International standing

The rights of PWD will shape the future interpretation and elaboration of the provisions of the International Bill of Human Rights.<sup>9</sup> In human rights law, the UN instruments- Conventions elaborate upon the provisions of the Bill of Human Rights.<sup>10</sup> At present, people with disabilities are engaged in the process of drafting a new UN Convention on the Rights of Persons with Disabilities ("CRPD").<sup>11</sup> The forthcoming CRPD will have the same standing as other UN Conventions, such as CEDAW<sup>12</sup> with respect to the provisions of the Bill of Human Rights. Given that the proposed Charter is to be based on a key part of the Bill of Human Rights, the ICCPR, the Charter should make specific provision for PWD in recognition of their international standing with respect to the Bill.

## 3. Cultural change

Cultural attitudes in Victoria towards the rights of people with disabilities are likely to be difficult to change until the introduction of a Charter that provides for them. Insensitivity and occasionally, sheer disregard, of the rights of people with disabilities can be found in people on the street, merchants, doctors, principals, executives and tradespeople. Despite the 'heads of disability discrimination' that make it unlawful to discriminate in particular areas- societal acceptance of PWD is still not prevalent. It should also be noted that these 'heads of disability discrimination' are quite specific and many PWD do not fall within the narrow definitions. Significantly, in the experience of the DDLs, members of the judiciary and parliamentary systems also demonstrate a lack of consideration for the requirements and point of view of people with disabilities

By contrast in Canada, the Canadian Human Rights Foundation recognises that 'knowledge, skills, values, attitudes and behaviours [are] required for individuals to

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<sup>6</sup> 'Human Rights', The New Encyclopaedia Britannica: Macropaedia – Knowledge in Depth, Vol. 20, 656.

<sup>7</sup> 'Nazi Persecution of the Disabled: Murder of the "Unfit"', United States Holocaust Memorial Museum <[http://www.ushmm.org/museum/exhibit/focus/disabilities\\_02/disabilities.php](http://www.ushmm.org/museum/exhibit/focus/disabilities_02/disabilities.php)> at 26 July 2005.

<sup>8</sup> 'Human Rights', The New Encyclopaedia Britannica: Macropaedia – Knowledge in Depth, Vol. 20, 656.

<sup>9</sup> The Bill comprises the Universal Declaration of Human Rights (UDHR) (1948), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) and the International Covenant on Civil and Political Rights (ICCPR)(1966) and two ICCPR Optional Protocols (1966, 1989).

<sup>10</sup> 'Human Rights', The New Encyclopaedia Britannica: Macropaedia – Knowledge in Depth, Vol. 20, 661.

<sup>11</sup> The progress of the drafting of the Convention is reported at <<http://www.un.org/esa/socdev/enable/rights/ahcwgreportax1.htm>>. For further information please consult <<http://www.pwd.org.au/disabilityconvention/>>.

<sup>12</sup> <http://www.ohchr.org/english/law/cedaw.htm>

understand, assert and defend their human rights as well as to respect the rights of others.<sup>13</sup> Much needed changes in cultural attitudes in Victoria are likely to flow from the inclusion of rights of PWD in the Charter and the provision of education related to these rights.

## B. RECOMMENDATIONS

### **The South African model**

Amongst the models on offer, the DDLS urges the Committee to adopt the model of human rights set up in South Africa. The advantages of the approach taken in South Africa include: enforceable social and economic rights, recognised civil and political rights, a pragmatic approach to human rights goals given available resources, and an independent cause of action for an individual whose rights are breached.<sup>14</sup> The remarkable achievement of human rights in South Africa indicates that the model of human rights adopted in that jurisdiction is a workable and successful model and should be reproduced in Victoria. Regrettably, time constraints arising from the limited period of time allowed for consultation restrain the DDLS from a more in depth discussion of the merits of the South African model beyond the recommendation that it should be adopted in Victoria.

The following specific recommendations must be considered in the light of the DDLS recommendation of the South African human rights model. Even though the Government's intended scope for the Charter is civil and political rights, the DDLS has taken the opportunity to furnish recommendations as to social and economic rights of people with disabilities. These rights are more practical and relevant to the lives of people with disabilities in Victoria and it is hoped that the Committee will recognise this in its report, whether by including social and economic rights in the Charter or by recommending a prompt review of the Charter following its commencement with a view to including social and economic rights in the Charter.

### **1. Standing**

If the Charter is to have a provision that confers on a select group of people standing to seek to enforce the provisions of the Charter, then people with disabilities must be among that select group. Firstly, the ability of PWD to enforce any human rights provisions will obviously be enhanced where it is expressly recognised that they have standing to do so. Second, the operation of provisions that concern PWD will be impeded unless PWD have standing in relation to them.

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<sup>13</sup> 'Our vision of Human Rights Education', Canadian Human Rights Foundation <<http://www.chrf.ca/english/ed-manuals/vision.php>> at 26 July 2005.

<sup>14</sup> Have your say about human rights in Victoria: Human Rights Consultation Community Discussion Paper, Human Rights Consultation Committee, 22-23.

## **2. Appropriate remedy**

If the Charter is to include provisions that relate to possible remedies, then the Charter should clarify the specific remedies that may be sought by people with disabilities. The DDLS is of the view that the remedies made available in other jurisdictions ought to be made available in Victoria's jurisdiction. It submits that the Government's stated intention to have an unenforceable Charter of Human Rights is ill-advised and insufficient having regard to the nature of human rights and the prospects of cultural change. At a minimum, a person having standing under the Charter must be able to bring an action against any person or organisation with culpability under the Charter.

The Charter should provide for, or be accompanied by legislation to provide for, legal and non-legal remedies. No single legal or non-legal remedy will be sufficient. Rather, a full complement of remedies ought to be made available to provide adequate redress for people whose rights have been breached. Accordingly, the Committee could consider not just one, but all of the following remedies:

1. Declaration as to contravention of a provision of the Charter
2. Damages and compensation
3. An injunction to stop conduct that appears likely to result in a contravention if that conduct continues unchecked.
4. The imposition of a fine or penalty for conduct
5. Conciliation and mediation, similar to those available in respect of disability discrimination under Commonwealth and State laws.
6. Publicity, whether in the form of a public hearing or the use of media to reproach wrong-doers
7. Trade campaigns in the form of boycotts.

## **3. Right to participate in society**

A provision that confers on PWD a right to participate in society will be useful. Every person with a disability has experienced uncomfortable moments of shame, confusion, anger and disappointment when their disability has hampered their participation in society. In many cases, an important cause of that exclusion from society is the attitude of those who control or participate in the social activity. In our experiences, sporting clubs have shown intolerance for people with disabilities. In such cases, for a person with a disability to point to a provision in the Charter would assist in fostering a sense of self-esteem and would ensure attitudes and behaviours that encourages that person's participation in society.

## **4. Right to necessary equipment or treatment at a reasonable cost or with reasonable finance**

The Charter may be able to alleviate the financial burden of necessary equipment or treatment imposed on PWD with a provision to ensure the cost of, or finance to obtain,

the equipment or treatment is reasonable having regard to the limited financial means of PWD. The cost of necessary equipment, such as wheelchairs, and treatment, such as psychiatric treatment, can be prohibitively expensive for people with disabilities. That financial burden is exacerbated in the many instances of PWD and their families who have low levels of income, or dependent on government pensions. In spite of the limited financial means of PWD, the costs of necessary equipment and treatment, and the costs of loans to obtain them, remain at prohibitive levels. The Charter should take the opportunity to redress this inequitable imbalance with a provision to make these costs reasonable having regard to the limited financial means of PWD, rather than having regard to the upper limits of market forces.

### **5. Right to receive information in accessible formats**

Provision should be made to ensure that people with disabilities have an enforceable right to have material and information made available to them in a variety of accessible formats. Under the present system of disability discrimination laws in Australia, it is permitted for people with disabilities to have information in accessible formats, provided that to do so imposes no unjustifiable hardship on the provider of information. Accordingly, under this system, providers of information take the view that they will only provide information in accessible formats where it is in their interests to do so. By contrast, an enforceable right to have information made available to people with disabilities in a variety of accessible formats would do much to ensure a society in which information is provided in an appropriate format to people with disabilities as a matter of routine.

### **6. Right to have access to buildings**

Provision should be made to confer a right on people with disabilities of access to all future building and construction developments, residential and commercial, undertaken in Victoria. Past and present building developments are already partially modified to provide such access and where no such access is provided, those developments indicate precisely the necessity for a right of access in Victoria. Houses, apartments, and office premises should be accessible by people with disabilities whether as tenants or owners. The costs and 'inconvenience' of providing access to people with disabilities are going to be minimal where the right of access directs the minds of developers and architects to the question at the very inception of the development.

## **4.CONCLUSION**

The DDLS believes that the Charter of Human Rights should provide for the human, civil and political and social and economic rights of people with disabilities. Accepting that the Government's intended scope of the Charter is restricted to civil and political rights, the DDLS nevertheless contends that it has presented a persuasive case for the inclusion of social and economic rights of people with disabilities, whether at the inception of the Charter or in a subsequent review of the operation of the Charter. The

scope and depth of the recommendations made and the South African model of human rights proposed are necessarily limited by the regrettable brevity of the consultation period. In spite of these difficulties, the DDLS believes that it is clear and necessary that the proposed Charter should provide for the specific rights of people with disabilities and confer appropriate standing to enforce those provisions. That is the only acceptable outcome for a legislative instrument that perpetuates the invaluable legacy of human rights. Victorians have a unique opportunity to address 'wrongs' and make them 'right'.