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Editors' Letter

The publicity around the Shut Out report, and the opportunities for a number of politicians to shake their heads and wistfully commiserate with the plight of people with disabilities was interesting to watch.

In particular, the inference to be drawn that the issues presented in the report were surprising to those in charge, was nothing short of incredible.

Just as the next report on how the child protection system is in crisis, or people with mental illness are slipping through the cracks is not going to surprise any of us, the results of this report are similarly familiar. One wonders how many reports of this nature must be written before action is taken.

Australia is not a poor country. In Victoria, we pour millions in to the Grand Prix, but children with disabilities cannot attend school full time. The Federal Government contributes hundreds of millions to private schools, but people with disabilities may have to fund raise to purchase new wheelchairs. The Department of Education spends millions on litigation in relation to children with disabilities, but will not increase its budget for the support of those children in schools.

The Shut Out report may open the eyes of someone new on the block, but to people who work in the sector, and people with disabilities and their families, this is old news.

The sad fact is that people with disabilities are not a funding priority, and are not valued.

For those of you who have the energy, lobby your local MP and relevant ministers and ask them what they are going to do in response to the Shut Out report. We will be interested to hear.

Julie Phillips

Jurisdictional Limitation – Language Interpretation

On 20 May 2009 in the case of *Mik v Hilakari & Ors* [2009] VCAT 902, the Tribunal adopted a very narrow interpretation of “clubs” under the *Equal Opportunity Act 1995* (Vic). This interpretation confirms the DDLS view that that the definition of clubs under the state legislation is too narrow in comparison with the definition under the *Disability Discrimination Act 1992* (Commonwealth) (“**DDA**”). Such a construction led to the Complainant’s claim of alleged discrimination being dismissed, and highlights the need for reform of the provision to make it consistent with the national legislation and more compatible with the Victorian *Charter of Human Rights and Responsibilities*.

The Complainant was a student of Monash University as well as the treasurer for the Monash Student’s Association (“**MSA**”), the Third Respondent. The First and Second Respondent’s were also members of the MSA.

The Complainant alleged that she had been unlawfully discriminated against in the area of employment and clubs as a result of her impairment and sex. For her claim to be recognised and upheld by the Tribunal, the MSA needed to be recognised as a “club” in the scope of the Act.

The definition of a “club” under the Act is “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 very narrow when compared to the definition provided by the national legislative equivalent, DDA: “an association 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.”

The MSA is a student organisation at Monash University that facilitates other student groups at university, ranging from academic clubs to the performing arts, to social welfare clubs and even spiritual clubs. MSA also advocates for student, women, gay and indigenous rights as well as co-ordinating a vast range of other public affairs. People such as the honourable ex-treasurer Peter Costello have been on the committee of this group.

Under the Act, the Tribunal could not label MSA a club because it did not fit the definition. Whilst MSA could possibly, conceivably and reasonably be recognised as a social or community service club or organisation, it is, strictly speaking, a student organisation for student rights. If the case was considered with regards to the DDA, then the result may well have been different since the student organisation is associated for “lawful purposes” and uses partly its own funds to provide and maintain its facilities. Clearly, a more general approach would better serve the general public by widening the scope and reach of the discrimination laws.

DDLS is critical of this decision because the Tribunal has further narrowed the concept of “clubs” in holding that whilst the organisation may have received funding from the state government, the funding was outside the scope of the complaint. Regardless of whether the learned member of the Tribunal was correct or not in her interpretation of the relevant provision of law, the case highlights the barrier to access to justice caused by the combination of a restrictive interpretation by the Tribunal and the jurisdictional limitations posed by the language of the Act.

Scrutiny of Acts and Regulations Committee

Exceptions and Exemptions in the Equal Opportunity Act 1995

On 16 December 2008, the Governor in Council commissioned a report by the Scrutiny of Acts and Regulations Committee to inquire into, consider and report on whether any amendments should be made to the exceptions and exemptions in the *Equal Opportunity Act 1995* (Vic) ('the Act'). On 7 May 2009, the Committee published its Options Paper on this report and has made a call for public submissions. The paper can be accessed here: http://www.parliament.vic.gov.au/sarc/EOA_exempt_except/Options%20paper/options_paper_complete.pdf

The DDLS strongly welcomes this opportunity to comment on the exceptions and exemption provisions in the Act. DDLS has made a joint submission with the Federation of Community Legal Centres, supported by Youth-law Community Legal Centre.

It is our firm belief that the Act needs to better facilitate effective responses to systemic discrimination, alongside improved investigation of individual complaints. Too often, discrimination impacts on communities and individuals who are already marginalised or disadvantaged. Discrimination only further entrenches this social inequality.

We believe it is appropriate to enact changes to the Act such that the close relationship between the Act and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter') are recognised. At present, the Act has a significant number of exceptions, and the definitions are often broad and vague. Unfortunately, this results in a lack of redress for many instances of wrongful discrimination.

Our preferred proposed change supports the view of the Human Rights Law Resource Centre, and is simple and straightforward whilst also being fair and providing justice. We believe that all the exceptions in the Act should be repealed, and instead, should be replaced with the more nuanced balancing test in s 7(2) of the *Charter*. This test requires an assessment of whether the limitation being considered is not only reasonable, but demonstrably justified in a free and democratic society. The assessment must include relevant factors such as:

- (a) *The nature of the right; and*
- (b) *The importance of the purpose of the limitation; and*
- (c) *The nature and extent of the limitation; and*
- (d) *The relationship between the limitation and its purpose; and*
- (e) *Any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

The effect of these changes is such that the exemptions and exceptions will better fulfil the Act's objective of education and its associated targeting of systemic rather than only individual discrimination. DDLS also supports HRLRC and PILCH's submission that guidelines should be developed in order to outline the nature and scope of permissible limitations under the Act, and that exemptions should only be granted on a case-by-case basis, using the same s 7(2) analysis.

For further information, please read our initial submission to the Department of Justice in relation to the *Equal Opportunity Act 1995* (Vic) which can be viewed on our webpage: http://www.communitylaw.org.au/ddls/cb_pages/images/EOA%20Exemption%20Review%201.doc

Human Rights and Equal Opportunity Commission Act 1986 New Powers – Convention on the Rights of Persons with Disabilities

Recently, some changes have been made to The Human Rights and Equal Opportunity Commission Act 1986 (**HREOC**) as well as the Disability Discrimination Act 1992 (**DDA**) by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009* (**the Amendment Act**). These new changes will provide another avenue for complainants to sue the Commonwealth Government.

Notably, the functions of the Australian Human Rights Commission (“AHRC”) have now been expanded to include the functions conferred on it by the DDA, which includes the promoting of an understanding, acceptance of and compliance with the DDA (s67 DDA).

Why is this important? The Amendment Act also grants the DDA, and thus indirectly the AHRC, the power to make the United Nations Convention on the Rights of Persons with Disabilities (**the Convention**) legally enforceable in regards to all areas of discrimination as per the DDA except for registered organisations under the Workplace Relations Act 1996, as well as Administration of Commonwealth laws and programs and Requests for information (s12(8) DDA).

Since the AHRC has the power to enforce all of its functions, complainants may now rely on the Convention as an alternative action. However, whilst it, as a convention ratified by the Commonwealth, is binding on state and federal authorities, it can be brought as an action only against the Commonwealth Government since they ratified it on 18 July 2008. This severely limits the range of parties that the Convention can be brought against, but at the very least, it is another step forward in holding the Government accountable, especially considering that a large amount of discrimination claims are in fact brought against the Government. One possible option to overcome this obstruction could be to argue that the Commonwealth Government is vicariously liable for the State Governments and other associated bodies of the Government that receive funding from the Commonwealth.

If AHRC concludes that there has been a breach of the Convention by the Commonwealth, no remedy will be available for the aggrieved, but it would work to publicly name and shame the Government. This, in turn, would hopefully place additional pressure on the Government to take further action to improve services for people with impairments.

Whilst no remedy is available, a complaint to the Commission regarding a breach of the Convention can be advantageous. Any other claim under the DDA may have to go to court if it fails conciliation and thus, the complainant risks the costs if they are unsuccessful. However, when there is a complaint to the AHRC regarding a breach of the Convention, the Commission will make its own finding of whether or not the Government is in breach of the Convention and thus, the matter will not reach the courts and subsequently there is no risk of costs.

These changes did not come into effect until 5th August 2009 which means that any prior events or proceedings may not rely on these recent changes.

Attached to the Convention is an Optional Protocol, which, as yet, has not been ratified by the Australian Government. There are, essentially, two parts to the Optional Protocol. Firstly, it enables individuals with disabilities in Australia to lodge complaints with the United Nations Committee on the Rights of Persons with Disabilities (**the Committee**) once all domestic remedies have been exhausted. Secondly, it permits the Committee to initiate and

conduct its own inquiries where it suspects a grave or systemic breach of the Convention is taking place. It would give Australians with disabilities more of a fair go, but unfortunately, whilst this Optional Protocol has been recommended to be ratified by the Joint Standing Committee on Treaties in March this year, the Government is yet to act on this.

SHUT OUT Report

“SHUT OUT: The Experience of People with Disabilities and their Families in Australia” is a National Disability Strategy Consultation Report prepared by the National People with Disabilities and Carer Council.

The report is largely based on information collected from the community, in particular, people with disabilities and their family and friends. The report is aimed at projecting their views, opinions and hardships. Littered throughout the paper are a collection of quotes collected by the Council that emphasise the distress and even desperation of those with disabilities seeking social, political and economic reform.

“We live in one of the wealthiest countries in the world and yet all too often people with disabilities struggle to access the very necessities of life.” What most Australians take for granted can be a daily battle for people with disabilities. Their lives are a constant fight for resources, support and acceptance.

Having said that, most agree that they do not want any particular special treatment. What most people would consider an ordinary life, is the stuff of dreams for people with disabilities. They simply want the barriers in society removed, such that they can be not merely present in society, but also be a part of it.

The report highlights the main concerns of people with disabilities including:

1. Social exclusion and discrimination
2. Lack of services and support
3. The need for lifetime care and a support scheme
4. Poor employment experiences
5. Sub-standard education

Having analysed and processed their calls for change, the Council has summarised their suggestions and concerns into four broad strategic priorities for the National Disability Strategy:

1. Increasing the social, economic and cultural participation of people with disabilities and their families, friends and carers
2. Introducing measures that address discrimination and human rights violations
3. Improving disability support and services
4. Building in major reform to ensure the adequate financing of disability support over time.

This report, in itself, is very constructive and positive towards improving accessibility and the rights of people with disabilities. As always though, this report is just words, and whilst it is nice in theory, it will not be of any practicable benefit until it is acted upon.

Snapshot of the DDLS

Committee of Management

Jan Ashford (Chair)
Martin Leckey (Deputy Chair)
Bill Ford (Treasurer)
Robert Pask
John McKenna (Public Officer)
Cettina D'abaco
Jane Simmonds
Tim Greenall (Observer)
Julie Phillips (Secretary)

Staff

Manager

Julie Phillips

Principal Solicitor

Placido Belardo

Solicitor

Deborah Randa

Administrative Officer

Anna Leyden

Bookkeeper

Marie Collard

Volunteers

Andrew Chen	Cassandra Lee
Abby Levy	Helen Drake
Alan	Natasha Koravos
Patricia Woo	Adam Jones
Yasmin Tian	Laura Southwell
	Sally Pottenger

Volunteer Profile

Andrew Chen

Andrew began volunteering for DDLS in early November 2008 and has been helping out around the office once a week ever since.

He is currently in his second year of a double degree of Bachelor of Commerce/Bachelor of Laws at Monash University Clayton and finds the position as a volunteer at DDLS both challenging and extremely rewarding.

Apart from volunteering at the DDLS, Andrew is currently tutoring primary school students in a private tutoring school and previously volunteered at Vision Australia, aiding them in running activity days for its members.

Andrew's other interests include table tennis, violin and piano. He is currently the president of the Monash University Table Tennis Club and a regular competitor in table tennis tournaments around the state.

Disclaimer

DDLS makes every effort to ensure the accuracy of the contents of this newsletter. However, DDLS accepts no liability whatsoever arising from anything published in the newsletter, including liability arising from errors, misprints or inaccuracies. Any opinions expressed therein should not be taken as legal advice. Case studies are presented observing client privacy. Any similarity with any other person's experience or circumstances is purely accidental.

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