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Editors' Letter

A step backwards for people with disabilities living in Melbourne.....

Recent council elections saw Robert Doyle become Melbourne's new Lord Mayor. Mr Doyle quickly shared his wisdom on a number of subjects - clearly ambivalent as to his knowledge of the subject, sensitivity to the community or discrimination issues.

People with disabilities, parents with small children, and even those of us who have to lug huge suitcases full of files from one end of the city to the other have been benefiting from the steady construction of tram super stops. What does Mr Doyle think?

"I don't like them, never have. I think they choke the town. I understand for disabled people and some people it is easier to get on the tram ... I just think the proliferation of them has done a lot to congest the city."

In other words if there is a conflict between the issue of people with disabilities being able to access public transport, and therefore their community, and inconvenience to cars – then cars it is. This does not augur well for people with disabilities, or any of us who feel that perhaps the broader issues of human rights are more important than motor vehicles.

The DDLS has written to Mr Doyle seeking a public retraction of his comments. We shall see....

Thank you to Michael Leach who contributed much of this season's Advocate.

The DDLS will be closed 25 December to 2 January. We wish everyone a safe break.

Julie Philips
Manager

Amendments to Disability Discrimination Act 1992

The *Disability Discrimination and other Human Rights Legislation Amendment Bill* (2008) proposes amendments to the *Disability Discrimination Act 1992*, the *Age Discrimination Act 2004* and the *Human Rights and Equal Opportunity Act 1986*. These amendments implement recommendations made by the Australian Productivity Commission in its 2004 *Review of the Disability Discrimination Act 1992*. This Bill also implements the House of Representatives Standing Committee on Legal and Constitutional Affairs' recommendation to remove the 'dominant purpose' test from the *Age Discrimination Act 2004*. Specifically, the new amendments to the *Disability Discrimination Act* will:

- § make explicit that refusal to make reasonable adjustments for people with disability may in itself amount to discrimination
- § make the defence of unjustifiable hardship available in relation to all unlawful discrimination on the ground of disability, except harassment and victimisation
- § clarify the matters to be considered when determining unjustifiable hardship
- § clarify that the onus of proving unjustifiable hardship falls on the person claiming it
- § make clear that the definition of disability includes genetic predisposition to a disability, and behaviour that is a symptom or manifestation of a disability
- § replace the 'proportionality test' in the definition of indirect discrimination with the requirement to prove that the condition imposed has the effect of disadvantaging people with the disability of the aggrieved person
- § shift the onus of proving the reasonableness of a requirement or condition in the context of indirect discrimination from the person with disability to the respondent, and
- § extend the power to make standards under the Act.

The DDLS welcomes these changes and anticipates that they will assist complainants in proving their complaints under some of the more technical aspects of the DDA. In particular, shifting the onus of proving the reasonableness of a requirement or condition to respondents will be extremely beneficial for complainants.

National Disability Strategy

The DDLS welcomes the Australian Government's decision to develop a National Disability Strategy. We especially welcome the Government decision to base the National Disability Strategy on the UN Convention on the Rights of Persons with Disabilities (CRPD), which was ratified by the Australian government in July this year. DDLS strongly endorses the view of the CRPD Implementation Taskforce that the National Disability Strategy is the best avenue for the implementation of the UN Convention. The National Disability Strategy is an opportunity for co-ordinated federal action in cooperation with the states to improve the lives of people with a

disability in Australia by translating Australia's specific treaty commitments into legislation and standards. While the *Disability Discrimination Act* 1992 and the *Disability Services Act* 1986 and their state equivalents already incorporate key elements of the CRPD into Australian law, DDLS endorses the CRPD Implementation Taskforce views that the following remain areas of concern.

- Disability discrimination law – particularly with respect to the duty to provide reasonable accommodation; limits on the categories of persons protected; limits on the areas of life covered; the exclusion of particular categories of state and non-state actors; the relative inaccessibility and cost of enforcement for individuals;
- Disability services law – particularly with respect to the lack of compliance with the principles and objectives of the legislation; the lack of remedies for violations; and the lack of entitlement to essential support services;
- Laws and regulations relating to the built environment – particularly with respect to public infrastructure, residential dwellings, and in relation to emergency exits;
- Guardianship and administration laws – particularly with respect to the absence or ineffectiveness of procedural safeguards; the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to substitute decision-making;
- Mental health laws – particularly with respect to the absence or ineffectiveness of procedural safeguards for compulsory treatment, the failure to implement in some cases the principle of the least restrictive alternative; and the failure to ensure the effective promotion and support of alternatives to compulsory treatment;

(From 'Submission to the National Disability Strategy review', UN CRPD Ratification Taskforce , Supported by ACOSS, 2008)

Access to Premises Standards

On 2 December 2008, the *International Day of Persons with Disabilities*, the Federal Government tabled the long-awaited *Disability (Access to Premises – Buildings) Standards*. If passed, these will inform building codes to ensure compliance with the *Disability Discrimination Act* 1992 in relation to all new buildings - and also to retrofits of existing buildings when and if these occur. The House of Representatives Standing Committee on Legal and Constitutional Affairs will now conduct consultations on the draft Standards and to report to Parliament in the first half of 2009.

The major issues will include access to 2 and 3 story buildings, and specifically, the question of what size a building must be to have lifts installed. It seems likely that the approach to this issue in the Standards will be based on gross floor area – an approach which may cause inequities in rural and regional areas which tend to have smaller premises.

The draft *Disability (Access to Premises – Buildings) Standards* and related documents can be accessed here <http://www.ag.gov.au/premisesstandards>

Government Considers Optional protocol to CPRD

The Rudd Government is considering accession to the Optional Protocol to the UN Convention on the Rights of Persons with Disabilities (CPRD).

If implemented, the Optional Protocol would allow a person who considers that Australia has not complied with the CPRD, and has exhausted all domestic remedies, to lodge a complaint with a specialised UN Committee (the Committee on the Rights of Persons with Disabilities).

A National Interest analysis will be undertaken by the Joint Standing Committee on Treaties before any further steps are taken. See here for further information.

<http://www.aph.gov.au/house/committee/jsct/3december2008/tor.htm>

DDLS encourages you to have a say on this important subject. Currently, systemic discrimination continues to rely on individual people with disabilities to address by taking legal action. Such action is often settled confidentially, and even if successful only addresses one particular person. While there can be precedent value in such actions, a good example is education for people with disabilities, which over the years has attracted a multitude of complaints under state and federal discrimination law. Not only has the situation not improved, but it has actually deteriorated in Victoria in the last few years with great restrictions on eligibility criteria for funding. As there is no appropriate expert UN Special Rapporteur on disability, the ability to make complaints to a dedicated UN committee would be extremely beneficial to people with disabilities. While formal submissions may have closed, please contribute to this discussion by contacting the Joint Standing Committee on Treaties with your views.

RECENT CASES in VCAT

Latrobe City Council & Ors v De Zwart [2008] VCAT 1789, 15 August 2008

Issue: Impairment and Parent/carer discrimination

Facts: This case involved a number of complaints including a manager imposing a requirement or condition on employees that they must work without Rostered Days Off. Ms De Zwart - because she needed additional time off to care for her children - was less able, or found it more difficult to comply with this condition (or was at a disadvantage with respect to compliance) compared to employees without parental or carer responsibilities.

Decision: The tribunal held that that part of the complaints may not be struck out without hearing evidence as to the reasonability of requiring employees to work without a rostered day off. Whilst the tribunal did not deal directly and extensively with the issue, it said that stress may constitute an impairment.

Maroondah City Council [2008] VCAT 1936, 9 September 2008

Issue: Exemptions from anti-Discrimination legislation for persons with particular attributes.

Facts: Maroondah City council applied for exemption from the *Equal Opportunity Act* (Vic) to build a women's-only gym at the Croydon Leisure and Aquatic Centre. This facility was designed to promote health and exercise among those who feel unable to participate in mixed company due to religious convictions and cultural issues.

Decision: Exemption granted. The *Equal Opportunity Act* contains provisions which clearly show an objective to permit discrimination where necessary for the protection of health, or

to redress disadvantage suffered by those with particular attributes. Sections 80 and 82 are examples of such provisions.

The Death of Tyler Cassidy

I feel sorry for this boy and her family. I believe we need an independent inquiry into this matter, because the OPI 's investigative success (like most internal affairs units of a police organisation) are more determined and objective when identifying and prosecuting dishonest police as opposed to those who make operational mistakes in "good faith" or matters relating to grey areas in policy and protocol. There is a strong possibility that the police officers in question may have used their handguns validly at the time the triggers were pulled, but may have unwittingly created a situation where they then found themselves with no choice but to shoot. Under police policy they have been trained to deliver bullets where it is most likely to cause an unintended fatality. It appears that their initial response was to subdue him rather than contain the situation. His taunts to kill the police officers were probably cries for help - I may be wrong but it has tell-tale signs of "suicide by cops" syndrome. According to news reports he made two calls to lure police where he was, and had no hostage but himself. It also appears he had no design to widen the perimeter of his misconduct, and that his threats were clearly not matched to the number and weaponry of the police personnel at the scene. Perhaps if the first responding teams had secured the area and brought in a negotiator in civilian clothes rather than attempted to subdue and arrest him, his anger could have subsided to a more manageable level. He was clearly exhibiting disturbed behaviour and his capacity to comply, or to comply in a timely fashion with orders from uniformed police was severely diminished. Arguably, police persistence in attempting to secure his immediate obedience was (indirectly) discriminatory of a person with a serious mental or psychological impairment.

In relation to the "inadequate police weapons" discussion, perhaps the real reason why Victoria police has not proceeded with standard issue of taser guns is simply their own anticipation that their members' crisis management skills would stagnate, or default to the immediate use of so called non-lethal weapons. A non-lethal weapon culture could put the safety or lives of both police and the subject of policing more at risk because in a tense situation, particularly where the subject person has diminished capacity, frustrated or annoyed officers may tend to prefer the convenience of using non lethal devices instead of exhausting communication or diffusion techniques.

Placido Belardo

ASSISTANCE ANIMALS

Legislation relevant to persons using Assistance Animals is currently before Federal Parliament. Aspects of the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* relevant to assistance animals include:

a. Section 7 Discrimination in relation to associates

(1) This Act applies in relation to a person who has an associate with a disability in the same way as it applies in relation to a person with the disability.

This means: for example, it is unlawful for an employer to discriminate against an employee on the ground of a disability of *any of the employee's associates*, including an associate having an assistance animal.

b. Section 9 (2) Definition of an assistance animal

For the purposes of this Act, an ***assistance animal*** is a dog or other animal:

- (a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; **or**
- (b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; **or**
- (c) trained:
 - (i) to assist a person with a disability to alleviate the effect of the disability; and
 - (ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

This means: An animal will be considered an assistance animal if it meets ***any*** of the above three tests (a, b, or c).

c. Section 54A Assistance animals and Discrimination Issues

This is a long section, which we summarise below.

This means:

It is ***not*** unlawful to require that a person with an assistance animal ***control*** that animal

It is ***not*** unlawful to ***request evidence*** that an animal is an assistance animal, or that it is suitably trained in appropriate hygiene for public places.

It is ***not*** unlawful to ***discriminate*** against a person ***on the basis that they have an assistance animal*** if:

- that animal is reasonably suspected of having an infectious disease, or is a risk to public health or the health of other animals
- if evidence that an animal is an assistance animal was requested and not produced.
- If evidence that an animal is trained in relation to standards of hygiene suitable to a public place was requested and not produced.

Snapshot of the DDLS

Committee of Management

Martin Leckey(Chair)
Jan Ashford (Deputy Chair)
Bill James (Treasurer)
Robert Pask
Tricia Malowney
Barbara Hocking
John McKenna
Cettina D'abaco
Jane Simmonds

Staff

Manager

Julie Phillips

Principal Solicitor

Placido Belardo

Solicitor

Deborah Randa

Administrative Officer

Anna Leyden

Bookkeeper

Marie Collard

Volunteers

Andrew Chen	Cassandra Lee
Tian Lim	Helen Drake
Mohsin Mughal	Kaitlyn Gullet
Simon Pitt	Angel Ma
Patricia Woo	Michael Leach
Yasmine Tian	Natasha Koravos
Natalie Durkovic	Adam Jones

Volunteer Profile

Adam Jones

Adam received his Bachelor of Laws from Melbourne University in 2006 and also has a Bachelor of Arts. He previously worked with the Replay Group, which runs the Australian Centre for Discrimination Risk Management, the Australian Centre for Workplace Learning, and the Australian Centre for Health, Safety and Environmental Risk Management. Adam's role there was as manager of business development.

Adam has a disability and has permanent double vision and epilepsy as a result of a cancerous brain tumour twenty years ago.

As well as a soon-to-be-admitted lawyer, Adam is also a part-time comedian and once regularly performed at the Comic's Lounge in North Melbourne, under the stage name "The Great Adamo". Adam encourages people to laugh and realize that people with disability have a healthy sense of humour too. He has the attitude that it is better to laugh and have the whole world laugh with you, than to cry and cry alone! He is available for Bar Mitzvahs, Weddings, Parties, anything – though at a considerable fee.

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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