

Equality & Justice

for people with disabilities



Issue-2- 2008 Winter

The DDLS Advocate

Editors' Letter

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It has been an interesting few months with the ratification of the UN Convention on the Rights of Persons with Disabilities, proposed changes to the *Disability Discrimination Act 1992*, and also to the *Equal Opportunity Act 1995*.

While the DDLS applauds the Federal Government and the enthusiasm with which it has embraced the UN Convention, it continues to be extremely disappointing that the State Government in Victoria is over-represented as a respondent in discrimination complaints.

Changes to domestic discrimination acts and new international conventions continue to rely on people with disabilities taking legal action against respondents to enforce their rights.

The State government needs to be the role model for the rest of the community and demonstrate that their commitment to human rights is genuine, rather than rhetoric.

The DDLS looks forward to the day when it is rare rather than commonplace that the State of Victoria is being challenged in relation to its treatment of people with disabilities.

Julie Phillips
18 August 2008

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Convention on Rights of Persons with Disabilities

On Friday 17th July 2008 the Federal Parliament ratified the United Nations Convention on the Rights of Persons with Disabilities.

The Convention and its Optional Protocol were adopted by the United Nations General Assembly in December 2006, and opened for signature in March 2007. Australia is one of the first 29 countries to ratify the convention. The convention aims to promote, protect and ensure the human rights and fundamental freedoms of people with disabilities. As noted by the United Nations Secretariat's in its Enable Newsletter, this Convention 'marks a paradigm shift' in attitudes and approaches - persons with disabilities are now viewed more as "subjects" to the law who can actively contribute to society with exercisable rights. The Convention offers protection using a flexible and expansive categorisation of disability and parties to the Convention are obliged not only to eliminate discrimination on the basis of disability, but also to enhance the societal inclusion and participation of people with a disability.

The advantages of early ratification of this Convention were espoused by the Attorney General and the Human Rights Commissioner and, Australia will now have the opportunity to participate in selection of the inaugural Committee on the Rights of Persons with Disabilities. The committee will be comprised of individuals with recognised competence and experience, whose role will be to monitor and promote the implementation of the Convention. Participating States will submit periodic reports which the Committee will review. Mr Thomson from the Federal Treaties' Committee expressed Australia's aspiration to participate in the nomination process of this Committee.

It has been observed by the United Nations that this human rights treaty has been the 'fastest negotiated...in history'. Indeed, Australia appears to have emulated this speed, with the Federal Treaties Committee having taken the slightly unusual step of tabling its recommendation prior to the final report on this inquiry, to allow ratification to proceed as quickly as possible.

There were strong reasons for doing so. The Convention reflects and affirms the protections already existing under Australia's domestic laws and as noted by HREOC, signing the treaty provides an international benchmark and framework against which current and future laws can be assessed and it provides a potent symbolism of national commitment. Ratification of this treaty is also a significant step in reinforcing Australia's preparedness to rise to the challenge of universally eliminating obstacles faced by persons with disabilities.

Report 92 and background information on the Convention is available on the Committee's website: www.aph.gov.au/house/committee/jsct.htm or by contacting the Committee Secretariat on (02) 6277 4002.

The recent VCAT decision of *Victorian Women with Disability Inc (Anti-Discrimination Exemption)* paves the way for a promising new community service.

Facts of the Case

Women's Health Victoria applied for exemptions from s13, 42, 100 and 195 of the *Equal Opportunity Act 1995*. The purpose of the exemption is to enable *Women's Health Victoria* to work in conjunction with *Victorian Women with Disability Network Inc*, to provide an advocacy information service for women with disabilities. It seeks to exclusively employ women with disabilities to staff the new service. Under an agreement with the Department of Human Services, the funder of the service and the employer of staff will be *Women's Health Victoria*. In making employment decisions, *Women's Health Victoria* will be working in conjunction with the *Victorian Women with Disability Network*.

The Law in This Area

There is a broad power conferred on VCAT under the *Equal Opportunity Act 1995* to grant exemptions under the provisions of the Act. VCAT will first address the question of whether there is potential discrimination involved in granting the exception. If the answer is yes, the next step is to see whether granting the exemption is appropriate in all the circumstances of the case. Relevant considerations include whether there is some broad public interest to justify the exemption; whether the exemption is within the spirit though not necessarily the letter of the express exception provisions; and whether it promotes one of the objectives of the *Equal Opportunity Act 1995*.

Significance of the Decision

According to the Deputy President of VCAT, Cate McKenzie, there was a clear public interest in justifying the exemption. The proposed service is a place where women with disabilities can find out about the various advocacy options open to them. The view expressed was that the best qualified people to start such a service were women with disabilities themselves who are experienced in matters relating to advocacy. This decision was made in recognition of the fact that clients will be more comfortable communicating with employees who have been in the same situation and experienced the same barriers. The President went on to say that it was not as effective to have employees without disabilities staffing such a service. This may have the unfortunate result of underlining the client's sense of alienation or exclusion from society. In recognition of the fact that the proposed service is primarily designed to address disadvantage, an exemption was granted for the maximum period of three years.

The DDLS believes exemptions to the Act should be made sparingly.

PROPOSED CHANGES TO THE DISABILITY DISCRIMINATION ACT

A press release from the Attorney-General issued 18 July 2008 stated that the Rudd government will introduce legislative amendments to the Disability Discrimination Act in the spring sittings of Parliament.

The Human Rights & Equal Opportunity Commission ("HREOC") report that a draft Bill is not yet available, however the press release indicated that the amendments will implement recommendations from the Productivity Commission's 2004 review of the Act. The previous

government accepted (but did not get as far as introducing legislation to implement) these.

HREOC supports these recommendations which include:

- Express provision for duties to make reasonable adjustments
- Extending the application of the unjustifiable hardship defence to all areas covered by the Disability Discrimination Act
- Simplifying the definition of indirect discrimination (similar to reforms already made to the Sex Discrimination Act)
- Extending the power to make Disability Standards to cover all the areas covered by the Disability Discrimination Act
- Clarifying the relationship between disability standards and State laws
- Providing for action plans to be lodged by any organisations covered by the Disability Discrimination Act rather than only by organisations as services providers

HREOC has also suggested and hope to see a number of other reforms:

- Simplification of the definition of direct discrimination to address some of the problems which have emerged since the *Purvis* case
- Clearer provision for recognition of assistance animals
- Clarification of how the definitions of discrimination apply to carers and other associates

Is the Victorian State Government About to Reinvent the 30-Year-Old Equal Opportunity Act?

The recently launched Review of the *Equal Opportunity Act (Vic)* 1995 provides 93 recommendations for the State Government to consider and in its submission to the Review, the Equal Opportunity Commission noted:

“Access by people with disabilities to the built environment is one of the most widespread and fundamental forms of systemic discrimination confronting our community.”

The recommendations to be considered include:

- a more robust and flexible regulatory framework to protect human rights in Victoria;
- the name of the Act to be changed to the “Equality Act”;
- the Commission to be renamed “Human Rights Victoria”, and;
- use of facilitative measures (such as education, research and guidelines) as the primary means through which to encourage compliance with the Act.

In addition, the Review proposes a new dispute resolution model which features:

- early and active intervention by the Commission to facilitate both compliance with the Act and dispute resolution;
- the provision of legal advice and representation by a specialist advice service outside of the Commission and made available from an early stage of a dispute;
- equal and effective access to the Victorian Civil and Administrative Tribunal (VCAT), with the option for claims to go directly to VCAT, and;
- development of jurisprudence to clarify rights and responsibilities in this area.

The Review also recommends the Commission be able to intervene in matters under the Act as under Section 40 of the Charter of Human Rights and Responsibilities and to act as

“*amicus curie*” (a friend to the court) in matters raising issues under the Act with leave of the Court or Tribunal.

Wide-ranging amendments to the Act are also recommended to assist with the removal of barriers to eliminating discrimination. These include amending the definition of:

- direct discrimination so as to reflect the aims of progressively achieving a distinctive equality and give consistency with the Charter, and;
- “indirect” discrimination to allow the onus of proof to be shifted from the complainant to the respondent to show that a requirement or condition found to be discriminating is reasonable in the circumstances.

Other recommendations include those for:

- an express requirement for reasonable adjustments for people with impairments to be made in all areas protected by the Act and in public places;
- “reasonableness” to be clarified in the legislation;
- section 51 to be amended to permit reasonable alterations to accommodation to cover property governed by owner corporation rules;
- a specific provision in the Act to protect disability access to public spaces in the built environment so that the Act is consistent with the DDA;
- homelessness and irrelevant criminal record be included as protected attributes and for guidelines to be developed to assist in determining if a criminal record is irrelevant or not;
- volunteers to be provided with the same protection against discrimination as employees.

To facilitate and enforce compliance with the Act, the Review recommends the Commission be given new powers to allow it to identify systemic discrimination and to be able to:

- address this without having to rely upon an individual bringing a complaint;
- permit the Commission to enter into enforceable undertakings and issue compliance notices and guidelines;
- maintain a voluntary register of action plans that meet minimum standards;
- the Commission to have its own motion inquiries with the discretion to table reports on these in Parliament, and to;
- change the governance structure of the Commission so that it will reflect the proposed new mandate and provide better integration of the Charter with the Act.

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

Patrick Donovan	Cassandra Lee
Tian Lim	Helen Drake
Mohsin Mughal	Kaitlyn Gullet
Simon Pitt	Angel Ma
Patricia Woo	Michael Leach
Clare Marshall	Natasha Koravos
Yasmine Tian	

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Volunteer Profile

Helen Drake

Helen received her Bac. Laws from La Trobe University in 2008 and also has a Bac. Arts (Hons). She has extensive experience as a case manager and supervisor from when she worked with the Employment Services Division of the former Commonwealth Department of Employment, Education, Training and Youth Affairs (DEETYA). Helen was Victoria's representative and the national women with disabilities representative on the DEETYA National Women's Consultative Committee, and a representative on the DEETYA National EEO Standing Committee. She has also worked with Centrelink.

In addition, Helen has been active in a broad range of voluntary positions. For example, she was active in the formation of the Australian South Sudanese Support Group and was this group's Secretary for several years; she actively lobbies against systemic discrimination issues affecting people with disabilities who reside in her local area; and she participates in events promoting reconciliation between indigenous and non-indigenous Australians.

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