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Australian Law Reform Commission

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Equality, Capacity and Disability in Commonwealth Laws

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Communication Rights Australia

Communication Rights Australia is an advocacy and information service for people with little or no speech. Their main function is to promote the interests and wellbeing of those with a disability through advocacy. Communication Rights Australia provides representation and referrals, as well as support that allows individuals to make their own choices about issues that affect their life

Disability Discrimination Legal Service Inc

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability

Villamanta Disability Rights Legal Service Inc.

Villamanta Disability Rights Legal Service ("Villamanta") is a community legal centre that specialises in disability related legal matters for people who have a disability. It has a priority constituency of people who have an intellectual disability and does most of its legal casework for them. Villamanta provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of Villamanta are to ensure that people who have a disability have the same rights and opportunities as other people and are equally included in the community, in particular that they know about the law and are enabled to use the law to help them get their legal rights.

INTRODUCTION

'One of the most telling and challenging statistics is that Australia ranks 21st out of 29 OECD countries in employment participation rates for those with a disability. In addition, around 45% of those with a disability in Australia are living either near or below the poverty line. These facts alone show us that we need to change.[1]*'*

Over the last two decades, Australia has seen numerous reports on various aspects of the lives of people with disabilities. Whether people with disabilities have benefited from any of these reports, is questionable.

The above Price Waterhouse Cooper report relevantly tells us that as at 2011, the quality of life for people with disabilities remains substandard, and the various and many barriers to a rich and fulfilling life remain.

A system whereby people with disabilities are required to struggle, often on their own, to achieve equality, either at law or in life, is ineffective and unworkable.

Every right a person with a disability has must be fought for, often at great financial and emotional cost. The international conventions that ostensibly offer protection, cannot be accessed without an individual putting themselves at great risk of costs by virtue of the requirement to exhaust all domestic remedies in their own country. This risk is one that many people with disabilities, understandably, choose not to take.

It is for this reason that it is vital the State ensure the provision of effective, low-cost and equal access to justice and the relevant laws.

All research, reporting and direct feedback from people with disabilities indicate that they do not have this access.

The wide ranging scope of this inquiry requires a significant period of time to competently respond.

The issues set out below are only some that are relevant to this inquiry. We urge the Commission to seek further comprehensive input on this very important topic.

ANTIDISCRIMINATION LAW

The Disability Discrimination Act ["DDA] has recently suffered from a lack of progressive decisions, and rather has been characterised by narrow and rigid legislative interpretations. The consequence is that the law is not always offering the protection that parliament intended to people with disabilities.

[1] Price Waterhouse Cooper "*Disability Expectations Investing in a Better Life a stronger Australia*" 2011

Disability Standards for Education 2005 ("Standards")

A review of the Standards was held by the Department Of Education Employment and Workplace Relations in 2011. Implementation of any recommendations in response to this review was held over due to the proposed consolidation of federal antidiscrimination legislation. As a consequence, no action has been taken in relation to addressing the inadequacies of the Standards.

In relation to the proposed consolidation of antidiscrimination legislation, many individuals and organisations took the opportunity to set out proposed changes to address the perceived ineffectiveness of the DDA. This project has also been held over, however it contains important feedback on the DDA that should be taken into consideration by the Commission.

In addition to the Commission availing itself of the results of the Standards review in order to inform itself, further issues have arisen in the interpretation of the Standards, issues which threaten the usability of the Standards themselves, and the DDA in relation to complaints of discrimination in the area of education.

The difficulties lie in Parts 4.2 [3], 5.2 [2], 6.2 [2] and 7.2 [5] and [6]. These sections set out the process by which reasonable adjustments for students with disabilities are decided upon. An example of the manner in which the sections are being interpreted is set out below.

Walker v State of Victoria (2011) 297 ALR 284

> [284]. Some features, which are common to both ss 5.2(2) and 6.2(2) should be noted. The first is that both provisions require a school to consult a student or his or her parents about prescribed matters. **They do not, however, require that such consultation take any particular form or occur at any particular time.** Those involved may meet formally or informally. Discussions can be instigated by either the school or the parents. Consultation may occur in face-to-face meetings, in the course of telephone conversations or in exchanges of correspondence. Once consultation has occurred **it is for the school to determine** whether any adjustment is necessary in order to ensure that the student is able, in a meaningful way, to participate in the programmes offered by the school. The school is not bound, in making these decisions, by **the opinions or wishes of professional advisers or parents.**

Similar interpretations have been made in *Abela v State of Victoria* [2013] FCA 832 and *Sievwright v State of Victoria* [2012] FCA 118.

As is made clear, the courts are interpreting the Standards in a manner consistent with the decision-making process in relation to reasonable adjustments for students with disabilities resting completely in the hands of educational staff. Students with disabilities, their parents and practitioners have no rights or influence as to what

these decisions may be. Considering the conflict of interest that schools have in relation to the provision of reasonable adjustments, namely expenditure, to have discrimination legislation which allows school staff to make decisions about adjustments, regardless of how brief their consultation may be, and how ignorant those staff may be about disability issues, is a failure of legal drafting.

The quality of education for children with disabilities has been highlighted in Victoria through countless reports by the Victorian Auditor General's Office over the last 10 years, and the Victorian Equal Opportunity and Human Rights Commission Report "*Held Back-the experience of students with disabilities in Victorian schools*" 2012. The role that education plays in the lives of people with disabilities was also referred to in the Price Waterhouse Cooper Report "*Disability Expectations Investing in a Better Life a Stronger Australia*" which cites barriers to education throughout the document.

Given that s 34 of the *Disability Discrimination Act* provides a defence for educational institutions who can prove that they have acted in accordance with the Standards, the risk is that the drafting of the Standards has jeopardised access to the Act in this area.

ACCESS TO JUSTICE AND LEGAL ASSISTANCE PROGRAMS

Equal access for people with disabilities to discrimination legislation is compromised by the lack of funds available to provide them with the same supports that respondents can afford throughout a trial or hearing. Research on the socioeconomic status of people with disabilities is widely accepted, supported by the Price Waterhouse Cooper report above which on page 3 states that "*around 45% of those with a disability in Australia are either living near or below the poverty line."*

Transcript

The ability of respondents to pay for transcript in the absence of people with disabilities having the funds to do so, puts them at a significant advantage.

Video Evidence

Fees apply for video linkups which may be required by a person with a disability, or an expert witness from another state or country.

Expert Witnesses

Most expert witnesses require payments for reports and attendance.

Legal Assistance

As is made clear in the report *Legal Australia-Wide Survey of Legal Need in Australia 2012* (Law and Justice Foundation of New South Wales), access to legal

assistance is a significant impediment for the general population, but clearly moreso for individuals who cannot afford to pay for private representation.

Community Legal Centres, due to their size, are often unable to assist at a hearing or trial due to resource limitations. Individuals will often have to rely on pro bono assistance from counsel. This is not always available.

A failure by the State to facilitate legal assistance for people with disabilities has a consequence that the laws designed to assist them are inaccessible.

Costs

The *Disability Discrimination Act* requires for enforcement a trial at the Federal Court of Australia. This presents a substantial barrier to people with disabilities due to the imposition of a cost order against them if they are unsuccessful. For employment and education cases which could require trials between two and five weeks, such an order could be hundreds of thousands of dollars.

Currently, people with disabilities have the option of using state discrimination laws, which lead them to an administrative tribunal which is generally [but not always] no cost, or federal discrimination laws which put them at risk of costs. The impediments to Community Legal Centres of running trials are set out above. As an example, the Disability Discrimination Legal Service has a base staff of 2.6 EFT to service the state of Victoria.

Due to tribunals being no costs jurisdictions, private law firms, who may offer to assist clients on a “no win no fee” basis will not do so as it is fairly certain that even if they are successful, no costs will be awarded. This reduces assistance to people with disabilities who then have to rely on pro bono firms. Such assistance is difficult to obtain, particularly in the face of long hearings.

On the other hand, “no win no fee” firms are more motivated to work in the Federal Court due to the certainty of costs if successful, however this requires the client to put themselves at risk of costs.

An overview of both jurisdictions therefore presents a choice of two unsatisfactory systems for people with disabilities who wish to use antidiscrimination legislation.

Any decision to alter the hearing of complaints under the *Disability Discrimination Act* in order to implement a no cost system at the Federal Court, would simply re-create the same set of impediments currently present at the tribunal level.

The DDLS supports the notion of those choosing to go to the Federal Court not being at risk of costs, however respondents paying costs if they can afford to do so upon unsuccessfully defending a case.

Not only would this encourage more respondents to enter into alternative dispute resolution with a greater incentive, it would continue to encourage “no win no fee” law firms to provide legal assistance to people with disabilities using the Act.

Given the restricted availability of legal assistance to people with disabilities, the greater the number of legal alternatives available to those people, the more accessible the legislation itself is.

EMPANELMENT OF JURORS WITH DISABILITIES

In summary, the DDLS is of the view that current national and state jury laws should be reformed to avoid exclusion of people with disabilities from participating in jury duty. The DDLS maintains that the law should allow potential jurors with disabilities to participate in jury duty where such disabilities can be reasonably accommodated. This should replace the current legal position where prospective jurors with auditory and visual disabilities are readily challenged or stood down from a panel.

There are several compelling reasons with accompanying authorities which strengthen our submission, namely:

- The availability of resources enabling such jurors to perform in accordance with their duty to assess the evidence and arrive at a final, truthful verdict. There have not been issues in other jurisdictions regarding the availability of resources such as interpreters and newer and better technologies to assist jurors with disabilities. There is no reason why this should be any different in Victoria.
- The idea of a representative jury necessitates that people with disability be included in the jury process as they form an important part of the community.
- The enhancement of procedural fairness by including such jurors as they possess added perception in some issues during trials given the circumstances of their disability.
- Inclusion of jurors with disabilities would create consistency with other court rules and procedures.
- The possible beneficial effects on other members of the jury to have professional and positive exposure to people with disabilities.

Our system of jury duty effectively prevents people who are blind or deaf from participating as jurors. Schedule 2 of the *Juries Act 2000* (Vic) disqualifies people who are not able to 'communicate in and understand' English[2] and people with a physical disability who are not 'capable of discharging' their duty as a juror.[3] Whilst this is not an express exclusion of persons with sensory disabilities, we are not aware of any instances of blind or deaf jurors in the history of the Victorian justice system.

[2] Schedule 2, s 3(f).
[3] Schedule 2 s 3(a).

In the High Court in *John Fairfax Publications Pty Ltd v Rivkin*,[4] Callinan J took the opportunity in a civil defamation case to emphasise the deference that juries are accorded in our justice system. He observed that

> 'both as a practical and legal matter, a jury's decision on a factual question, although [not] impregnable, does have an authority over and above that of a [tribunal of fact constituted by a single trial judge] … The jury is representative of the community.'[5]

At present, all States and Territories tend to exclude in practice blind or deaf candidates from jury service. In all jury statutes such exclusion may be supported by an express exclusion of people with disabilities and/or a requirement that candidates be either able to read English or are allegedly incapable of performing the duties of jury service without proper articulation as to why. Some international jury law is also in line with Australian jury law.[6]

Some overseas jurisdictions provide contrast. Texan jury law provides for reasonable accommodation of a deaf or hard of hearing person serving as a juror.[7] An interpreter shall be present at all times during the case[8] and shall be allowed in jury deliberations.[9] In addition, the New York Court of Appeals has indicated that the presence of an interpreter in the jury room will not give rise to breaches of confidentiality and illegal interference.[10] Furthermore, s 504 of the Illinois *Rehabilitation Act 1973*[11] appears to provide that automatic exclusion on grounds of disability is a violation of the law, even for blind or deaf candidates.[12] Meanwhile, according to a detailed article in the St. Peterburg Times,[13] one deaf woman who relied on interpreters was elected forewoman of a jury in a civil proceeding.

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[4] John Fairfax Publications Pty Ltd v Rivkin [2003] HCA 50 (10 September 2003) ('Rivkin').
[5] Callinan J, *Rivkin* at 184.
[6] See, eg, Section 4(m), Jury Act (NEWFOUNDLAND, CANADA); Section 4(a), Jury Ordinance (HONG KONG).
[7] Section 62.1041(a) Government Code (Tx), as amended by the Seventy-fourth Legislature. Cited in Opinion, Texas Attorney General, May 14 1996, http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm.
[8] Ibid.
[9] Section 21.009 of the Civil Practice and Remedies Code (Tx). Cited in Opinion, Texas Attorney General, May 14 1996, http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm
[10] New York v. Guzman, 555 N.E.2d 259 (N.Y. 1990). Cited in Opinion, Texas Attorney General, May 14 1996, http://www.oag.state.tx.us/opinions/op48morales/dm-392.htm.
[11] 29 USC 794
[12] Illinois Legal Aid. http://www.illinoisprobono.org/index.cfm?fuseaction=home.dsp_Content&CONTENTID=212&suppressAll=true. Last update 17 November 2002.
[13] Anita Kumar, 'Deafness is no obstacle for jury duty in bay area', St. Petersburg Times 5 June 2000 <http://www.sptimes.com/News/060500/TampaBay/Deafness_is_no_obstac.shtml> at 7 September 2004.

In the absence of practical difficulties posed by blind or deaf jurors, the selection of such persons should not compromise but only add to the perceived fairness of a trial. The New South Wales Law Reform commissioner remarked in April 2004 that trial lawyers believe that blind or deaf jurors will compromise the fairness of the trial because such people are unlikely to fully 'comprehend or deliberate on the evidence'.[14] But the selection of blind or deaf jurors will only add to the special authority of a jury, a tribunal of fact, in that it will be representative to an unusual degree of the wider community.

In matters that involve defendants, plaintiffs, and third parties with disabilities, blind or deaf jurors could also enhance the authority and fairness of a jury as a tribunal of fact in such matters. One such case came before Justice Teague of the Victorian Supreme Court in 2001 in *R v Masters*.[15] Four people, three of whom were profoundly deaf, pleaded guilty to manslaughter of another profoundly deaf man. In the course of his sentencing reasons, Teague J observed that 'a substantial degree of [naiveté] typically affects people suffering from a profound hearing loss since birth'[16] and that the deaf offenders' naiveté and gullibility were 'traits … linked to the disability'.[17] His Honour's observations were offered in a case where by pleading guilty, no evidence was called or judicial notice taken of facts in support of those observations. It may be that a juror with a disability could have taken a different view about traits linked to profound deafness than a judge without a disability, concerned to take into account disability in sentencing. Indeed, the special insight of a juror with a disability in such matters would appear to add more weight to the authority and fairness of a jury as a tribunal of fact.

The present effective exclusion of blind and/or deaf people from jury duty also seems inconsistent with other court processes. For example, in most jurisdictions, jurors have to swear an oath or make an affirmation that they will 'give a true verdict according to the evidence.'[18] This is the same sort of commitment that must be made by witnesses in most jurisdictions, substituting 'account' for 'verdict according to the evidence'.[19] Without that commitment, witnesses are not competent to give sworn evidence, although they may still give unsworn evidence. As a result, witnesses need only show capacity to understand and honour the obligation of truthfulness to

[14] Michael Tilbury, The World Today on ABC, April 6 2004, <http://www.abc.net.au/worldtoday/content/2004/s1082248.htm>.
[15] R v Masters & Ors [2001] VSC 111 (10 April 2001).
[16] Ibid at [10].
[17] Ibid at [26-27]
[18] Juries Act 1967 (ACT), s 45; Jury Act 1977 (NSW), s 72A; Juries Act 1980 (NT), s 58; Juries Act 1927 (SA), s 33; Jury Act 1899 (Tas), Sch 2 Form VII; Juries Act 2000 (Vic), Sch 3. Cited at [64] in The Laws of Australia as at July 2004.
For [19] Section 13(1) Evidence Act 1995 (Cth) (regarded as basis for uniform evidence legislation in ACT, NSW, and Tas); s 9B(2) Evidence Act 1977 (Qld); s 9(1) Evidence Act 1929 (SA); s 100A Evidence Act 1906 (WA). Cited in Gans, J, and A Palmer, Australian Principles of Evidence, 2nd Edition 2004, pp 49-50.

be eligible to give sworn evidence – whether they are blind or deaf. In the same way, capacity to understand and honour the obligation of truthfulness perhaps should be more important to eligibility of a potential juror in a trial, as opposed to the fact of their blindness or deafness.

Moreover, it is not a ground of appeal that a juror had been asleep during part of the trial.[20] In other words, jurors appointed under current law must be physically present yet are not expected to be consciously attentive for the duration of their empanelment. Our justice system, therefore, connives at a juror receiving no auditory and visual input for an indefinite period at trial, yet excludes a blind or deaf juror who may compensate for limited ordinary auditory and visual input through alternative, equally reliable types of input about the credibility of a witness. As Illinois Legal Aid has observed, a blind juror - currently excluded by Australian jury law – 'can hear the clearing of the throat or pausing to swallow, voice quavering or inaudibility due to stress … [that is,] things permit[ting] a blind juror to make credibility assessments of witnesses just as well as sighted jurors.' As a result, it is not clear why a trial is fair when a juror falls asleep and yet unfair when a juror is permanently blind and/or deaf. Moreover, people with such disabilities are accustomed to long periods of higher concentration than other people because of the nature of their disabilities. Such people may be less likely to suffer a lapse in conscious attention during a jury service in a trial.

Another group of people with disabilities for whom judgments are made about their suitability for jury duty are people with complex communication needs who require communication devices or communication support workers to expressively communicate.

With today's technology and continuing product development that addresses or alleviates sensory limitations, it is neither reasonable nor necessary to permit arbitrary exclusion from jury service on grounds of disability, English incapacity, or an imputed inability to discharge their duties as a juror, or satisfaction of the Sheriff (See Appendix B for a discussion of the present position taken by the NSW Sheriff's Office to potential jurors with disabilities). Rather, that approach should now be discarded in favour of a more reasonable, inclusive approach to jury service candidacy of people with disabilities.

[20] R v Grant [1964] SASR 331.

RESTRICTIVE PRACTICES

The continued use of restrictive practices against people with disabilities puts Australia in conflict with international human rights legislation.

The Department of Human Services [State of Victoria] has in the last few years made significant steps in regulating restrictive practices in its services. While accepting that changes "on the ground" may lag behind policy and procedure, the Department of Human Services' aim to cease restrictive practices completely is admirable and proper.

Unfortunately, restrictive practices in schools against children with disabilities remain a systemic problem which has shown no signs of change, despite the urging for regulation by statutory authorities. We refer to the joint submission to the Department of Families, Housing, Community Services and Indigenous Affairs by the Federation of Community Legal Centres which should be read as part of this submission, and which is attached.

The continued failure by the Department Of Education and Early Childhood Development to regulate restraint and seclusion puts children with disabilities at risk of injury or death. Attempts by advocacy organisations, parents and peak bodies to have this issue addressed have failed. This includes approaches to the relevant Federal Government Ministers of the day. If the State cannot demonstrate interest in protecting one of the most vulnerable groups in our society from physical and psychological harm, it is hard to envisage how the finer points of protecting the rights of people with disabilities will be competently addressed.

SUMMARY

The short timeframe required to respond to this inquiry has limited our response. We urge the Commission to make use of the reports and research documents of the last 10 years that address in part, many of the terms of reference. It is the opinion of the authors of this report that Australia does not meet its obligations to people with disabilities as set out in the UN *Convention on the Rights of Persons with a Disability.*

While the road to meeting its obligations is not always clear, we believe there have been sufficient advisory reports to guide the State in going some way towards achieving significantly better outcomes for people with disabilities living in Australia. If we can be of more assistance to the Commission, we would welcome any opportunity to do so.