



RESPONSE TO THE DRAFT OF AUSTRALIA'S INITIAL REPORT UNDER THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES

The DDLS

The Disability Discrimination Legal Service ("DDLS") is one of the peak disability discrimination legal bodies in Victoria that works with people with disabilities to enforce their rights as they are embodied within the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD), through its work in assisting people with disabilities under Federal and State discrimination legislation. The DDLS is therefore ideally positioned to comment on the Initial Report on the United Nations Convention on the Rights of Persons with Disabilities ("the Report").

Summary of Response

The DDLS is concerned with the correctness or accuracy of the information that the Commonwealth intends to submit to the United Nations. In fact, the DDLS has made formal submission to the Federal Attorney General's office in relation to the crisis facing children with disabilities in Victorian schools. At least one complaint per month under discrimination legislation is made against the Victorian government in the area of education. The Report does not reflect the said information notwithstanding our efforts to put the Commonwealth on notice, hence we have strong reason to state that Report is by itself is misleading.

We note the Commonwealth has emphasised awareness raising or education, in its response to its obligations of compliance with the CRPD. This is unfortunate and insufficient in our view. Anti-discrimination laws have been in existence for people with disabilities since the mid eighties. The Commonwealth parliament passed the Disability Discrimination Act in 1992 ("DDA"). The relevant human rights commissions have been educating the community on the aims and objectives of these laws for decades. That such widespread and continuing program of awareness raising has not substantially affected the treatment of people with disabilities means that much more needs to be done.

We believe it is incumbent on the government to do so. In fact, an analysis of respondents in discrimination complaints, and general complaints about the poor treatment of people with disabilities, will reveal that the major respondent standing in the way of people with disabilities achieving equal rights is government itself. Awareness raising seems redundant or ironic if those responsible for the mistreatment of people with disabilities work alongside the same people conducting the awareness raising. While we understand the impetus of the Commonwealth to put a positive spin on what is happening to people with disabilities in Australia, we also believe it has an obligation to be honest and transparent, and the Report needs to be reviewed in light of this.

PARAGRAPH 12

Paragraph 12 of the Report states that “*Persons with disabilities are highly valued members of families, communities and workplaces and make a positive contribution to the diversity of cultural and community life in Australia.*”

State and Federal government and non-government reports released in the last 1 1/2 years suggest that the situation for people with disabilities in Australia is far from acceptable and does not reflect the above claim. ‘*SHUT OUT: A report prepared by the National People with Disabilities and Carer Council 2009*’ and the Victorian Office of the Senior Practitioner Annual Report present a very different analysis of the status of people with disabilities in Australia. There are numerous other reports that are easily accessed that present similar information.

PARAGRAPH 15

Paragraph 15 of the Report refers to anti-discrimination legislation and implies that the existence of such legislation has led to improved human rights outcomes for people with disabilities.

The DDLS submits that whilst the DDA provides an avenue of redress, it systemically fails many people with disabilities in achieving the Act’s aims for the following reasons:

1. Complaints of discrimination must be driven by people with disabilities. Even the provisions of the DDA that define offences have not been tested because there has been no single case of prosecution. The AHRC who is tasked to investigate complaints of discrimination merely perform a simple administrative investigation, hence its “fact finding” effort rarely assists the aggrieved party who 90% of the time does not have the means to uncover information vital to their cases.
2. Complainants are intimidated by the complaints/court process and fear the possibility of having to pay costs. There are no protective costs orders available to complainants, including those who institute public interest proceedings.
State anti-discrimination tribunals, while commonly understood to be free have been known to award cost orders against unsuccessful claimants. There are also some that are seen to be unprogressive and therefore there is widespread reluctance, particularly for unrepresented litigants, to use them.

PARAGRAPH 23

Paragraph 23 of the Report refers to Statistical data relating to the commencement of the DDA in 1993 to 30 June 2009 stating *there had been a total of 10,217 disability discrimination complaints made under that Act.*

The DDLS submit that data is not contextualised. It does not therefore reflect how many of these complaints are against government bodies, were resolved or of a recurrent nature. There is no analysis by governments of complaints against government or action by governments to ascertain what the systemic issues are and address them, despite a request by NGOs. If the Commonwealth had more successful positive interventions and compliance with the CRPD occurred, then the number of disability discrimination complaints would reduce, and that this would be an indication of the Commonwealth’s success. Currently, discrimination complaints continue to be lodged and timeframes processing those complaints are inadequate due to the Commission’s inability to keep up with the increasing workload. We do not believe that the said data showcases successful compliance with the UNCRPD -rather it is clearly indicative that people with disabilities continue to be discriminated against in a range of areas.

PARAGRAPH 38

Paragraph 38 of Part B: Articles 5 and 8–30 of the Report in relation to equality and non-discrimination

refers to Australia's anti-discrimination laws being underpinned by a human rights or equal opportunity commission in each jurisdiction which have a range of functions in relation to the anti-discrimination legislation in their jurisdiction.

The existence of state and federal human rights commissions has had little bearing on correcting discriminatory conduct, because it simply provides a limited investigative and conciliation service" for complainants, and has no power to make orders.

It would be more useful for people with disabilities if the AHRC could bring a complaint on their behalf. This is currently not the case, and therefore individuals bear the full responsibility of ensuring human rights legislation compliance. This is not practical or desirable, and in fact has not been successful in our view. In contrast, the AHRC has powers to grant exemptions to the DDA. The DDLS believes this power is used too frequently

The decision in *Clarke v Catholic Education Office* upheld the right of deaf students to be educated through their native sign language, Auslan. The confidence of government and other substantially sized organisations to discriminate against people with disabilities, despite the existence of human rights Commissions and the court's attempt to enforce them is reflected in the number of repeated complaints on the right to Auslan in the education system that have been made and are current in State governments systems. This demonstrates that the DDA, human rights commissions and case precedents make little difference to arrest discriminatory conduct if government continues to refuse or fail to impose policies that address the discriminatory treatment.

PARAGRAPH 45

In the report, Paragraph 45 of Part B articles 5 and 8-30 showcases "awareness-raising" as a tool to promote a greater understanding of human rights across the community.

The DDLS submits that education is important as part of the overall plan to reduce or prevent disability discrimination in Australia, but is an insufficient response to Australia's obligations under the CRPD. The \$12 million quoted could be better spent reducing the time it takes for complaints to be processed and heard by the AHRC, or assisting people with disabilities to pay for lawyers and other costs necessitated by the requirement on them to take breaches of discrimination laws to the courts. Further, there needs to be greater policing of government given that the most significant breaches of disability discrimination laws are committed by government. A CRPD compatibility statement must accompany and precede every policy, practice or procedure adopted or implemented by them.

PARAGRAPH 50

Paragraph 50 Article 9 Accessibility in the Report refers to the DDA, and how the AHRC has functions of advising on the development of standards, monitoring and reporting on their operation, and granting temporary exemptions from the standards.

The DDLS considers the AHRC's power to exempt organisations from the DDA, has been unhelpful to the rights of people with disabilities in the past, and therefore not something to be showcased as some sort of compliance tool in relation to the CRPD.

PARAGRAPH 51

Paragraph 51 of Part B articles 8-30 Article 9 Accessibility refers to the *Disability Standards for Accessible Public Transport* (commenced on 23 October 2002,) and how they establish minimum accessibility requirements to be met by providers and operators of public transport conveyances, infrastructure and premises.

The DDLS submit that standards have not been effective and helpful as claimed. The Victorian Department of Transport and current tram operators admit they are not in compliance with the standards and there has been no intervention by the AHRC. Approached on this matter, the Department of Transport have no intention of meeting the standards. Once again it is left to a person with a disability to make a complaint and begin a court case against the State of Victoria. This has recently occurred, and the matter is currently before the Federal Court. It is therefore not open to Office of the Attorney General to use these standards as an example of compliance with the CRPD. Indeed, it is instead an example of government's refusal to contribute to compliance with the CRPD and discrimination legislation, and highlights the burdens on individuals with disabilities to bring the government to task.

PARAGRAPH 56

Paragraph 56 on Accessibility in the Report refers to the establishment of the Aviation Access Working Group to consider practical measures that can be taken by both industry and government to improve access to air services for persons with a disability.

People in wheelchairs still cannot access planes. Airlines do not allow wheelchairs to be carried or used within the passenger area. Aeroplanes are not designed for wheelchair use, and airlines continue to refuse to allow some wheelchairs to be stored below due to “occupational health and safety” reasons. People in wheel chairs must therefore suffer the predicament of refused or demeaning services simply because they rely on mobility equipment. People in custom-made wheelchairs that are designed to specifically support them and ameliorate particular physical problems, cannot travel at all, because they are unable to sit in an airline seat.

The safety literature or cabin announcements are not provided in alternative formats for people with visual or sensory impairments.

PARAGRAPH 58

Paragraph 58 in the Report on Right to Life refers to Persons with disabilities enjoying the right to life on an equal basis with all other Australians.

The DDLS submit that the right to life is not strictly interpreted as the right to be alive. It encompasses the right to a quality of life. State and federal reports conclude that people with disabilities do not enjoy the same quality of life as their nondisabled counterparts, and the Commonwealth is aware of this.

PARAGRAPH 64

Paragraph 64 in the Report refers to “general acceptance in Australia of the value of supported decision making frameworks” in relation to a person with a decision-making disability.

In Victoria, decision-making for people with disabilities receiving services from the Department of Human Services (“DHS”) is often restricted to events such as planning meetings. The DHS Language Policy allows interpreters to be used in very limited situations, but allows no right for people who are deaf to receive services in their native language. These services encompass residential services and day services. Therefore daily decisions are often not possible due to the inability of deaf people with disabilities to communicate with their carers and staff. The same applies to people with complex communication needs, who require augmentative and alternative communication. There is no right to this communication in Victoria and in fact, a range of government schools have policies that refuse to

recognise the right to native sign language and augmentative and alternative communication, despite Article 2 of the CRPD.

It is not possible to make decisions when you cannot communicate. The Commonwealth have done nothing to ensure these rights for people with disabilities.

PARAGRAPH 70-76

Paragraph 70-76 of the Report relates to Access to Justice for persons with disabilities.

The DDLS consider the Federal Court/Federal Magistrates Court to be largely inaccessible to people with disabilities, due to the reasons espoused in relation to paragraph 38. There is no access to justice when people with disabilities are unable to use laws specifically designed to protect them, hire lawyers, obtain reports that assist their case and be expected to have the confidence to litigate against government.

The DDLS submits that due to the significant gap between the life experiences of members of the judiciary and lives of people with disabilities, Federal Court decisions do not reflect the aims and objectives of the convention, nor domestic human rights legislation. In *Devers v Kindilan Society*: (Fed Ct 2009) the court found that it was acceptable for a profoundly deaf residential care worker to have no access to training or staff meetings through Australian Sign Language due to the fact that she only worked part-time. The decision was also despite the fact that the carer had to undertake medication training, fire training and was then responsible for the care of other people with disabilities. Kindilan Society sub contracts to the Department of Human Services and is a substantial organisation owning multiple properties and running a variety of services. The decision endorses breaches of the CRPD in a number of areas, including deaf people's right to their native sign language, their right to employment, and people with disabilities' rights to a safe environment and quality of life.

PARAGRAPH 87

People with disabilities in Australia continue to be subjected to inhumane and degrading treatment contrary to the claims in the Report. One example that has been brought to the attention of the Premier of the State of Victoria is the requirement for children with multiple disabilities to travel to special schools on buses for up to 4 hours per day. No food, water, appropriately trained supervision, toilet breaks or activities are provided during this time. Children can urinate or defecating in their pants and sit in those conditions for up to 2 hours. The State of Victoria has ignored formal representations that these conditions breach domestic and international human rights legislation.

PARAGRAPH 94

The Report claims that the Victorian Government has implemented a number of policies to ensure that persons with disabilities are protected from all forms of exploitation, violence and abuse. Examples quoted are the Disability Services Commissioner and the Office of the Public Advocate. Neither organisation has the power to direct government to cease actions which cause violence and abuse to people with disabilities. Again, it is the government itself that is largely responsible for violence and abuse of people with disabilities through, in Victoria, the Department of Human Services and the Department of Education and Early Childhood Development. Chemical and physical restraint in government Community Residential Units have been formally reported on, and physical restraint and coercion to chemically restrain children is reported regularly in relation to children with disabilities in schools.

PARAGRAPH 98

Protecting the integrity of the person (article 17).

Australia considers that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental illness, where such treatment is necessary as a last resort and subject to safeguards.

The DDLS submit that people with disabilities are consistently denied physical and mental integrity and are subjected to breaches of their rights as they are defined by the UNCPRD. To this extent breaches of the UNCPRD that are defined as 'measures taken for the treatment of mental illness, where such treatment is necessary as a **'last resort'** are consistently used as the **first response** to responding to the physical and mental difficulties that some people with disabilities face.

The DDLS submit that people with disabilities are not subject to safeguards such as the UNCPRD and that terms such as 'last resort' and 'safeguards' are ambiguous terms open to interpretation and this ambiguity creates a further risk to the physical and mental integrity of people with disabilities. The physical and mental integrity of disabled students is threatened every day when Victorian Special school buses require children to travel 4 hours per day without food, drink and toileting while sometimes harnessed. These breaches of the UNCPRD have been repeatedly brought to the government's attention and there is a refusal to address them.

PARAGRAPH 105

Right to enter/remain in Australia.

The Report claims "In relation to non-nationals, persons with disabilities are assessed on the same basis as all other persons seeking to enter Australia."

The Migration Act disallows the migration of people with disabilities. The DDLS submits that such a restriction amounts to a breach of the UNCPRD. .

PARAGRAPH 112

The Report showcases the Home and Community Care (HACC) Program as being a program that supports families where there are members with disabilities.

The DDLS submit that HACC programs provide limited assistance to people with disabilities. HACC programs are limited to certain disabilities. *B v Hume City Council* illustrates the limitations of HACC programs and the inadequacy of the HACC system as an ongoing means of meeting the needs of people with disabilities. In this case, Hume City Council withdrew services to a single mother with two disabled children claiming their staff did not have the skills to deal with the children but refusing to put in appropriate training. As a result, the parent has attempted to relinquish one of her children. The DDLS submits that this program cannot be used to show compliance with CRPD.

PARAGRAPH 113

The Report claims that The Younger People with Disability in Residential Aged Care Program is "having a positive impact on a large number of younger persons living in, or at risk of admission to, residential aged care and that it was on track to reduce the total numbers of young persons in nursing homes by up to 689 persons by 2011. "

Young people are still being placed into nursing homes even if the numbers are reduced by 689

persons. Nursing homes are generally inadequately resourced to meet the specific needs of young people. Australia has the resources to address this problem immediately but chooses not to do so.

PARAGRAPH 114

The Australian Government claims it provides funds to the States and Territories to manage and deliver public housing.

People with disabilities can spend many years waiting for public housing. In the meantime they can live in conditions which are inhumane and degrading, or are homeless - particularly those with mental illness. Australia has the resources to address this problem immediately but chooses not to do so.

PARAGRAPH 125

Personal Mobility.

The Report claims that the Australian Government is working with the States and Territories as part of broad ranging reforms under the National Disability Agreement to ensure more consistent access to aids and equipment for persons with disability across Australia by the end of 2012.

The DDLS submit that people with disabilities cannot access anything but the most basic of equipment, and more sophisticated wheelchairs, communication devices, and so on are not covered by aids and equipment programs. This results in the individual needs of people with disabilities not being met, and the quality of their life being affected by limitations on equipment and aids that best meet their needs.

PARAGRAPH 128

The Report implies positive access to captioning services for deaf people.

There is only one cinema in Victoria that offers captioning for the deaf. The DDLS made a submission to the AHRC this year related to the application of the Australian Subscription Television Association (ASTRA) for a temporary exemption from the application of section 24 of the DDA to their members. Their members include organisations such as Foxtel and other multi-national broadcasting companies. ASTRA claimed that its members needed the exemption because of the financial hardship that compliance causes their members and the need for more time to caption their services. The DDLS submits that the granting of the initial exemption from section 24 of the DDA and the possible granting of a further exemption extending the period that people with disabilities will be denied their rights related to goods and services constitutes a breach of Australia's obligations under Article 30 - Participation in cultural life, recreation, leisure and sport; Education article 24 and Accessibility article 9.

Access to captioning to television is extremely poor. Despite countries in Africa providing simultaneous native sign language interpretation on television, Australia does not provide the same service to deaf people.

PARAGRAPH 136

Australia claims in the Report that it recognises that parents and carers of young children with disability are at significant risk of isolation and are often socially disconnected from family and friends due to the intensity of their caring role. Despite this, parents in Victoria regularly threaten to, and indeed do, relinquish their children due to insufficient support from government. The Commonwealth is aware through the "Shut Out" report and many other previous reports in relation to the mental health status of carers, that the quality of their lives is poor and mental health problems frequent. The Commonwealth's

response has been insufficient and it is not open to the Commonwealth to imply that carers in Australia receive adequate support services.

PARAGRAPH 144

The Report claims that in Victoria, the Program for Students with Disabilities provides adequate support for children with disabilities. The Attorney General's office has received formal reports from the DDLS on this subject which are self explanatory. Case law upholds the discriminatory nature of education services for Victorian children with disabilities. The DDLS submits that any implication that children with disabilities are receiving an adequate service in Victorian schools misleads the UN committee. The DDLS has advised the Attorney General's office that it is making a formal complaint to the Committee under the CRPD. It is not open to the Commonwealth to provide its Report to the UN Committee in its current form in relation to this article.

PARAGRAPH 160

The Commonwealth quotes the DDA to imply that people with disabilities have equal access to healthcare. The DDLS submits that they do not.

As an example, in Victoria, public hospitals have a chequered record of providing Auslan interpreters for deaf people. There have been four complaints against the same public hospital in a two-year period relating to their failure to provide interpreters. These hospitals do not change their practices and deaf people are at risk by not being able to communicate with hospital staff.

PARAGRAPH 165

The Report claims that people with disabilities receive adequate habilitation and rehabilitation. These services are extremely limited, and access to aids and equipment which support such services is also limited.

The DDLS submit that there is no right to anything but the most basic of equipment and time-limited rehabilitation.

PARAGRAPH 175

The report claims that the Australian Government is committed to ensuring persons with disabilities have the right to work and to gain a living by participation in a labour market and work environment that is open, inclusive and accessible.

The DDLS submits that the Federal Court decision of *Devers v Kindilan* confirms workplaces are not accessible for deaf people (See above Paragraph 71). An analysis of the complaints that the DDLS receives and has been receiving for the last 10 years, confirm that employment is rife with discrimination against people with disabilities.

PARAGRAPH 203

The Australian Government states in the Report that it is committed to ensuring all Australians have the opportunity to participate in and enjoy cultural life, recreation, leisure and sport.

There are limited opportunities for people with disabilities to participate in these areas. In particular, camps, clubs and recreational groups catering for persons with disabilities often refuse to provide sign language interpreters for deaf people who are unable to participate. The Department of Human Services does not support private organisations to provide such interpreting. Therefore deaf people are

unable to have the same opportunities as others.

Turner v Inspire Camps (Federal Court 2010) is the current claim relating to this topic.

PARAGRAPH 221

Early Childhood Intervention for Children with Disabilities.

The Report claims that all Australian jurisdictions have early childhood intervention programs for children with disabilities.

In Victoria, funding to child-care centres is not for the child, but for the child-care centre itself. Therefore, the funding does not allow for one-to-one assistance if that is required and may not allow for specialist assistance. For example if a deaf child in a child-care centre requires Auslan or a child with complex communication needs requires one-to-one assistance with a Communication device, the funding does not provide for this.

Summary

The DDLS urges the Commonwealth to respect the responses to the Report from disability service providers, advocacy agencies and people with disabilities, who experience every day the reality of the Commonwealth's refusal to seek and/or mandate active compliance with the CRPD.