



## **Law Reform Submission to the Victorian Law Reform Commission**

### **Disability Vilification**

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## Abbreviations

AGS	Australian Government Solicitor
AHRC	Australian Human Rights Commission
DDA	<i>Disability Discrimination Act 1992 (Cth)</i>
DDLS	Disability Discrimination Legal Service
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICERD	<i>International Covenant on the Elimination of Racial Discrimination</i>
ICRC	<i>International Covenant on the Rights of the Child</i>
ICRPD	<i>International Covenant on the Rights of People with a Disability</i>
NDS	National Disability Strategy
RDA	<i>Racial Discrimination Act 1975 (Cth)</i>
RRTA	<i>Racial and Religious Tolerance Act 2002 (Vic)</i>
VEOHRC	Victorian Equal Opportunity and Human Rights Commission

## I Executive summary

The Disability Discrimination Legal Service Inc ('DDLS') is a community legal centre providing legal advice and community education in relation to disability discrimination. Our work and regular contact with the community has enabled us to develop a unique insight into the incidence of disability vilification and the effect it has on people's lives and capacity to realise the right to equality.

DDLS has recently undertaken research into disability vilification. The research methodology included an exploration of the experiences of people with a disability in relation to disability vilification in the community, a review of State, Territory and Commonwealth laws protecting people with a disability from discrimination, harassment and vilification and a review of the literature, government policy and initiatives relevant to disability vilification.

The literature review revealed a shifting paradigm in relation to identifying and addressing the physical, social and cultural barriers to overcoming systemic discrimination of people with a disability. This is reflected by an emerging preference for models of disability which focus on the capabilities and capacity, rather than the limitations of people with a disability as a basis for achieving substantive equality.

The outcomes of the qualitative component of the research indicated that people with a disability experience a spectrum of negative behaviours which are generally perceived to be examples of 'vilification' and that the perpetrators are predominantly members of the public or service providers. However, on many occasions the conduct described by the participants is unlikely to be found by a court or tribunal to reach the required threshold of seriousness necessary in order for the conduct to amount to *unlawful* vilification. This threshold has been developed by the courts when interpreting and applying anti-vilification legislation in order to reflect the acceptable limits of government regulation of people's behaviour. The threshold also reflects the need to balance the competing rights of people with a disability with the right to freedom of expression and ensure any limitations on rights are reasonable, justified and necessary.

The review of government reports and publications such as those associated with the review of the DDA and the development of the National Disability Strategy ('NDS') highlight the importance of public acceptance and community support for people with a disability. In addition, government policy as outlined in the recently released NDS appears clearly focussed on measures to address the systemic nature of disability discrimination.

DDLS concludes from the research that disability vilification impacts on a person's self-esteem, confidence and security and therefore limits the capacity of people with a disability to optimise their capabilities, gain equitable access to the benefits of society and participate as an 'equals' in their community. Disability vilification contributes significantly to the isolation of people with a disability in

the community and accordingly, DDLS strongly recommends the introduction of regulatory initiatives to address this form of systemic discrimination.

DDLS also concludes that the introduction of laws designed to protect people from disability vilification are consistent with the broader aims of government policy and the emergence of newer and better adapted models of disability.

Although the eradication of disability vilification will require a number of different measures, DDLS is of the view that legislation prohibiting vilification ultimately sends a clear message to the community that such behaviour is not tolerated and furthers community awareness and public acceptance. It also reassures people who experience disability vilification that avenues for redress are available and importantly, that their right to equality and respect has been validated by government action.

### **Recommendation**

DDLS recommends the development and introduction of a regulatory scheme aimed at addressing disability vilification in the community through:

1. education and initiatives to improve public awareness of the isolation and barriers to social inclusion and equality; and
2. the inclusion of provisions which make it unlawful for a person to do an act (otherwise than in private) that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people with a disability.

## II Introduction

DDLS is a state-wide Community Legal Centre dedicated to the elimination of discrimination based on disability. It is a not-for-profit organisation and provides a free legal advice, representation and referral service for people with a disability who have experienced discrimination. DDLS also provides community legal education and undertakes law and policy reform projects in the areas of disability discrimination.

The Committee of Management is responsible for the strategic direction of the legal service and the development of policies, procedures and practices in collaboration with staff and management. The DDLS Committee of Management is comprised of people with a disability and people who work within the disability sector.

DDLS is funded by the Commonwealth and State Attorney's-General, and administered through the Victoria Legal Aid Community Legal Centre Funding Program. DDLS is supported by one full-time and four part-time staff members and a committed team of volunteers.

During the 2010-2011 financial year, DDLS provided 213 episodes of legal advice, represented 37 clients in primary dispute resolution and 15 clients in court or tribunal proceedings. In addition DDLS conducted 14 community legal education sessions and prepared 6 written submissions to various law reform projects<sup>1</sup>.

DDLS provides free of charge, advocacy for clients who have experienced discrimination seeking a remedy under the provisions of Commonwealth and Victorian anti-discrimination laws. These laws prohibit conduct which amounts to direct and indirect discrimination and harassment of people with a disability in areas such as employment, education and the provision of goods and services.

Through our casework and contact with the community, we are frequently made aware of instances of disability vilification experienced by people with a disability. Our experience is that vilifying conduct may be directed at individuals or a group or at people with a disability. Clients may seek assistance from DDLS in relation to a discrimination matter but may also reveal concurrent or past situations in which they have experienced vilification; or they may seek assistance specifically in relation to vilification. On occasions, DDLS is approached by disability organisations seeking legal advice about disability vilification in response to issues that have been brought to their attention. DDLS is able to assist when the vilifying conduct falls within the discrimination provisions of the Victorian equal opportunity legislation<sup>2</sup> or the discrimination or harassment provisions of the Commonwealth *Disability Discrimination Act 1992* ('DDA'). When it does not, we are obliged to advise the client that there are no legal protections against the conduct they have experienced.

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<sup>1</sup> Disability Discrimination Legal Service *Annual Report 2010-2011*.

<sup>2</sup> The *Equal Opportunity Act 1995* (Vic) and the *Equal Opportunity Act 2010* (Vic).

During 2009 - 2011, DDLS conducted research in relation to disability vilification. The research had several components:

1. A survey inviting responses from people with a disability and their carers to describe the incidence of disability vilification in the community.
2. A seminar in which attendees shared their experiences of disability vilification and the impact of vilification on self-esteem and security, their confidence to participate as an equal and respected member of society and the relative effectiveness of the available legislation.
3. A review of the literature and various disability models that underpin government policy initiatives.
4. A review of the State, Territory and Commonwealth legislation in relation to disability vilification and other forms of vilification and racial hatred.
5. A review of government reports and publications in order to understand government policy and initiatives aimed at improving experiences of people with a disability.

This report will discuss the outcomes of the research, draw some conclusions and make some recommendations for law reform.

### **III Disability**

The DDA provides for a broad definition of disability which includes: loss of bodily or mental functions or loss or disfigurement of part of the body, the presence of disease or organisms capable of causing disease; and learning differences and disorder of thought processes or behaviour. It includes a disability which presently exists, previously existed or may exist in the future, manifestations of the disability and the imputed characteristics of disability.<sup>3</sup>

The label 'disability' captures a broad group of people with little in common except that each has any one or a combination of a wide range of characteristics which result in some form of limitation to their mental, physical or intellectual capacity which a person without a disability, or a different disability, does not have. The label defines people within the group in terms of their actual or perceived limitations when compared to people outside the group.

The word 'disability' itself is problematic. 'Disability' prefixes 'ability' with 'dis'. 'Dis' is a Latin prefix defined as having a reducing or negating effect. The word disability and its alternative, 'impairment' does not inspire images of strength through adversity or capacity in the context of a person's disability.

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<sup>3</sup> s 4(1) *Disability Discrimination Act 1992* (Cth).

Instead the words create images of powerlessness, incapacity, no ability or at best 'diminished ability'. It can be argued however, that the words 'disability' or impairment are at least preferable to 'handicapped', 'retarded' or 'spastic'.

The connotations of the word disability itself may be partly responsible for community attitudes and perceptions about the status and treatment of people with a 'disability' in a community.

Weber<sup>4</sup> identifies some of the key attitudes that motivate disability vilification. Central to these is a sense that the individual with disabilities 'should not be here', that 'their presence makes people feel 'uncomfortable' and that people without disabilities are 'superior' and, therefore, have 'power over them'.

Titchkosky<sup>5</sup>, argues that, '[E]veryone disabled or not, who interacts with disability is engaged in producing its meaning and its social identity.' Barnes et al<sup>6</sup> support the argument through their work.

As such societal attitudes toward disability should be the starting point for the analysis of the cause, effect and solution to disability vilification. Barnes writes 'labels are generally imposed rather than chosen, and therefore, socially and politically divisive. It follows that 'disability' should be seen to be a social construct.'<sup>7</sup>

## ***A. Models of disability***

Models of disability are generally proposed by academics and classify different approaches to disability which may ultimately be used to underpin government policy and strategies for addressing the needs of people with a disability. In other words, they are devised by one group to describe another group. They may be criticised as theoretical and not reflective of reality and are influenced by attitudes, personal philosophies and perceptions of how things may appear. The analysis of models of disability also provides a useful method for understanding various approaches to gauging whether or not a particular policy or strategy is consistent with a generally held view and whether it may or may not be useful.

It has been suggested<sup>8</sup> that models of disability can be classified into two distinct groups. In one, people with a disability are generally dependent on society and as a result, may often be viewed as second class

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<sup>4</sup> Mark Weber, *Disability Harassment* (2007) New York, New York University Press.

<sup>5</sup> Tanya Titchkosky, *Disability, Self and Society*, University of Toronto Press (2003), 4.

<sup>6</sup> Colin Barnes et al, *Exploring Disability: A Sociological Introduction* (1999) John Wiley and Sons Ltd.

<sup>7</sup> Colin Barnes, *Disability Studies: what's the point?*, (2007) 1 (1) *Intersticios: Revista Sociológica de Pensamiento Crítico* 238, 4.

<sup>8</sup> The Michigan Disability Rights Coalition web page <<http://www.copower.org/leader/models-of-disability.html>> extracted 4 April 2012.



citizens, deserving of pity and subject to the view that people without a disability know what is best for them. In the other group, people with a disability are viewed as consumers of services who are to be afforded the same respect and treatment as a non-disabled customer. This approach is clearly more aligned with concepts of respect and equality however, it does not explain disability discrimination from within a community when a service is not being provided.

A comparison of the various models of disability reveals how concepts of disability create disempowering or empowering perceptions of people with a disability. The models can influence the expectations of people with and people without disabilities as to how people with a disability should access societal benefits, define their societal identity and recognise their capacity to contribute to society.<sup>9</sup>

The disempowering models of disability that may be more likely to legitimise individual perceptions and community attitudes that tolerate disability vilification appear to be embodied by the 'religious-moral', 'tragedy-charity' and 'economic' models of disability that segregate people with a disability and subsequently lead to their marginalisation. These models may serve to justify the construction of disability through implicit or explicit references to people with a disability as powerless and lacking in meaningful capacity as a result of their physiology, mental health or intellectual ability.

The 'social' model of disability describes disability as consequence of environmental, social and attitudinal barriers which impede people with a disability from achieving maximum participation in society. This view is apparent from the definition of disability provided by the Disabled Peoples' International as 'the loss or limitation of opportunities to take part in the normal life of the community on an equal level with others, due to physical or social barriers.'<sup>10</sup>

The social model of disability developed as a response to the medical model of disability. The medical model of disability reflects a perception of disability as a consequence of individual physical, mental and intellectual physiological deficiencies; limitations, generally unaffected by social or geographical influences.

The medical model measures and diagnoses deficiencies where disability is a category of physiology. The focus of the model is diagnosis and treatment related to the physiological management of the effects of an individual's disability. The medical model focuses on the medical process of removing or minimising the effect of abnormal physiology for the purpose of making a person with a disability as 'normal' as is physiologically possible.

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<sup>9</sup> Ibid

<sup>10</sup> Disabled Peoples International (2011) < <http://www.dpi.org/lang-en/>> at 4 April 2012

The medical and social models appear to have evolved from the religious and tragedy-charity models. Following the development of the social model other models have developed to further explain different aspects of disability and the development of public policy.

The social model of disability is the product of continuing sociological analysis of disability that began in the late 1960's with the seminal work of Carol Thomas. Thomas considers the development of disability studies as a response to the social oppression of people with a disability that originates from the concept of 'societal deviance' as the 'conceptual axis' around which disability was defined. The societal interpretation of disability makes it part of a political discourse that analyses the extent to which people with a disability's access to societal benefits is affected by social power.<sup>11</sup>

The tragedy-charity model focuses on disabled people as victims who deserve sympathy and compassion. In other words, people that society should feel sorry for. Arguably, this model is the most common social identity of people with a disability held by people who do not have a disability and has often in the past been adopted by charity groups, notwithstanding disability charities are often involved in fundraising initiatives for the empowerment of people with a disability. The view that the most vulnerable and powerless in society are 'deserving' of charity is condemned by its critics as the most disabling and the most counter-productive to a positive emancipatory perception of people with disability as strong individuals overcoming adversity.

The biggest problem that we, the disabled have is that you, the non-disabled, are only comfortable when you see us as icons of pity. Because disabled people are seen as tragic victims. It follows that they need care, are not capable of looking after themselves or managing their own affairs, and need charity in order to survive.<sup>12</sup>

The tragedy-victim model of disability disempowers people with a disability and fosters attitudes of their susceptibility to humiliation and ridicule. The powerlessness central to the tragedy-victim model of disability impacts on the self-esteem of people with a disability and increases factors that make protest and change through mass mobilisation more difficult.

The economic model of disability considers disability in terms of a measure of the extent to which a person can make an economic contribution to society. For example, a person's capacity for employment. This approach arguably furthers the denigration of disability. In a global society that has been globalised predominantly for economic rather than cooperative reasons, the perception that people with a disability are unproductive becomes particularly stigmatising. The stigma is increased by a perception that people who cannot contribute to economic growth in the same way and the same rate as other people are a burden to society.

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<sup>11</sup> Carol Thomas, *Sociologies of Disability and Illness: Contested Ideas in Disability Studies and Medical Sociology*, (2007) Palgrave MacMillan.

<sup>12</sup> Nabil Shaban, author and writer quoted on the Michigan Disability Rights Coalition website above n 8.

The rehabilitation model sits within the medical model. It perpetuates the concept of disability as physiological deficiency. Disability is something to be fixed. It is something that a person gets over and moves on from. A person with a disability can be 'trained' to live 'normally'. However, the rehabilitation model does not acknowledge the societal barriers that impede the progress of people with a disability and the oppression that seeks their submission into acceptance of a 'lesser life' compared to people who do not have disabilities. As such it cannot be seen to support the complete empowerment of people with a disability and the removal of social structures that marginalise people with a disability and maintain their marginalisation.

The customer-empowering model acknowledges the unavoidable reality that people with a disability typically need some kind of service provision. While doing so it acknowledges that many barriers to societal benefits are created by the denial of rights of independence for people with a disability. This model treats a person with a disability as an active participant in how services are provided to them rather than a passive recipient of a service as seen in other models. People with a disability who are in receipt of a service are seen as customers/clients and by implication hold the legal rights of consumers. The expert professional is therefore accountable for their standard of care and service.

The relatively recent development of the rights- based disability model promotes the rights of people with a disability as a response to oppression that people with a disability have suffered. Other rights movements such as the women's suffrage during the late 19<sup>th</sup> Century and the American civil rights movement during the late 1950s into the 1960s originated from a period of consciousness raising and the mobilisation of the oppressed that required laws to remove attitudinal barriers which had previously restricted access to societal benefits. Changing the legal position of people with a disability also requires a period of consciousness raising and mobilisation.

Some of the models discussed above construct a view of disability that may serve to justify individual or community condemnation of people with a disability who are 'holding us back', 'compromising resources', 'restricting growth' or 'taking advantage of their disability'.

The conceptualisation of disability as an idea that people with different individual physical, intellectual and psychological characteristics have rights to appropriate accommodations in order for them to access societal benefits is relatively new. The adaption-accommodation model of disability focuses on how environmental accommodation and an individual's adaption of their environment or physical ability can overcome the detrimental effects of their disability. It negates the assumption that a person with a disability is powerless, weak and cannot contribute in a meaningful way to society.

## ***B. Accommodating disability***

Environmental accommodation can occur through the provision of an appropriate means to ensure equality in relation to access to societal benefits. For example, the replacement of stairs or steps by a

ramp so that a person in a wheelchair can access a restaurant or the availability of alternative formats for written material such as 'talking text' technology or 'voice to text' technology to facilitate access to information.

Legislation in the form of Disability Standards<sup>13</sup> have been introduced in order to improve the access of people with a disability to public buildings, education and transport and augment existing Commonwealth legislation which creates a positive duty for educators and service providers to make reasonable adjustments to accommodate the needs of people with a disability. This legislation does more than provide legal redress to a person who has been discriminated against. They also send a message to the community that there is an expectation that reasonable adjustments need to be made and as such, they normalise the accommodation process. When tabling the Standards in Parliament, the Minister for Aging stated that improved building access enhances opportunities to access employment, education and services, and to connect with the broader community.<sup>14</sup>

The International Convention on the Rights of People with a Disability ('ICCPR') takes environmental accommodation further than access to the physical environment, to broader issues of equality and elimination of legal and social barriers to participation, social opportunities, health, education, employment and personal development<sup>15</sup>. Australia ratified the ICCPR in 2008 and by so doing is bound to treat persons with disabilities not just as victims or members of a minority, but as subjects of the law with clearly defined rights.

Legislation prohibiting vilification of people with a disability and providing a means of legal redress when vilification is alleged can be seen as a form of environmental accommodation for people with disability. Disability vilification laws have the power to change societal barriers represented by negative social attitudes towards people with a disability which underpins derogatory behaviours such as name calling and bullying. These attitudes manifest in derogatory treatment of people with a disability and arguably impose greater challenges in terms of access to societal benefits than are imposed by physical barriers.

Fundamental to facilitating change in negative community attitudes and individual perceptions of people with a disability is the recognition of the determination that people with a disability have to access community benefits despite the lack of appropriate accommodation. The triumph of people with a disability over adversity should be seen as a demonstration of their strength, tenacity and determination. We note that strength of character; tenacity and determination are often considered to

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<sup>13</sup> See the Commonwealth *Disability Standards for Accessible Public Transport 2002; Disability Standards for Education 2005; Disability (Access to Premises - Buildings) Standards 2010*.

<sup>14</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 March 2010, 2375 (Justine Elliot, Minister for Aging).

<sup>15</sup> United Nations Enable, *Backgrounder: Disability Treaty Closes a Gap in Protecting Human Rights* (2008) <<http://www.un.org/disabilities/default.asp?id=476>> at 9 April 2012.

be the qualities of the most accomplished people in society and of leaders. However, they are rarely recognised or valued in people with a disability.

The inclusion of provisions prohibiting vilification on the grounds of disability offer a public acknowledgment of the need to prevent or eliminate the expression of words, images, gestures or behaviour that manifests these attitudes for the purpose of promoting alternative positive attitudes towards people with disability. The reduction and elimination of these attitudes provide greater space for the promotion of attitudes that promote the strength of character of people with disability and the ability they necessarily gain to overcome the adversity of societal barriers.

Understanding the effect of perspectives of disability created by people without a disability is essential to the evaluation of regulatory models to reduce the negative effects of disability on people with a disability. It can be argued that models of disability are determined either on the basis of a philosophy that people with a disability are dependent on society, or alternatively, could be based on how the value of the contribution that people with a disability make to society can be equal to that of people without disabilities. However, this shift in thinking requires society to take responsibility for making appropriate accommodations to facilitate the capacity of people with a disability.

Weber<sup>16</sup> has analysed U.S. case law relevant to the application of disability legislation. Weber's analysis suggests that American laws currently fail to increase the capacity of people with a disability to enjoy all the benefits of living in a society such as that of America or facilitate the contribution of people with a disability to the development of American society and ensure that it is recognised.

To support his argument Weber refers to conduct in cases that humiliate, ridicule and intimidate people with a disability. The cases include a case in which a child is consistently ridiculed in front of their peers. In another case, a disability aide physically restrains a student with a disability and forces them to eat allergenic food containing their own vomit. Another example refers to a work supervisor of a person who would not shake their hand because they had HIV. A further illustration is the ridiculing, humiliating conduct of a person with an intellectual disability that affected his learning capacity. The person's supervisors at his maintenance and assembly job ridiculed him as stupid. He was required repeatedly to redo work without reason. They accepted him being humiliated by his fellow employees.

Weber refers to the work of Michelle Fine and Adrienne Asch as 'path breaking' regarding their challenge to the general view that the origin of disability stigma does not emanate from the individual but from 'human made' barriers. They cite Erving Goffman author of the seminal work on social attitudes towards people with disability *Stigma and Social Identity* and *Stigma Notes on the Management of Spoiled Identity* to support their argument.

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<sup>16</sup> Mark Weber above n 4.

Their view is that stigma is effectively a social construct that exists as an instrument of marginalisation of people with a disability. As such people with a disability become a manifestation of disability. This presents a paradox to people with a disability because in many instances people with a disability struggle against their disability defining them. For example, people with physical disabilities will not be deterred from accessing a building that is inaccessible to people who have a physical disability. While a person may not be able to see the stairs this does not mean that they will never enter a building with stairs. It just means that they have to develop a method of knowing where the stairs are in a way that was not intended or facilitated by the people who constructed the stairs.

It is at each point where the person cannot use the stairs because they cannot see them that the person is made disabled.

### ***C. Disability vilification in the community***

Our research has indicated that vilifying treatment manifests as both individual and group behaviours ranging along a spectrum from generally accepted usage of words such as ‘retard’ or ‘spastic’, taunting and teasing, or imitating perceived characteristics of a person with a disability to more serious assaults. Such behaviours are generally reported to occur when the perpetrators are in a group and one member of the group is inciting others to respond in a similar way, thus perpetuating the vilifying behaviour and the attitudes and perceptions that underpin it.

Generally people affected by vilification are those who are the most socially marginalised. This can be seen to be because vilification is a means to reinforce stereotypes and generate stigma that reinforces the justification for marginalising a person or group of people. The theoretical discourse related to vilification laws focus on the validity of anti-vilification laws with respect to how such laws affect rights to freedom of expression or the capacity of such laws to prevent psychological or physical harm to a person or group of persons caused by vilification.

For those who are working to extend the coverage of Australia’s vilification laws to other individuals or groups of people who are most vulnerable to vilification, the current racial and religious vilification laws provide a guide to how vilification laws may operate.

There are some analogies between racial and religious vilification and disability vilification. The incitement of hatred caused by racial or religious vilification that causes serious contempt for or severe ridicule is well recognised throughout history. Disability vilification may also be understood in a historical context. However, the result of such vilification with respect to how it has oppressed an entire culture or how it has led to horrific violence such as genocide is distinctly different.

Evans<sup>17</sup> refers to the systematic murder of hundreds of thousands of people with a disability as part of the Holocaust. However, these victims of the Holocaust do not seem to be remembered in the same way as the victims who died because of their race or their religion. It would appear that this is because disability is not a characteristic that is common to all people in the same way that race or religion is common to all people.

In the Australian context, Commonwealth, State and Territory legislation currently exists which prohibits vilification on the grounds of race<sup>18</sup>. In Victoria for example, vilification on the grounds of both religion and race is prohibited and in addition to civil sanctions, serious<sup>19</sup> racial and religious vilification attracting criminal sanctions are also part of the regulatory scheme.

However, disability vilification is different to racial or religious vilification and occurs in a different context. People who are discriminated against or vilified on the grounds of their race, ethnicity or religious affiliation may experience discrimination because of affiliation with a distinct social group or community. By comparison, there is a wide diversity within the disability attribute and people with a disability may not feel that they are a part of a distinct community group.

Survey data from the Australian Bureau of Statistics<sup>20</sup> indicates that people with a disability generally feel less secure within their communities than other people. The survey results are referred to in the National Disability Evidence Base<sup>21</sup> to show that people with restrictions in core activities feel more vulnerable than people without disability in the same situations. The survey also showed that 'compared with people without disability, people with restrictions in core activities were 1.8 times more likely to have been victims of physical or threatened violence'<sup>22</sup>. Racial and religious vilification is indeed a wide spread problem but arguably, it also has greater visibility in the community. Disability vilification may be less noticeable in the general community but is nevertheless a significant social issue which warrants regulatory attention.

There is considerable variation in terms of the needs and capabilities of people who have a disability. People with a disability often depend on others for assistance and as a result of mobility and other

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<sup>17</sup> Suzanne E. Evans, *Forgotten Crimes: The Holocaust and People with Disabilities* (2004) Ivan R. Dee Publisher.

<sup>18</sup> Tasmania also prohibits public conduct that incites hatred towards, serious contempt for, or severe ridicule of a person or group of persons on grounds of disability, sexual orientation and lawful sexual activity. NSW has similar provisions also prohibiting vilification of transgender persons, vilification on the ground of the homosexuality of the person; and vilification of people who are HIV/AIDS infected.

<sup>19</sup> 'Serious' racial and religious vilification under the *Racial and Religious Tolerance Act 2001* (Vic) requires an intention to incite as well as assault or threats of physical harm. It is prosecuted by the police.

<sup>20</sup> ABS 2007b, *General Social Survey: Summary Results*, cat. no. 4159, ABS, Canberra.

<sup>21</sup> Commonwealth of Australia, *National Disability Strategy 2010-2020 Evidence Base* (2011), 21.

<sup>22</sup> *Ibid* 22.

limitations, are not so able to access a social group with whom they can identify. The following is an illustration:

[I]t was clear from the submissions that too many people with a disability in the community are isolated and lonely. For some, the barriers in the built environment limit their ability to participate fully in community life. But for others the barriers are social and attitudinal. It is these barriers that have proved the most difficult to overcome.

Few can appreciate the impact of exclusion and profound isolation on the identity and self-esteem of people with a disability. Always defined as 'different', always defined by lack—many people spoke movingly of the impact of being defined by others. When identity is always framed by others and always framed in a negative way, it is difficult to develop and maintain a strong positive sense of self and difficult to establish and maintain relationships characterised by equality and mutual support.<sup>23</sup>

The increased use of the internet through blogs and other formats has provided a powerful forum for people to participate in disability vilification. The internet creates additional challenges because of the difficulties in tracking down the perpetrators and also, because State laws prohibiting vilification or discrimination do not operate outside Victoria.

A recent Victorian case<sup>24</sup> illustrates this issue. The complainant had been diagnosed with Asperger's Syndrome and became aware of a blog on the Internet entitled '*hatingautism*' that had been set up in the US. Mr Gluyas complained that he had been personally vilified, and about the constant vilification of people with autism spectrum disorders. The blog had been established on the Google domain and Mr Gluyas lodged a complaint naming Google as a respondent. As there are no disability vilification laws in Victoria, the complaint was lodged under the *Equal Opportunity Act 1995*. The case was dismissed by the Victorian Civil and Administrative Tribunal because the Victorian Act was found not to have any extra-territorial jurisdiction.

Disability vilification occurs in the community and contributes to the myriad of physical and social barriers to participation that people with a disability experience. When vilification occurs it can be generally correlated with negative attitudes of the community and individual perceptions towards people with disabilities. These attitudes underpin the general lack of behavioural and environmental adjustments necessary to accommodate the needs of people with a disability so that they can strive to overcome systemic discrimination and achieve substantive equality. Public policy and regulation in the form of access and transport standards have been developed to address some of the environmental barriers but further reform is needed to address the continuing behavioural and social barriers.

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<sup>23</sup> National People with Disabilities and Carer Council, *SHUT OUT: The Experience of People with Disabilities and their Families in Australia National Disability Strategy Consultation Report* (2009), 2.7.

<sup>24</sup> *Gluyas v Google Inc* (Anti-Discrimination) [2010] VCAT 540.



## IV Government policy and initiatives

### ***A. The National Disability Strategy***

The Prime Minister announced<sup>25</sup> the development of a National Disability Strategy through the Council of Australian Governments as a central mechanism for implementation of the International Covenant on the Rights of People with a Disability ('ICRPD')<sup>26</sup>. The strategy describes how 'a national effort is needed to make the necessary changes to transform the experience of people with disability and demonstrate the benefits for all Australians of more inclusive communities'. The NDS also describes how 'Australians with disability have significantly worse life outcomes compared to others or to people with disability in similar countries'.<sup>27</sup>

The NDS responds to a report<sup>28</sup> summarising the results of a national consultation process. This report is important because it documents the real lived experiences of people with a disability and illustrates entrenched and widespread adverse social and community attitudes.

A lack of social inclusion and the multiple barriers to meaningful participation in the community faced by people with a disability were the most frequently raised issues in the submissions and consultations. More than half the submissions received (56 per cent) identified exclusion and negative social attitudes as critical issues. People with a disability and their families, friends and carers reported daily instances of being segregated, excluded, marginalised and ignored. At best they reported being treated as different. At worst they reported experiencing exclusion and abuse, and being the subject of fear, ignorance and prejudice.<sup>29</sup>

The way in which community attitudes towards people with a disability are expressed ranges in impact and effect. Vilifying behaviours exist at the more extreme end of the spectrum and although exposure to these behaviours may be relatively short, the long term effects on self-confidence and feelings of worth, as well as fear associated with public settings highlights the real harm which results from vilification.

The NDS recognises the further debilitating contribution that adverse community attitudes have on people with a disability and how these operate to prevent people from enjoying economic participation,

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<sup>25</sup> The Honourable Kevin Rudd *Address to the National Disability Awards Ceremony*: Great Hall, Parliament House Canberra. 23 November 2009.

<sup>26</sup> The Convention was ratified by Australia in 2008.

<sup>27</sup> Commonwealth of Australia, *National Disability Strategy 2010-2020* (2010), 9.

<sup>28</sup> National People with Disabilities and Carer Council, above n 23.

<sup>29</sup> *Ibid.*

social inclusion and equality, consequences which should not be the inevitable result of an individual's impairment<sup>30</sup>.

The NDS addresses six policy areas:

- ***Inclusive and accessible communities***—the physical environment including public transport; parks, buildings and housing; digital information and communications technologies; civic life including social, sporting, recreational and cultural life.
- ***Rights protection, justice and legislation***—statutory protections such as anti-discrimination measures, complaints mechanisms, advocacy, the electoral and justice systems.
- ***Economic security***—jobs, business opportunities, financial independence, adequate income support for those not able to work, and housing.
- ***Personal and community support***—inclusion and participation in the community, person-centred care and support provided by specialist disability services and mainstream services; informal care and support.
- ***Learning and skills***—early childhood education and care, schools, further education, vocational education; transitions from education to employment; life-long learning.
- ***Health and wellbeing***—health services, health promotion and the interaction between health and disability systems; wellbeing and enjoyment of life.<sup>31</sup>

As discussed, the effects of vilification have a wide range of adverse effects on the lives of people with a disability. The effect on self-esteem and a sense of acceptance by the community influences a person's confidence to optimise educational and training opportunities, seek employment and achieve economic security. It also impacts on health and well-being.

The National People with a Disabilities and Carer Council, in preparing the *National Disability Strategy Consultation Report*<sup>32</sup> received 750 responses to its discussion paper. The discussion paper asked people with a disability and their families, friends and carers to identify the main barriers to their full participation in the economic and social life of the community. Of the 750 submissions received, 56% identified social inclusion and community as a barrier to participation; 34% identified employment; 29% identified education; 29% identified rights, justice and legislation; and 29% identified health and well-being<sup>33</sup>. More than half the submissions received identified exclusion and negative social attitudes as

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<sup>30</sup> Commonwealth of Australia, above n 27, 15.

<sup>31</sup> Ibid 9.

<sup>32</sup> National People with Disabilities and Carer Council, above n 23, 2.

<sup>33</sup> Ibid.

critical issues. The report noted that ‘... discrimination is a feature of daily life for many people with a disability and their families’<sup>34</sup> and provided a quote from one of the submissions that ‘[V]irtually every Australian with a disability encounters human rights violations at some point in their lives and very many experience it every day of their lives.’<sup>35</sup> Further, the report noted that ‘discrimination is both systemic and systematic, entrenched in the everyday practices of government, businesses, community groups and individuals’.<sup>36</sup>

Conduct which is expressed as vilification can often be characterised as a discrimination issue and community attitudes are closely linked to both, the widespread nature of discrimination in the community is a clear indication that vilification is also a problem.

The NSW Law Reform Commission has indicated that the attributes protected by vilification prohibition should be extended when there is evidence that:

- there is a practical problem which needs to be addressed;
- existing laws are not effective to address the problem;
- the proposed measure is one which might reasonably be expected to have an appropriate impact on the problem; and
- the measure, consistently with its legitimate object, does not cause a disproportionate diminution of freedom of speech.

Enacting legislation prohibiting disability vilification is directly linked to the *rights protection, legislation and justice* policy area of the NDS but will support all of the policy areas identified.

The elimination of barriers to participation and the harm created by disability vilification has resonance with the NDS. The vision of the NDS for example, is for ‘[a]n inclusive Australian society that enables people with disability to fulfil their potential as equal citizens’<sup>37</sup> and consistently with the ICRPD, its principles are:

- respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons
- non-discrimination
- full and effective participation and inclusion in society

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<sup>34</sup> Ibid 3.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Commonwealth of Australia, *National Disability Strategy Inquiry Report* (2011), 20.

- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.<sup>38</sup>

There is an intention that the policies and practices developed by government under the strategy will reflect and reinforce a number of approaches including ‘a whole-of-community change effort ... to remove barriers and support inclusion of people with disability in the life of their communities’.<sup>39</sup>

Further, the NDS identifies all Australians as having a role to play in working together to achieve a society that enables people with disability to reach their full potential and requires the community to ‘provide[s] social connectedness through genuinely welcoming, respecting, valuing and actively involving people with disability.’<sup>40</sup>

Improving community attitudes and facilitating the development of an environment in which people with a disability are accepted and treated with dignity and respect requires a number of different measures. The introduction of legislation prohibiting disability vilification is one important measure that would provide a significant contribution to the efforts of government and the ability of the NDS to overcome some of the social and attitudinal barriers discussed above.

Initiatives to address disability vilification fall within the scope of the rights protection, justice and legislation policy area of the NDS and are consistent with the important role that it will play in protecting, promoting and fulfilling the human rights of people with disability.

## ***B. The Productivity Commission’s review of the DDA***

The Productivity Commission’s Draft Report<sup>41</sup> on the review of the DDA released in October 2003 noted that disability vilification provisions are not mentioned in the DDA and that some submissions received by the inquiry had indicated that such provisions may be a useful addition to the DDA, following the

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid 21.

<sup>40</sup> Ibid 22.

<sup>41</sup> Productivity Commission *Review of the DDA 1992* (2003), Chapter 8.

model of Australia's racial vilification legislation and similar legislation overseas<sup>42</sup>. Sane Australia for example submitted that

[A]ction against stigma and discrimination towards Australians with psychiatric disability is held back by the limited nature of the DDA's terms, especially in relation to vilification and harassment. Offensive, stigmatising representation of this group in the media and advertising needs to be easier to prosecute as discriminatory.<sup>43</sup>

Another submission recommended the adoption of the NSW Anti-Discrimination Act 1977 vilification provisions 'to make it unlawful to do any public act that is capable of inciting hatred, serious contempt or severe ridicule of people on the ground that they are, or are presumed to be, living with HIV or AIDS'.<sup>44</sup>

The Productivity Commission's draft report also noted that the NSW Equal Opportunity Tribunal had heard several complaints under the NSW vilification provisions.

The then Human Rights and Equal Opportunity Commission also submitted that such a provision merits further consideration and a further submission (sub 189, p 1) suggested that vilification stigma, harassment and discriminatory practices should be the subject of 'a public awareness campaign'<sup>45</sup>.

The Productivity Commission sought legal advice from the Australian Government Solicitor in respect of whether there exist Constitutional limitations on the Australian Government with respect to inserting a vilification provision into the DDA. In summary, the view of the Australian Government Solicitor was that:

1. The Commonwealth Government does not have the constitutional power to legislate generally in relation to vilification of disabled persons through the proscription of incitement to hatred, contempt and serious ridicule of persons with a disability; and
2. The United Nations Declaration on the Rights of Disabled Persons 1975 cannot justify a vilification provision in the DDA<sup>46</sup>.

This is further discussed below under 'Constitutional Considerations'.

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<sup>42</sup> Ibid 232.

<sup>43</sup> Ibid 234( sub. 62, 2).

<sup>44</sup> Ibid 234 (Smyth 2003, 3).

<sup>45</sup> Ibid 235.

<sup>46</sup> Australian Government Solicitor. Productivity Commission's inquiry into the *Disability Discrimination Act 1992*: 'vilification'. Legal Advice (2004).

## V Survey and seminar results

### *A. Survey*

The survey tool asked respondents to describe instances of vilification that they had experienced, witnessed or were aware of. The survey was predominantly completed by people with a disability or by carers. Some examples provided by respondents are as follows (note that these experiences have been summarised and adapted to the extent necessary to preserve confidentiality).

1. Ridicule of a person with a mental illness by staff in a commonwealth department in front of other staff and clients.
2. Ridicule and harassment of a person with a mental illness by police.
3. Ridicule of a person using a wheelchair in a coffee shop which attracted laughter from other customers in the shop.
4. Taunting and ridicule of a person with cerebral palsy using a wheelchair by a group of young people whilst waiting for a train.
5. Mimicking the personal characteristics of a person with a disability and attracting laughter from a group.
6. Pointing and laughter from workers on a building site when a person using an electric wheelchair passed by.
7. A group of young people switched off the power on a person's electric wheelchair and spun the chair around whilst laughing at the person.
8. Negative comments referring to a person's disability and physical features posted on their Facebook wall.
9. Being called a 'retard' in front of a group of fellow students because of a personal characteristic.
10. Ridicule in relation to a person's sex and physical disability by members of the opposite sex.

Survey respondents reported feeling 'very sad'; 'hurt and insulted'; 'inferior and ashamed of myself';

Respondents also reported significant effects on their self-esteem and feeling that they were not supported by the community and the government.

Most people when reading these examples can empathise with a person with a disability and relate to the feelings of humiliation, hurt and intimidation. The examples demonstrate the spectrum of

'seriousness' however, only examples 1, 4 and 7 are likely to be found to be sufficiently serious to trigger vilification legislation. This is further discussed below.

## ***B. Seminar***

The purpose of the seminar as explained by the facilitator was to understand the participants' experience of disability vilification in the community and explore the usefulness of laws prohibiting vilifying conduct.

Some of the experiences and comments from the seminar are summarised below.

- People with a physical disability are frequently assumed also to have an intellectual disability and experience ridicule that is not even reflective of their particular disability. This demonstrates how misinformed some members of the public are.
- The media is responsible for perpetuating and encouraging negative stereotypes about people with a disability. Use of the word 'retard' in the media sends a message to young people who are just forming their views that this is OK. The media should be more responsible and anti-vilification laws may be needed to make the media more responsible.
- The media often refers to a person as 'suffering' from a disability rather than living with a disability. Reference to a person's disability may often be made when it is not relevant to what is being said as if the person has to be described in terms of their disability. This isn't vilification itself but it perpetuates the belief that people with a disability are different or inferior.
- People shouldn't let themselves be affected by vilification. Laws can't stop people from saying things. It's better to spend the money on helping people with a disability deal with vilification.
- A carer described how a person using a wheelchair was pushed over. The police helped him but because he couldn't speak, the police did not take a statement and nothing was done. If they had bothered the incident was probably on CC TV. It would have been different if a pregnant woman was pushed over.
- If there were vilification laws probably not everyone would use them, but even so, the very fact that they are there says something about what society is willing to tolerate. This would mean a lot for people with a disability as it means that the problem is not just being ignored.

The majority of examples discussed at the seminar concerned a standard of conduct that would be unlikely to trigger a vilification threshold. However, there appeared to be agreement that the presence of anti-vilification laws sends a message to the community and also provides a basis for education and awareness raising.

## VI The law

The Commonwealth and all States and Territories have enacted anti-discrimination legislation although the attributes protected, legal tests, exceptions and defences available differ across jurisdictions. A discussion of the operation of discrimination and harassment provisions is included, because conduct which may amount to vilification may also satisfy a test for discrimination or harassment and as such, disability vilification in limited situations is already protected by Commonwealth, State and Territory legislation.

The key features of discrimination, harassment and vilification provisions are summarised in the table below:

Table 1: Disability discrimination, harassment and vilification.

	<b>Discrimination</b>	<b>Harassment</b>	<b>Vilification</b>
Definition / elements	<ul style="list-style-type: none"> <li>Differential treatment or effect</li> <li>on the grounds of disability</li> <li>which results in disadvantage to the person with the disability because of the disability.</li> </ul>	<ul style="list-style-type: none"> <li>Unwelcomed, repeated, humiliating comments, actions or insults that create a hostile environment</li> <li>public or private conduct, behavioural or verbal</li> <li>causing offence, humiliation or intimidation (subjective or objective test).</li> </ul>	<ul style="list-style-type: none"> <li>A public act which (depending on the jurisdiction) either: <ul style="list-style-type: none"> <li>incites hatred towards or serious contempt for or revulsion of severe ridicule of</li> <li>or</li> <li>is reasonably likely to cause offence, humiliation or intimidation</li> </ul> </li> </ul>
Conduct directed towards	Directed towards an Individual or group, complainant must be 'aggrieved'	Must be directed at a particular person	Directed towards an Individual or group, the complainant must be 'aggrieved'
Areas where conduct unlawful	All specified areas - employment, education, goods and services, accommodation, clubs and sport etc.	Limits prohibition to areas of employment, education, goods and services.	Prohibits vilification generally in a public place – restrictions are not limited to a specific area.



## ***A. Discrimination***

Discrimination refers to the differential treatment of a person on the grounds of an attribute.

Discrimination complaints are generally characterised as 'direct' or 'indirect' discrimination.

1. Direct discrimination can be explained as the less favourable treatment of a person because of their attribute in comparison to the treatment of a person without the attribute, or a different attribute.
2. Indirect discrimination can be explained as the existence of a requirement, condition or practice which appears fair because it applies to everyone equally but has the effect of disadvantaging some people who, because of their attribute cannot comply.

Discrimination on the grounds of an attribute is only unlawful if it occurs in one of the specific areas defined by the relevant legislation. These generally include: employment, education, the provision of goods and services, clubs, sport and accommodation. Employers and principals are taken to be vicariously liable for the conduct of their employees or agents when the employee or agent is acting in the course of their employment or acting as an agent. Therefore, vilification occurring in employment situations, such as between employees or between an employee and a client, club member or resident may be unlawful if it can be also characterised as less favourable treatment consistent with the direct discrimination described above. We note that education providers are not vicariously liable for the actions of students towards one another.

Differential treatment which amounts to vilification may be characterised as a discrimination complaint if it occurs in one of the areas specified in the relevant Act. Disability vilification occurring in public space but outside the areas defined under the relevant anti-discrimination legislation is not unlawful under anti-discrimination provisions. Thus a person may experience vilification but can only seek a remedy if the conduct is 'caught' by anti-discrimination legislation.

## ***B. Harassment***

The DDA prohibits harassment on the grounds of disability. The term harassment is not defined by the DDA but can be explained generally as unwelcomed, repeated humiliating comments, actions or insults that create a hostile environment and are directed towards a person because of their disability.

The areas in which disability harassment is unlawful are limited under the DDA to employment, education and in connection with the provision of goods, services and facilities. As with discrimination, conduct amounting to disability vilification may be unlawful when the conduct can also be described within the terms of the harassment provision discussed above and it occurs in one of the three specified areas.

Harassment occurring outside the three specified areas but within the additional areas in which discriminatory conduct is prohibited, may also be unlawful under the discrimination provisions if the harassing conduct can also be characterised as discrimination.

We note that harassment provisions apply when conduct is directed towards an individual<sup>47</sup>. Vilifying conduct may not therefore be 'caught' by the harassment provisions if it is directed to a group generally, rather than an individual, despite the fact that it occurred within a specific area. Discrimination generally is unlawful if it is directed towards an individual or group but in order to make a valid complaint, the complainant must be a person aggrieved by the conduct<sup>48</sup>.

### ***C. Vilification***

The Commonwealth, all States and the ACT have enacted legislation prohibiting racial vilification and in addition, NSW legislation also prohibits vilification on the grounds of homosexuality, transgender status and HIV/AIDS infection. Protections against religious vilification are available in Victoria, Queensland and Tasmania. Tasmania is the only state to prohibit disability vilification; it also prohibits vilification on the grounds of sexual orientation or lawful sexual activity, race and religion.

To amount to vilification, the conduct has to be sufficiently 'serious'. The legal interpretation of 'vilification' which has emerged from relevant judicial decisions does not consider conduct of a less serious nature to constitute *unlawful* vilification. Therefore, although morally reprehensible, conduct which involves less 'serious' behaviours such as teasing, making fun of a person or certain derogatory comments do not amount to vilification. The legal tests for vilification are discussed further below.

Whilst developments in anti-discrimination law have had some impact on removing barriers that prevent a person with a disability from participating in public life, people with a disability repeatedly come up against offensive, humiliating, insulting and intimidating treatment by members of their community that is not proscribed by law.

Meagher<sup>49</sup> has evaluated the effectiveness of vilification laws in Australia. The essence of his approach to the evaluation of racial vilification laws is encapsulated by a quote of Martin Luther King from an Address at the National Press Club in The United States where he said '*It may be true that morality*

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<sup>47</sup> However, conduct directed towards a group may constitute discrimination.

<sup>48</sup> See for example, s46P of the *Australian Human Rights Act 1986* (Cth),

<sup>49</sup> Dan Meagher, *So Far So Good?: A Critical Evaluation of Racial Vilification Laws in Australia*, (2004) 32(2) *Federal Law Review* 225 < <http://www.austlii.edu.au/au/ezproxy.lib.monash.edu.au/au/journals/FedLRev/2004/10.html> > at 4 April 2012.

*cannot be legislated, but behaviour can be regulated. The law may not change the heart, but it can restrain the heartless*.<sup>50</sup>

Meagher's analysis is limited to the reasons for racial vilification laws and their effectiveness. However, the reasons for, and the effectiveness of such laws is arguably applicable to all vilification laws. Meagher's arguments in support of racial vilification laws can also be applied to disability vilification laws. Meagher argues that s 18C(1) of the *Racial Discrimination Act 1975* (Cth) ('RDA') is at its most problematic when determining the harm threshold for vilification which requires that vilifying conduct that is the subject of a complaint must be reasonably likely within the context of the circumstances to 'offend, insult, humiliate or intimidate another person or group of people. Meagher argues that there is 'no firm basis to make a practical assessment of conduct that crosses the harm threshold.'<sup>51</sup> The essence of his argument seems to be that the term 'likely within the circumstances' invites too much subjectivity into the test such that a judge or administrator must turn to their intuitive conception of what 'justice' requires in each case.

The result according to Meagher 'is a body of judicial and quasi-judicial decisions that often lack a coherent, underpinning principle'. Meagher is adamant that hatred must be the basis for vilification. In this context words expressed in a demeaning or mocking way do not necessarily amount to hatred in the sense of being an expression of intense dislike or detestation of a person or people. Meagher argues that this has led to the development of an incoherent body of case law because s 18C of the RDA leaves too much open to the decision-maker in each individual case. The result is that judgments are too often little more than a series of findings of fact rather than reasoned conclusions of law. Meagher considers that the consequence of the ambiguity of s 18C is that the law has developed into a state of unprincipled fluidity that leads to improvised subjective decisions. Meagher's analysis reflects a view that the harm threshold should denote 'profound and serious effects.'

The conduct that the Parliaments of the States and Territories that have enacted anti-vilification laws intend to regulate is defined as conduct that either incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons or incites hatred against that other person or class of persons; and threatens , or incite others to threaten, physical harm towards that person or class of persons or the property of that other person or class of persons.

The first relates to vilifying behaviour that does not constitute a physical threat of harm but denigrates, demeans or puts a person down with an aim to make a person feel bad about themselves. The second level of vilification constitutes a threat of physical violence and aims to scare someone or make them fearful of the potential actions of the individual or group that is vilifying an individual or group.

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<sup>50</sup> Ibid

<sup>51</sup> Ibid

The major issue related to whether the current structure of racial and religious vilification laws in Australia are appropriate for disability discrimination law is whether the harm threshold that needs to be satisfied before a complainant can successfully take action for disability vilification is appropriate to the circumstances in which people with a disability are vilified.

While there needs to be a limit to expression that can be classified as unlawful vilification to ensure that the legal threshold for unlawful vilification is clear, the limit needs to be determined in the context of the function of vilification. The function can be seen to relate to how vilification creates a specific effect on the person or group who is being vilified.

Helen Basili demonstrates the point on the New South Wales Service for Treatment and Rehabilitation of Torture and Trauma Survivors (STARTS) website.

Opponents of laws to prevent racial vilification argue that such laws compromise our right to freedom of speech. But is it asking too much that minority groups bear the burden of hate speech so the rest of us can enjoy this right unhindered?<sup>52</sup>

Basili, epitomises the effect of vilification when she refers to how:

words are powerful tools. They can have an impact on minds and hearts. Words in the form of propaganda have moved masses. When words are used to insult, ridicule or incite violence against a group or individual because of their race or ethnicity, the effects can be devastating.<sup>53</sup>

Basili doesn't include disability when she refers to how vilification can incite hatred that leads to 'violence against a group or individual because of their race or ethnicity.'<sup>54</sup> However, race and ethnicity in the sense that it is manifest by an individual or group's physical features can be seen to be analogous to a disabled person's physical features or physical disability.

Basili argues that free speech is not an absolute right<sup>55</sup>. It is an argument supported by Professor Kathleen Mahoney, Professor Mari Matsuda, and former NSW Anti Discrimination Board President, Chris Puplick. Each of whom criticise arguments that racial vilification legislation poses an obstruction to free speech. Their collective view is that free speech is not an absolute right rather it is qualified by other rights.<sup>56</sup>

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<sup>52</sup> Helen Basili *Words that Wound* (2007) < <http://www.startts.org.au/default.aspx?id=160&PrintPage=true>> at 26 April 2012.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

<sup>56</sup> Ibid.

According to David Knoll's article *Anti-Vilification Laws Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia*<sup>57</sup>, anti-vilification laws can be seen to be a necessary evil. While they restrict free speech on the one hand they protect people who are vulnerable to the abuse of free speech on the other.

Knoll considers Phillip Adams' argument against vilification laws. Adams argues that Australia should be seen to be unique amongst nations because of its lack of vicious forms of vilification. He suggests that Australia is still an easy going place.<sup>58</sup> While tolerance in Australia may be mistaken as indifference it is still not a country whose people seek to vilify people who are different. It is in this context that Adams' contends that vilification laws are more likely to provoke bigotry towards those who are not part of the mainstream rather than protect them. In this respect he views vilification laws to create a self-fulfilling prophesy.<sup>59</sup>

Knoll considers Adams' argument as overlooking the capacity for judicial discretion and the possibility for alternative dispute resolution rather than jail for the breach of vilification laws. Knoll's arguments for judicial flexibility and discretionary enforcement of vilification laws are a direct contradiction of Meagher who argues for judicial pronouncements on the application of State and federal vilification laws. However, neither Meagher, Adams nor Knoll consider that cases of vilification generally arise as a result of an abuse of power by a majority against a minority.

Legislation relevant to vilification is largely limited to vilification on the grounds of race or religion. This is useful to the discussion because it provides an indication of how disability vilification laws might be drafted, interpreted and utilised. A summary is provided below.

## 1. The Commonwealth

The Commonwealth Criminal Code contains racial hatred provisions criminalising conduct where a person intentionally urges another person, or a group, to use force or violence against a group<sup>60</sup> or members of groups<sup>61</sup> intending that force or violence will occur where the targeted group is

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<sup>57</sup> David Knoll, *Anti-Vilification Laws Some Recent Developments in the United States and their Implications for Proposed Legislation in the Commonwealth of Australia* (1994) Australian Journal of Human Rights 4. <  
[http://www.davidknoll.com.au/files/HR\\_DISC/Anti-Vilification%20Laws%20Some%20Recent%20Developments%20in%20the%20United%20States%20and%20their%20Implications%20for%20Australia.htm](http://www.davidknoll.com.au/files/HR_DISC/Anti-Vilification%20Laws%20Some%20Recent%20Developments%20in%20the%20United%20States%20and%20their%20Implications%20for%20Australia.htm)> at 4 April 2012

<sup>58</sup> Ibid

<sup>59</sup> Ibid

<sup>60</sup> *Criminal Code Act 1995* (Cth) s 80.2A.

<sup>61</sup> *Criminal Code Act 1995* (Cth) s 80.2B.

distinguished by race, religion, nationality, national or ethnic origin or political opinion. The maximum penalty is 7 years imprisonment.

Civil penalty provisions prohibiting vilification on the grounds of race were introduced into the RDA by the *Racial Hatred Act 1994* nearly 20 years after the RDA was enacted. The bill was thought to have two objectives:

1. to set a social standard for the community which will have an educational effect; and
2. to punish acts which are reasonably likely to incite racial hatred, thereby deterring others from committing such acts.<sup>62</sup>

The bill is intended to close a gap in the legal protection available to the victims of extreme racist behaviour. No Australian should live in fear because of his or her race, colour or national or ethnic origin. The legislation will provide a safety net for racial harmony in Australia, as both a warning to those who might attack the principle of tolerance and an assurance to their potential victims.<sup>63</sup>

The second reading speech introducing the bill described it as being about the protection of groups and individuals from threats of violence and the incitement of racial hatred, which leads inevitably to violence<sup>64</sup>. Neither the term 'vilification' nor 'hatred' appear in the legislation and are not defined.

The legal test for vilification in State and Territory jurisdictions is whether a person observing the offending conduct, is reasonably likely to consider that the conduct is likely to incite hatred towards a person or group of persons of the relevant race or religion. The Commonwealth differs from other jurisdictions where the offending conduct, 'racial hatred' is considered from the perspective of whether a person observing the conduct is reasonably likely, in all the circumstances, to consider that it would offend, insult, humiliate or intimidate another person or a group of people. The former test can be described as the 'reasonable observer test' and the latter as the 'reasonable victim test'. The RDA test is preferred because it focuses on the effect on the person vilified rather than the effect on other people observing the conduct. The scope of the prohibition is discussed further below.

Ss 18B-18D of the RDA set out the vilification provisions under Part IIA *prohibition of offensive behaviour based on racial hatred*. We note that 'racial hatred' is only referred to in the title of Part IIA and 'vilification' is not referred to at all.

S 18B states that if an act is done for 2 or more reasons; and one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for

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<sup>62</sup> Senate Legal and Constitutional Legislation Committee Commonwealth of Australia *Racial Hatred Bill 1994* Report (1995).

<sup>63</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3336 (Michael Lavarch, Attorney-General).

<sup>64</sup> *Ibid.*

doing the act); then the act is taken to be done because of the person's race, colour or national or ethnic origin.

S 18C(1) of the *Racial Discrimination Act 1975* sets out the test for unlawful vilification:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

- (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
- (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

- (a) causes words, sounds, images or writing to be communicated to the public; or
- (b) is done in a public place; or
- (c) is done in the sight or hearing of people who are in a public place.

In summary under s 18C, it is unlawful for a person to do a public act that is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people where the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

An act is taken not to be done in private if it causes words, sounds, images or writing to be communicated to the public; or is done in a public place or in the sight or hearing of people who are in a public place. A 'public place' includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

The extent to which offending conduct in s 18C may amount to vilification has been judicially considered to reconcile it with the competing principles of the right to freedom of opinion and expression (see further below). To amount to unlawful vilification, the conduct in question 'must have profound and serious effects, not to be likened to mere slights'.<sup>65</sup> Also, it is not necessary that the victim(s) of the

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<sup>65</sup> Per Kieffel J, *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352. This approach has been cited with approval in subsequent cases (see also *Bropho v Human Rights & Equal Opportunity Commission* (2004) 135 FCR 105, 123 and *Kelly-Country v Beers* (2004) 207 ALR 421, 441-442 [88]).

offensive act were actually offended, insulted, humiliated or intimidated by the conduct.<sup>66</sup> The test is an objective one.<sup>67</sup>

S 18D sets out the exceptions to what would otherwise be unlawful conduct that are designed to ensure a balance between protecting freedom of expression and responding to racial hatred. S 18D provides that s 18C does not render unlawful anything said or done reasonably and in good faith:

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or
- (c) in making or publishing:
  - (i) a fair and accurate report of any event or matter of public interest; or
  - (ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In *Jones v Scully*<sup>68</sup> Hely J considered that the words in the phrase ‘offend, insult, humiliate or intimidate’ in the RDA denote profound and serious effects, not to be likened to mere slights and in the absence of a statutory definition, should be given their ordinary dictionary meaning as follows:<sup>69</sup>

Offend means (1) “[t]o irritate in mind or feelings; cause resentful displeasure in; (2) [t]o affect (the sense, taste, etc) disagreeably”<sup>70</sup> or “[t]o hurt or wound the feelings or susceptibilities of; to be displeasing or disagreeable to; to vex, annoy, displease, anger; to excite a feeling of personal annoyance, resentment or disgust in (any one).”<sup>71</sup>

Insult means “[t]o assail with offensively dishonouring or contemptuous speech or action; to treat with scornful abuse or offensive disrespect; to offer indignity to; to affront, outrage.”<sup>72</sup>

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<sup>66</sup> *Jones v Scully* (2002) 120 FCR 243, 269 [99].

<sup>67</sup> *McGlade v Lightfoot* (2002) 124 FCR 106, 116-117 [43]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615; *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 355 [12]; *Jones v Scully* (2002) 120 FCR 243, 268-269 [98]-[100]; *Jones v Toben* [2002] FCA 1150, [84]; *Obieta v NSW Department of Education and Training* [2007] FCA 86 [223]; *Silberberg v Builders Collective of Australia Inc* [2007] FCA 1512, 21.

<sup>68</sup> [2002] FCA 1080.

<sup>69</sup> *Jones v Scully* above n 71, 102.

<sup>70</sup> Macquarie Dictionary 3<sup>rd</sup> Ed.

<sup>71</sup> Oxford English Dictionary.

<sup>72</sup> Oxford English Dictionary.



Humiliate means “[t]o lower the pride or self-respect of; cause a painful loss of dignity to; mortify”<sup>73</sup> or “[t]o make low or humble in position, condition or feeling; to humble.”<sup>74</sup>

Intimidate means (1) “[t]o make timid, or inspire with fear; overawe; cow; [t]o force into or deter from some action by inducing fear”<sup>75</sup> or [t]o render timid, inspire with fear; to overawe, cow; in modern use especially to force to or deter from some action by threats or violence.”<sup>76</sup>

The provisions in other jurisdictions differ from the RDA in that they prohibit conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, an individual or a specific group of people because of their 'race', 'colour', 'descent' or 'ancestry', nationality or national origin, ethnicity or ethnic origin. This prohibition is subject to similar private and public exceptions as in the RDA.

The essential difference is that s 18C of the RDA focuses on the effect of the conduct on the person vilified whereas other vilification provisions referring to ‘incitement’ focus the offence on the effect of the conduct on others. The term ‘incite’ has been discussed in two Victorian decisions. In *Robin Fletcher v Salvation Army*<sup>77</sup> the term was found to connote to ‘inflame’ or ‘set alight’. *Catch the Fire Ministries Inc & Ors v Islamic Council of Victoria*<sup>78</sup> confirmed that it means to ‘urge, spur on ... stir up, animate or stimulate’<sup>79</sup>. It was also noted in this decision that it is not necessary that the conduct actually incited feelings of hatred, revulsion or severe ridicule of a person only that it may be capable of inciting such feelings in the context of the audience it is directed towards.<sup>80</sup>

The vilification prohibition in the RDA is a general provision and unlike the discrimination and harassment provisions in the DDA, unlawfulness is not confined to specified areas defined in the Act. Importantly and relevantly, racial vilification is unlawful wherever it occurs provided it occurs in a public place. A person who has experienced an offensive act is able to make a complaint the Australian Human Rights Commission (‘AHRC’)<sup>81</sup>.

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<sup>73</sup> Macquarie Dictionary 3<sup>rd</sup> Ed.

<sup>74</sup> Oxford English Dictionary.

<sup>75</sup> Macquarie Dictionary.

<sup>76</sup> Oxford English Dictionary.

<sup>77</sup> [2005] VCAT 1523, Morris J.

<sup>78</sup> [2006] VSCA 284, Neave J.

<sup>79</sup> *Ibid*, 13

<sup>80</sup> *Ibid*, 154

<sup>81</sup> s 46P *Australian Human Rights Commission Act 1986* (Cth).

## 2. The Australian Capital Territory (ACT)

Section 66(1) of the *Discrimination Act 1991* defines the cause of action for vilification:

- (1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of people on the ground of any of the following characteristics of the person or members of the group:
  - (a) race;
  - (b) sexuality;
  - (c) gender identity;
  - (d) HIV/AIDS status.
- (2) This section does not make unlawful—
  - (a) a fair report of an act mentioned in subsection (1); or
  - (b) a communication or the distribution or dissemination of any matter consisting of a publication that is subject to a defence of absolute privilege in a proceeding for defamation; or
  - (c) a public act, done reasonably and honestly, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and presentations of any matter.

## 3. New South Wales (NSW)

Conduct which humiliates, offends or intimidates a person may amount to harassment and is unlawful in NSW under the *Anti-Discrimination Act 1977* (NSW) if it occurs because of a person's sex, pregnancy, breastfeeding, race, age, marital status, homosexuality, disability, transgender status or carer's responsibilities. Harassment can take many forms including material displayed on a wall or computer, jokes, comments and gestures or by ignoring, isolating or segregating a person.<sup>82</sup>

Vilification is prohibited if it occurs in connection with a person's race<sup>83</sup>, transgender status<sup>84</sup>, homosexuality<sup>85</sup> or HIV/AIDS status<sup>86</sup>. NSW protects people with a disability from vilification where they

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<sup>82</sup> NSW Anti-Discrimination Board, *Sexual Harassment and Harassment Fact Sheet*. 2011.

<sup>83</sup> s 20C *Anti Discrimination Act 1977* (NSW).

<sup>84</sup> *Ibid* s 38S.

are infected with HIV/AIDS. Under s 49ZXB of the *Anti-Discrimination Act 1977* (NSW), it is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the ground that the person is or members of the group are HIV/AIDS infected or thought to be HIV/AIDS infected (whether or not actually HIV/AIDS infected). Certain conduct is excepted from the prohibition, this includes:

- a fair report of a public act
- a communication or the distribution or dissemination of any matter in situations where a defence of absolute privilege would be available in defamation proceedings;
- a public act done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or for instruction or other purposes in the public interest, including discussion or debate about and expositions of any act or matter

An example of the operation of this provision can be seen in *R v D & E Marinkovic*<sup>87</sup>. In this case a complainant brought vilification proceedings against his neighbours. He alleged he had been subjected to vilification and abuse for a period of a year. Conduct by the neighbours included yelling out from their balcony 'bloody poofter', 'gay faggot' and 'I don't want faggots living near my baby'. The complainant suffered stress, sleeplessness, suicidal tendencies and an exacerbation of his medical condition as a result of the conduct and was awarded \$50,000 for general damages. The respondents were also required to pay costs of the proceedings and to make a public apology.

A public act<sup>88</sup> is defined as:

- (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
- (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and
- (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

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<sup>85</sup> Ibid s 49ZS.

<sup>86</sup> Ibid s 49 ZT.

<sup>87</sup> (1996) EOC 92-841.

<sup>88</sup> See ss 20D, 49ZS, 49ZXA *Anti Discrimination Act 1977* (NSW).

Vilification is not unlawful where the conduct occurs in the context of:

- (a) a fair report of a public act, or
- (b) a communication or the distribution or dissemination of any matter on an occasion that would be subject to a defence of absolute privilege, or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific, research or religious discussion or instruction purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

Further, the legislation creates an offence of serious racial<sup>89</sup>, transgender<sup>90</sup>, homosexual<sup>91</sup> and HIV/AIDS vilification. Serious vilification provisions are triggered when the offending behaviour includes:

- (a) threatening physical harm towards, or towards any property of, the person or group of persons, or
- (b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Prosecution requires the consent of the Attorney-General and the offence carries a penalty in the form of a fine, imprisonment for 6 months, or both in the case of an individual and a fine in the case of a corporation.

#### **4. Queensland**

S 124A of the *Anti-Discrimination Act 1991* (Qld) prohibits vilification on the ground of race, religion, sexuality and gender identity. Under the legislation a person must not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race, religion, sexuality or gender identity of the person or members of the group.

Similarly to NSW, vilification is not unlawful where the conduct occurs in the context of:

- (a) the publication of a fair report of a public act; or

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<sup>89</sup> S20D *Anti Discrimination Act 1977* (NSW).

<sup>90</sup> *Ibid* s 38D.

<sup>91</sup> *Ibid* s 49ZTA.

- (b) the publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation; or
- (c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including public discussion or debate about, and expositions of, any act or matter.

## 5. Tasmania

As discussed above, Tasmania is the only State to make disability vilification unlawful. Under the s 19 'inciting hatred' provision of the *Anti-Discrimination Act 1998* (Tas), a person, by a public act must not incite hatred towards, serious contempt for, or severe ridicule of, a person or any member of the group on the ground of any disability of the person or any member of the group. The Tasmanian Anti-discrimination Board reports that it received 19 complaints of disability discrimination in the 2010-2011 period.

S 19 of the *Anti-Discrimination Act 1998* (Tas) prohibits by public act, the incitement of hatred, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of –

- (a) the race of the person or any member of the group; or
- (b) any disability of the person or any member of the group; or
- (c) the sexual orientation or lawful sexual activity of the person or any member of the group; or
- (d) the religious belief or affiliation or religious activity of the person or any member of the group.

*W v D*<sup>92</sup> is the only case related to s 19C of the Tasmanian Anti-Discrimination Act. The complainant 'W', a person with a disability, had collapsed on two occasions whilst assisting the respondent 'D' in his shop. After the second occasion, the respondent was alleged to have told the complainant that 'you are a bloody health asset and I don't want you to help me anymore' and subsequently arranged for someone else to do the work in the complainant's place. The complainant lodged a formal complaint with the Tasmanian Anti-Discrimination Commission on the basis that he had been discriminated against and the respondent had contravened the Act by inciting hatred on the ground of disability. The part of the complaint relevant to disability vilification had been rejected by the Tasmanian Anti-Discrimination Commissioner as it had been determined that the conduct complained of did not amount to the

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<sup>92</sup> [2006] TASADT 5.

incitement of hatred by a public act. The substantive complaint was dismissed by the Tribunal in August 2005.

## 6. Victoria

The *Racial and Religious Tolerance Act 2001* (Vic) ('RRTA') provides that a person must not, on the ground of the race<sup>93</sup> or the religious belief or activity<sup>94</sup> of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

Vilification is not unlawful if the person establishes that the person's conduct was engaged in reasonably and in good faith-

- (a) in the performance, exhibition or distribution of an artistic work; or
- (b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
  - (i) any genuine academic, artistic, religious or scientific purpose; or
  - (ii) any purpose that is in the public interest; or
- (c) in making or publishing a fair and accurate report of any event or matter of public interest.

A religious purpose includes, but is not limited to, conveying or teaching a religion or proselytising.

The Victorian legislation further provides for the offences of serious racial<sup>95</sup> and religious<sup>96</sup> vilification. Both offences require that the conduct is intentional, incites hatred against the other person or class of persons; and threatens, or incites others to threaten, physical harm towards the other person or class of persons or the property of the other person or class of persons. 'Engage in conduct' includes use of the internet or e-mail to publish or transmit statements or other material. A prosecution cannot be commenced without the written consent of the Director of Public Prosecutions.

In a legal context, disability vilification generally refers to public conduct by one person or group towards another person or group of persons with a disability that would be considered by a general observer likely to either:

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<sup>93</sup> s 7 *Racial and Religious Tolerance Act 2001* (Vic).

<sup>94</sup> *Ibid* s 8.

<sup>95</sup> *Ibid* s 24.

<sup>96</sup> *Ibid* s 25.

1. incite in another person serious contempt for, or revulsion or severe ridicule of the person with a disability; or
2. cause a person with the disability to be offended, humiliated or intimidated.

Conduct may be verbal or communicated in other ways such as in a written or electronic format. Conduct may be offensive, humiliating, threatening or violent in its extreme.

The two points above represent different approaches to the legal test for whether or not the offending conduct amounts to vilification discussed above. The first test which is common to most State and Territory based vilification legislation focuses on whether the conduct is capable of inciting hatred, serious contempt, revulsion or severe ridicule. The second test which appears in s 18C of the RDA focuses on the effect of the conduct. In both tests, the extent to which the conduct can be considered to be offensive is assessed by the standards of a 'reasonable person', that is, a 'reasonable observer' in the first test and a 'reasonable victim' in the second test. Whether or not an onlooker has in fact been incited by the behaviour or the person subjected to the conduct feels offended, humiliated or intimidated is not relevant to the test, although it may be raised in evidence<sup>97</sup>.

#### ***D. Education and awareness raising***

The law not only contains substantive provisions prohibiting certain types of conduct, it also importantly sets up statutory bodies such as anti-discrimination Commissions and gives them a mandate to conduct community and industry education.

For example, s11 of the *Australian Human Rights Commission Act 1986* (Cth) which sets out the functions of the Australian Human Rights Commission including: to promote an understanding and acceptance, and the public discussion, of human rights in Australia; and to undertake research and educational programs and other programs, on behalf of the Commonwealth, for the purpose of promoting human rights, and to co-ordinate any such programs undertaken by any other persons or authorities on behalf of the Commonwealth.

In Victoria, s 155 of the *Equal Opportunity Act 2010* (Vic) sets out the functions of the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'). One of these is to establish and undertake information and education programs. During the 2010-2011 financial year, the VEOHRC reports that around 15,000 people attended its various education and training sessions.<sup>98</sup>

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<sup>97</sup> *McGlade v Lightfoot* (2002) 124 FCR 106, 117 [44]; *Hagan v Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615, [28]; *Jones v Scully* (2002) 120 FCR 243, 269 [99]-[100].

<sup>98</sup> Victorian Equal Opportunity and Human Rights Commission, *Annual Report 2010/2011* (2011), 17.

The introduction of anti-vilification legislation into Commonwealth, State and Territory law therefore provides an avenue for other initiatives for community education and awareness raising.

Vilification laws are also an important mechanism for getting disability vilification into people's consciousness. Where there are laws, there are court and tribunal decisions, discussions, academic papers and a general advancement of the discourse and an impact on community attitudes and public behaviours.

## ***E. Constitutional Considerations***

### **1. The Commonwealth power to legislate**

Legislative power in Australia is distributed between the Commonwealth and the States. The Commonwealth's power to enact legislation is generally limited to the 39 heads of power set out in s 51 of the Constitution and matters that are incidental<sup>99</sup> to these. Powers not included in s 51 are residual powers and remain within the purview of the States.

Generally, Commonwealth anti-discrimination legislation is characterised under the external affairs head of power which empowers the Commonwealth to give effect to the international human rights treaties that have been ratified by Australia. Any proposed law seeking to give effect to international human rights legislation must be capable of being characterised as falling within the s 51(xxix) external affairs head of power to avoid the risk of being challenged and declared invalid by the High Court.

In order to pass through the external affairs 'filter' legislation must, amongst other things, be both reflective of the relevant international convention and expressed in a way that is appropriate and adapted to it. A law prohibiting disability vilification must be balanced against other competing international human rights such as the right to freedom of expression. Although DDLS does not claim expertise in international or constitutional law, we anticipate that this may be able to be achieved by including relevant exceptions in the legislation and ensuring that a court has discretion to develop a threshold at which impugned conduct becomes unlawful and reflects a legitimate limitation on any competing rights.

Vilification provisions under s 18C of the RDA have been considered reasonably appropriate and adapted to fulfilling Australia's obligations under article 4 of the International Convention on the Elimination of all forms of Racial Discrimination ('ICERD'). Australian signed the ICERD on 13 October 1966 and acceded to it on 30 September 1975.

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<sup>99</sup> s 51(xxxix) Australian Constitution.



In *Tobin v Jones* (2003)<sup>100</sup> the defendant brought an action against the respondent Frederick Tobin alleging that he had published anti-Semitic material and material denying the Holocaust on the internet which was a breach of the racial hatred provisions of the RDA. Tobin argued that the law prohibiting racial hatred was unconstitutional and therefore invalid as it exceeded the scope of article 4(a) of the ICERD. Article 4(a) states that

[State Parties] [s]hall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

The Court found that the law was within the executive's power and was therefore valid notwithstanding it had not gone so far as to create an offence. The Court also noted the executive additionally had power to enact racial hatred laws under article 2 (prohibition of racial discrimination) and article 7 (measures to combat prejudice and discrimination, and promote tolerance) of the ICERD, and article 20 of the International Convention on Civil and Political Rights ('ICCPR')<sup>101</sup>. Article 20 of the ICCPR provides that

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

The power of the Commonwealth to enact legislation which prohibits disability vilification will depend on whether disability vilification can be characterised under the external affairs power or characterised as an incidental exercise of such a power. A valid exercise of incidental power requires that the provision in question deals with a matter which directly affects the subject matter of the relevant head of power and is reasonable necessary in order to give effect to the provision.<sup>102</sup>

Proper characterisation requires that the Commonwealth provision is capable of being reasonably considered appropriate and adapted to fulfilling the treaty obligations and reflect the intent and scope of the treaty. For example, article 20 of the ICCPR which refers to 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence' may support a Commonwealth prohibition of vilification on the grounds of race and religion. However, it cannot support a similar disability vilification provision in the same way because the article is limited to race and religion only. A Commonwealth provision prohibiting disability vilification seeking to rely on article 20 would be likely to be found to be invalid as it would exceed the scope of article 20.

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<sup>100</sup> 199 ALR 1.

<sup>101</sup> *Toben v Jones* (2003) 199 ALR 1, at 10-11.

<sup>102</sup> Leslie Zines, *The High Court and the Constitution*. 4<sup>th</sup> ed, (1997) 38.

Following the publication of the draft report of the review of the *Disability Discrimination Act 1992*<sup>103</sup> the Productivity Commission sought legal advice from the Australian Government Solicitor ('AGS') in respect of whether there are constitutional limitations on the Australian Government with respect to inserting a vilification provision into the DDA. In summary, the view of the AGS was that:

1. The Commonwealth does not have the constitutional power to legislate generally in relation to vilification of disabled persons through the proscription of incitement to hatred, contempt and serious ridicule of persons with a disability; and
2. The United Nations Declaration on the Rights of Disabled Persons 1975 cannot justify a vilification provision in the DDA<sup>104</sup>.

DDLS notes that the AGS advice was prepared in 2004, prior to Australia's ratification<sup>105</sup> of the ICRPD in 2008. The AGS advice refers to initial steps that had been taken at the time for the negotiation of an international convention to protect the rights and dignity of persons with disabilities. The AGS advice goes on to state that:

If such a Convention is adopted, and if Australia becomes a party to it, the Commonwealth will have the power to enact legislation that is reasonably capable of being considered appropriate and adapted to give effect to obligations under that convention. If the proposed Convention includes a provision requiring Parties to prohibit or prevent vilification of disabled persons, therefore, this would provide a constitutional basis for Commonwealth legislation to that effect.<sup>106</sup>

DDLS notes that such a provision is not contained in the ICRPD. However, it could be argued that article 16 (freedom from exploitation, violence and abuse) may provide sufficient scope to enable disability vilification provisions to be characterised under the external affairs power. Article 16 states that

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including

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<sup>103</sup> Productivity Commission above n 41.

<sup>104</sup> Australian Government Solicitor above n 46.

<sup>105</sup> Signing the Convention or Optional Protocol obliges the State to refrain from acts that would defeat the object and purpose of either instrument; and & Ratifying the Convention or Optional Protocol indicates at least an obligation to be bound by these instruments and to perform such obligations in good faith.

<sup>106</sup> Ibid 67.

through the provision of information and education on how to avoid, recognise and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.

3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

An analysis of whether article 16 of the ICRPD can support Commonwealth disability vilification provision is beyond the expertise of DDLS and the scope of this paper. Such an analysis would however require a consideration of the terms 'exploitation', 'violence' and 'abuse'. DDLS notes that these terms appear in a number of treaties<sup>107</sup>. The website *Disabled World*<sup>108</sup> offers some definitions which are reproduced below.

What exactly is, 'exploitation'? To exploit someone is to use them selfishly or unethically. For example; when political parties in America use the Social Security programs as a means to promote or prop up their particular campaign, it comprises exploitation of the people who are on the programs - most notably seniors and people with disabilities. The media in America, so quick to present a shocking headline, is guilty of the same exploitation of seniors and persons with disabilities.

Exploitation means taking unfair advantage of people, their characteristics, or their situations. Using a position of power in order to take advantage of people with disabilities and seniors is indeed exploitation. Exploitation can also involve the absence of something or the refusal to

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<sup>107</sup> For example, article 20(2) of the International Covenant on Civil and Political Rights, article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women and article 19(1) of the Convention on the Rights of the Child.

<sup>108</sup> The Disabled World web site, based in Montreal Canada, provides an international online community for people with disabilities. See Disabled World: <http://www.disabled-world.com/info/about.php#ixzz1t6CdOi65>.

include something - such as ratification of the Convention on the Rights of Persons with Disabilities; something America has not done while so many other nations in the world have.

Violence can involve physical force with the purpose of damaging, violating, harming, or inflicting injury on a person. Violence can mean the causing of emotional and/or mental trauma on someone. Violence can also involve abuse. Abuse means:

- To deceive or trick
- To use wrongly or improperly
- To hurt or injure through maltreatment
- To force sexual activity on; rape or molest
- To assail with contemptuous, coarse, or insulting words<sup>109</sup>

DDLS notes that the first paragraph of article 16 refers to protection from all forms of exploitation, violence and abuse *both within and outside the home*. The inclusion of 'outside the home' provides the public element required to support disability vilification legislation.

A further constitutional limitation is the requirement that the matter to be legislated under the external affairs head of power must be a matter of international concern. The ASG advice states

[H]owever, we do not, consider that these instruments provide sufficient evidence that vilification of disabled persons is of international concern in the sense required to establish Commonwealth constitutional power to legislate. None of them use the term 'vilification' or contain provisions along the lines of Article 4 of the [I]CERD or Article 20 of the ICCPR. The 1975 Declaration refers to a right "to respect for their human dignity" and to "be protected against .. all treatment of [an] abusive or degrading nature". However, even if such provisions, if included in a treaty, would be sufficient to support legislation on vilification (which is not entirely clear), it is not possible to treat a declaration in the same way. We have not found any references in the other international declarations that appear to relate to protection from vilification.<sup>110</sup>

DDLS concludes that there are significant constitutional risks associated with the enactment of commonwealth disability vilification legislation under the external affairs power which do not extend to the States and Territories who are not so constrained by the same constitutional limitations.

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<sup>109</sup> Wendy Taormina, *Exploitation, Violence and Abuse* (2011) < <http://www.disabled-world.com/disability/discrimination/exploitation.php> > at 4 April 2012.

<sup>110</sup> Australian Government Solicitor above n 46, [68].

## 2. Free speech

The AGS advice referred to above states that any law which prohibits vilification will also be subject to Australia's obligations under article 19 of the ICCPR (freedom of expression). Article 19 states that

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (ordre public), or of public health or morals.

The right to freedom of expression is not explicitly protected by the Constitution but the right has developed through the common law. An implied doctrine of freedom of political communication has been read into the Constitution as a result of a series of High Court cases in the 1990s. Gelber explains this doctrine as:

Australia's constitutional arrangement implies protection of speech on political matters, but still permits restrictions to occur when those restrictions are 'reasonably appropriate and adapted to serve a legitimate end, the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government'<sup>111</sup>

Any Commonwealth, State or Territory law which has the effect of limiting free speech runs a risk of being challenged and declared invalid by the High Court if it is found to be inconsistent with the implied constitutional right of freedom of political expression. The implied right was introduced by the High Court in *Lange v Australian Broadcasting Corporation*<sup>112</sup> and has been further developed and refined in subsequent cases. In *Lange* the High Court held that the freedom to discuss political and government matters and issues was essential to the maintenance systems of representative and responsible

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<sup>111</sup> Katherine Gelber *Background paper on Australia's response to articles 19 and 20 of the ICCPR* (2011) < <http://www.ohchr.org/Documents/Issues/Expression/ICCPR/Bangkok/KathGelber.pdf> >.

<sup>112</sup> 189 CLR 520.

government that had been established by the Constitution and must therefore be implied by the Constitution<sup>113</sup>.

Although many aspects of the implied right remain uncertain, it is likely that a law prohibiting disability discrimination would need to be drafted in a way that balances competing rights.

The doctrine is limited in its application and scope. It is a general implied right to freedom of expression resulting from the principles of representative and responsible government rather than an individual positive right. It does not therefore empower people to be able to speak freely according to a power conferred on them by legislative rights. Instead it merely limits government restraint on public expression related to politics and government actions.

In *Jones v Scully*<sup>114</sup> the Federal Court considered whether racial hatred laws infringe the implied constitutional doctrine of freedom of political communication. This case involved the distribution of leaflets containing ant-Semitic literature and the Court found that the racial hatred law is a valid and proportional infringement on freedom of speech, and that this is especially the case given the exemptions permitted under the law<sup>115</sup>

The High Court has found that freedom of political discussion is necessary to sustain representative democracy and is inherent within that principle.<sup>116</sup> In *Nationwide News Pty Ltd v Wills*<sup>117</sup>, the High Court held that a federal statute that restricted public criticism which might have brought the federal Industrial Relations Commission or its members into disrepute was constitutionally invalid. In *Australian Capital Televisions Pty Ltd v Commonwealth (No 2)*, the High Court held a Commonwealth statute to be invalid because it restricted access to political broadcasts on radio and television during referenda, State and Commonwealth election campaigns.

## VII Conclusion and recommendations

This report has described how disability vilification is a reality experienced by many people. It causes considerable distress and contributes significantly to the systemic discrimination of people with a disability. Disability vilification has a long lasting impact and threatens a person's independence and self-

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<sup>113</sup> Leanne Griffiths, *The Implied Freedom of Political Communication: The State of the Law Post Coleman and Mulholland* (2005) 12 James Cook University Law Review 93.

<sup>114</sup> [2002] FCA 1080.

<sup>115</sup> Katherine Gelber above n 111, 8.

<sup>116</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 per Deane and Toohey JJ; *Australian Capital Televisions Pty Ltd v Commonwealth (No 2)* (1992) 177 CLR 106 per Mason CJ.

<sup>117</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

confidence. It is responsible for creating insurmountable barriers to some, preventing them from equal access to employment and educational opportunities and from participating meaningfully in society.

As a result of our own experiences and the outcomes of the research our view is that disability vilification is a widespread concern and contributes strongly to the systemic discrimination of people with a disability. Disability vilification is experienced across the life span, in education, employment and specifically in public and private places where all people, including people with a disability have an equal right to be treated with dignity and respect.

Disability vilification has far reaching effects on self-esteem and a person's innate sense of acceptance by their community. As such it impacts on a person's ability to seek education and training, seek meaningful employment and participate in society.

Disability vilification regulation is important because it 'fills a gap' in the existing legal protections that is not covered by current discrimination and harassment prohibitions. Vilifying conduct occurring in the workplace, educational setting or in relation to the provision of services may be characterised as discrimination and / or harassment and can hence be caught by the relevant DDA or State anti-discrimination provisions. Vilifying conduct that can be characterised as discrimination also falls within the jurisdiction of the DDA or State anti-discrimination provisions if it occurs in the areas of access to premises, accommodation, land, clubs and sport. People with a disability who experience vilification in the public sphere outside these areas have no redress as such conduct is not unlawful. The protections available to people with a disability are clearly uneven and inadequate. In many situations where a person may feel particularly vulnerable outside the areas protected by anti-discrimination and harassment laws, there are no protections at all below the level of criminal assault.

Although DDLS accepts that it is not possible to change community attitudes through legislation, it believes that by proscribing vilification, legislation can nevertheless provide an effective tool. It both sets a standard of behaviour and reassures and empowers people with a disability by providing a way in which they can to seek redress if that standard is breached.

Laws proscribing certain deleterious conduct also have other benefits. They reinforce a message to people with a disability and the community about conduct that is not tolerated and they also provide a platform from which anti-discrimination bodies such as the AHRC and VEOHRC can promulgate information, conduct research and provide education.

Improving community attitudes and facilitating the development of an environment in which people with a disability are accepted and treated with dignity and respect requires a number of different measures. The introduction of legislation prohibiting disability vilification is one important measure which has the potential to improve the lives and future for people with a disability.

Existing Commonwealth, State and Territory legal protection from discrimination, vilification and harassment is inconsistent, and other than in Tasmania, unable to protect a person at risk of disability

vilification. Although we have identified that it may not be constitutionally possible for the Commonwealth to enact disability vilification laws, it is far more possible at State level, notwithstanding the requirement to balance the right to freedom of expression.

It is our submission that there is a sound basis in both policy and law, for the introduction of legislation prohibiting disability discrimination. The introduction of such legislation is consistent with the aims and objectives of the *National Disability Strategy* and the objective of the DDA to promote community recognition and acceptance of the rights of people with a disability<sup>118</sup>. It is also consistent with the human rights CRPD.

DDLS therefore concludes that existing Victorian and federal legislation is inadequate to protect people with a disability from the harmful effects of disability vilification and strongly recommend law reform in this area.

DDLS recommends:

1. The introduction of provisions prohibiting disability vilification which are drafted along the same lines as the racial vilification / hatred provisions in s 18B-18D of the DDA.
2. That the VEOHRC be given increased powers to conduct research and provide community education in relation to eliminating disability racial vilification in the community.

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<sup>118</sup> s 3(c) *Disability Discrimination Act 1994* (Cth).



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