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1 March 2004

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DDA Inquiry
Productivity Commission
Level 28
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Dear Mr Belin

Productivity Commission's inquiry into the *Disability Discrimination Act 1992*: 'vilification'

1. We refer to your letter dated 28 November 2003.

Background

2. The Productivity Commission ('the Commission') is currently undertaking an inquiry into the *Disability Discrimination Act 1992* ('DDA'). The Commission has produced a draft report on the Inquiry, 'Review of the *Disability Discrimination Act 1992*' (October 2003) ('the Draft Report'). You have sought our advice in relation to various issues that have arisen in this context. Advice on most of those issues was provided on 10 February 2004. This advice deals with your questions in relation to vilification of people with disabilities, which some have suggested should be prohibited by the DDA (pages 232-2 of the Draft Report).

QUESTIONS AND SHORT ANSWERS

1 Q What are the constitutional limitations on the Australian Government inserting a vilification provision into the DDA?

A We do not think that the Commonwealth has constitutional power to legislate generally in relation to vilification of disabled persons, along the same lines as State legislation on vilification of various social groups, ie to proscribe incitement to hatred, contempt etc. There may be some power to legislate generally to make unlawful conduct that attacks the 'honour or reputation' of a person or group of persons on the basis of disability, on the basis of the external affairs power (section 51(xxix) of the Constitution and Article 17 of the International Covenant on Civil and Political Rights. The Commonwealth has power to enact legislation that would prohibit vilification in certain circumstances, eg in the territories, by corporations.

2 Q Could the United Nations Declaration on the Rights of Disabled Persons 1975 justify a vilification provision in the DDA?

A In our view, no. As we have noted, constitutional support for legislation in relation to attacks on the honour or reputation of a person or group of persons might be able to be derived from the International Covenant on Civil and Political Rights.

3 Q What is the difference between harassment and vilification?

A See paragraphs 3 to 0 below. Essentially, as the term 'vilification' has been used in State legislation, it involves a public act that is likely to incite hatred or violence towards an individual or group, while 'harassment' involves public or private conduct directed towards, and with particular effects upon, the individual concerned. We point out that certain conduct that would constitute 'vilification' also constitutes discrimination or harassment, in the terms of the DDA.

REASONS

'Harassment' and 'vilification'

Meaning of 'vilification'

3. We think it is useful to deal first with what is meant by 'vilification'. The meaning of a term in legislation will depend, in the first instance, on whether the legislation defines it. If so, the term has the meaning in the definition. If a term is not defined, a court will interpret it according to its ordinary meaning, taking account of the context and the object and purposes of the legislation (eg see paragraph 15AB(1)(a) of the *Acts Interpretation Act 1901*).

4. 'Vilify' is defined by the Macquarie Dictionary as follows:

> to speak evil of; defame; traduce

5. However, over recent decades, the term 'vilification' has been used to refer to particular types of behaviour towards certain social groups or members of social groups, eg in the expression 'racial vilification'.

6. Article 20 of the ICCPR, which we discuss later in this advice, refers to 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence'. Article 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (New York, 7 March 1966) (CERD) requires Parties to prohibit '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'. Neither of these provisions uses the term 'vilification', but that word is often used to refer to the conduct they describe.

7. The Model Law against Racial Discrimination, prepared by the UN Secretariat at the invitation of the UN General Assembly, to provide guidance for States in enacting legislation to give effect to Article 4 of the CERD, includes the following draft provision:

> A. Offence of racial discrimination committed in exercise of the freedom of opinion and expression
>
> ...
>
> 23. It shall be an offence to threaten, insult, ridicule or otherwise abuse a person or group of persons by words or behaviour which cause or may reasonably be interpreted as an attempt to cause racial discrimination or racial hatred, or to incite a person or group of persons to do so.
>
> ...
>
> 25. It is an offence to defame an individual or group of individuals on one of the racial grounds referred to in part I.
>
> 26. It is an offence to disseminate or cause to be disseminated, in a publication, broadcast, exhibition or by any other means of social communication, any material that expresses or implies ideas or theories with the objective of incitement to racial discrimination.
>
> 27. The actions referred to in paragraphs 23 to 25 of this Section are deemed to constitute an offence irrespective of whether they were committed in public or in private.
>
> 28. An action which occurs inside a private dwelling and is witnessed only by one or more persons present in that dwelling shall not constitute an offence.

8. Most Australian States and Territories have legislative provisions relating to such behaviour, often with titles referring to 'vilification'. Such behaviour is made unlawful. (See: *Anti-Discrimination Act 1977* (NSW), sections 20C, 38S, 49ZT, 49ZXB; *Discrimination Act 1991* (ACT), section 66; *Racial Vilification Act 1996* (SA), section 37; *Racial and Religious Tolerance Act 2001* (Vic), sections 7 and 8; *Anti-Discrimination Act 1991* (Qld) section 124A.) (The conduct is called 'victimisation' in SA, but not in other jurisdictions where the term has a different meaning, as in the DDA.)

9. Generally speaking, in this State and Territory legislation the elements of vilification are:

   – by a public act (including any form of communication to the public, including by speaking, writing, printing, displaying notices, broadcasting, telecasting, screening or playing of tapes or other recorded material, or by electronic means; and any conduct in public, including actions, gestures and the wearing or display of clothing, signs, flags, emblems or insignia)

   – incite hatred towards, or (according to jurisdiction) serious contempt for, or revulsion or severe ridicule of,

- a person or group of persons,
- on particular grounds relating to the person or members of the group (the grounds being race, and according to jurisdiction, religion, sexuality or gender identity, HIV/AIDS infection, and (in Tasmania only) disability,
- subject to certain exceptions, eg fair report of a public act, publication of material in circumstances in which the publication would be subject to a defence of absolute privilege in proceedings for defamation, or a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest.

10. According to the jurisdiction, it may be required that the person intends to create, promote or increase hatred, or motive may be irrelevant.

11. In addition, in a number of jurisdiction 'serious vilification' is a criminal offence. (See: *Anti-Discrimination Act 1977* (NSW), sections 20D, 38T, 49ZTA, 49ZXC ; *Discrimination Act 1991* (ACT), section 67; *Racial Vilification Act 1996* (SA), section 4; *Racial and Religious Tolerance Act 2001* (Vic), sections 24 and 25; *Anti-Discrimination Act 1991* (Qld) section 131A.)

12. The criminal offence of serious vilification generally involves the same elements as set out above, with the addition of:

- a mental element (eg that the offender acts knowingly, intentionally or recklessly); and
- a requirement that the offender acts in a way that includes threatening, or inciting others to threaten, physical harm towards the person or group or towards their property.

Often a prosecution can be commenced only with the consent of the Attorney-General or Director of Public Prosecutions.

13. Western Australia has penal legislation aimed generally at the same type of behaviour but expressed very differently (*Criminal Code* (WA), sections 77 to 80).

14. There have been some cases relating to these provisions which give an indication of the type of behaviour covered. It is not practical, or useful, to canvass a large number of these cases, but the following may give some indication of the scope of the provisions. We emphasise that each decision depends on the particular wording of the provision concerned.

15. In *R v Marinkovic* (1996) EOC 92-841, neighbours in the same block of units as the complainant, who was infected with HIV, stuck an abusive note on the complainant's door, shouted abuse from their balcony and threw rubbish onto his balcony. They were found to have vilified the complainant on the grounds of homosexuality and HIV positive status, within the meaning of the NSW Act, and were ordered to

apologise and pay compensation. In *Anderson v Thompson* [2001] NSWADT 11, abusive words spoken on the stairwell of a block of units with such force that they could be overheard by other residents were found to be racial vilification under the NSW Act. On the other hand, in *Burns v Dye* [2002] NSWADT 32, incidents involving highly abusive words and conduct by a person towards his neighbour were held by the majority on the tribunal not to be homosexual vilification under the NSW Act because although they *conveyed* hatred, serious contempt and serious ridicule on the part of the actor, they were not likely to *incite* such feelings in others.

16. In *Harou-Sourdon v TCN Channel Nine Pty Ltd* (1994) EOC 92-604, a light-hearted comment in a television broadcast that: 'I thought the French had class. I knew they were not too good on hygiene, but I thought at least they had class', was found not to be vilification. The Commission considered that terms used to define vilification, such as 'incite', 'hatred', 'serious contempt' and 'severe ridicule' were intended to cover more serious matters. On the other hand, in *Wagga Wagga Aboriginal Action Group v Eldridge* (1996) EOC 92-701, comments by an alderman at a public function and a local council meeting, describing a particular group of persons as 'radical half-castes' and 'half-breeds' conducting a 'reign of terror', and describing a land claim as a 'declaration of war' were held to be vilification under the NSW Act. In *Kazak v John Fairfax Publications Limited* [2000] NSWADT 77 (22 June 2000), a newspaper article that was highly critical of the behaviour of 'the Palestinians' (in Palestine) was held to be racial vilification.

17. Since 1995, the (Commonwealth) *Racial Discrimination Act 1975* has contained provisions prohibiting offensive behaviour based on racial hatred (sections 18B to18F). Constitutionally, these provisions are supported by the external affairs power on the basis of the International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, and particularly Article 4, which imposes an obligation to adopt immediate and positive measures designed to eradicate all incitement to acts of racial hatred and discrimination, as well as Article 20(2) of the ICCPR. (See *Toben v Jones* [2003] FCAFC 137, and see paragraph 6 above.) The Racial Discrimination Act does not use the expression 'vilification', although the provisions on racial hatred have often been referred to as relating to 'racial vilification'. Section 18C which is entitled 'Offensive behaviour because of race, colour or national or ethnic origin', provides in part:

> (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.

18. Section 18C of the Racial Discrimination Act, is similar to the State legislation on 'vilification' in that it deals with public acts, on the ground of race, in relation to a person or group of persons. It is also subject to the same sort of exception for fair

reporting etc (section 18D). However, its focus is different, in that it deals with the likely effect of the conduct, not on members of the public (eg inciting hatred) but on the person or group, ie causing offence, insult, humiliation. (Compare the NSW provisions, as interpreted in *Burns v Dye*, discussed above.)

19. In *Toben v Jones* [2003] FCAFC 137, Allsop J at [115] to [132] reviewed the history of sections 18B to 18F. In rejecting an argument that 'because of race' should be read as 'because of hatred of race', Allsop J suggests that:

> There is no doubt that by the mid 1990s, provisions of the kind found in ss 18B, 18C and 18D of the RD Act were referred to as 'racial vilification' and 'racial hatred' laws. The heading to Part IIA said as much. The words of ss 18B, 18C and 18D, however, were not in those terms. They can be seen as a deliberate departure from the kind of language used in the State and Territory legislation and in the civil provisions in the 1992 bill.

20. In *Toben v Jones*, publication on the internet of material denying the holocaust, in terms described by one judge as 'deliberately provocative and inflammatory' was found by the Full Federal Court to be a contravention of section 18C of the Racial Discrimination Act.

21. We point out that, if the DDA were amended to prohibit vilification, the term 'vilification' could be defined for the purposes of the prohibition in any way the Government chooses, subject to the availability of Constitutional power. In our view, the ordinary meaning of the word 'vilification' is not sufficiently clear to be relied on in a legislative provision, especially one that imposes liabilities or penalties. Therefore, any provision should set out precisely the elements of the conduct intended to be covered, as is done in the legislation we have referred to.

State provisions on vilification and disability

22. We note, in case it is of interest, that the only State that has legislation relating to vilification on the grounds of disability is Tasmania (although it does not use the word 'vilification'). Section 19 of the *Anti-discrimination Act 1998 (Tas*) provides, so far as is relevant:

> **Inciting hatred**
>
> A person, by a public act, must not incite hatred towards, serious contempt for, or severe ridicule of, a person or a group of persons on the ground of -
>
> ...
>
> (b) any disability of the person or any member of the group; or
>
> ...

23. In NSW, the Part of the Anti-Discrimination Act relating to disability discrimination includes no provision relating to vilification on the grounds of disability, but there are provisions prohibiting vilification on the grounds of HIV/AIDS infection (49ZXA,

49ZXB, 49ZXC), among other things. In its *Report 92 (1999): Review of the Anti-Discrimination Act 1977 (NSW)*, the NSW Law Reform Commission considered a suggestion that the Act should include a provision relating to vilification on the grounds of disability, but recommended against it (see paragraph 7.92). (We point out that we have not undertaken research in relation to proposals for legislative reform, since it is beyond the scope of your request for advice, but have included this information, which we found incidentally, in case it is of use to you.)

Meaning of 'harassment'

24. 'Harass' is defined as follows by the Macquarie Dictionary:

> 1. to trouble by repeated attacks, incursions, etc., as in war or hostilities; harry; raid. 2. to disturb persistently; torment, as with troubles, cares, etc.

25. 'Sexual harassment' is defined in the Macquarie Dictionary as follows:

> persistent unwelcome sexual advances, especially when made by superiors in the workplace and when employment status is dependent upon compliance.

26. In *Nguyen v Scheiff* [2002] NSWSC 151, in the context of the section 53 of the *Property (Relationships) Act 1984*, Campbell J said:

> It seems to me that if there is persistent disturbance of a person, by conduct, that can be sufficient to amount to harassment.

27. The term 'harassment' is used in a number of provisions in the DDA (sections 35 to 40), but is not defined in that Act. We have not found any cases which discuss the meaning of harassment in the DDA. Some assistance might be gained from the definition of 'sexual harassment' in section 28A of the *Sex Discrimination Act 1984*. Leaving out references in that definition to the 'sexual' element of the offending conduct and substituting references to disability, the result would be on the following lines:

> A person ... harasses another person (the person harassed) if:
>
> (a) the person makes an unwelcome [remark] to the person harassed;
> or
>
> (b) engages in other unwelcome conduct ... in relation to the person harassed;
>
> [because of the disability of the person harassed]
>
> in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the person harassed would be offended, humiliated or intimidated.

28. The Anti-Discrimination Board ('ADB') has described harassment in a workplace in fairly similar terms as:

> any form of behaviour that is not wanted and not asked for and that provides a hostile environment. For example, it:

- humiliates someone (puts them down);or
- offends them; or
- intimidates them; and

that happens because of their race, sex, pregnancy, homosexuality, marital status, disability, transgender (transsexuality) or age. (See NSW LRC Review of ADA, paragraph 7.8.)

29. The term would cover, for example, abuse or disparaging comment about a person's disability. Harassment in some circumstances constitutes prohibited discrimination. For example, harassment in the workplace on a prohibited ground (including disability) by an employer can adversely affect the employee concerned by creating a hostile working environment and so constitute differential treatment on the basis of the prohibited ground. (See *Hall v A&A Sheiban Pty Ltd* (1989) 20 FCR 217.)

30. It would appear that conduct that would amount to vilification, in certain circumstances, (eg comments by an employer about an employee to other employees), would also be discrimination for the same reason. Therefore, in some circumstances conduct that would be 'vilification' might also be discrimination, even though it is not harassment, because not addressed to the person with the disability. For example, a Commissioner of HREOC in *McDonald v Hospital Superannuation Board* [1999] HREOCA 13 (16 July 1999) said:

> I accept that [A] did disparage [B] to [C] about his condition. This is not, of course, itself harassment. ...The incident is capable of being, and was in my view, one involving unlawful discrimination. To address a derogatory comment to a fellow worker about aspects of another worker by reference to a disability of the latter, and thereby to lower the dignity and regard of other persons toward that worker is to treat the latter differentially. The DDA has among its objects the suppression of attitudes that foster disparagement of persons with disabilities. In this instance, I find [A's] comments to [C] did represent unlawful discrimination.

Harassment and vilification compared

31. In some cases, the same behaviour could amount to both harassment and vilification. Both can involve, for example, verbal abuse, the public display of material, jokes, offensive gestures. We point out that the words ' offend, ... humiliate or intimidate ' in section 18C of the Racial Discrimination Act, in relation to racial hatred, reflect the words of section 28A of the Sex Discrimination Act 1984, which defines 'sexual harassment' in terms of unwelcome conduct that by which a reasonable person would anticipate the recipient would 'be offended, humiliated or intimidated'. The precise degree of overlap between legislative provisions on harassment and vilification will depend on the way in which those provisions are worded.

32. One major difference, as those terms are used in State legislation, is that vilification involves acts in public or communications with the public, whereas harassment can be completely private.

33. Further harassment must be directed at a particular individual, or a possibly more than one particular individual. Vilification, as we have seen, can take the form of a published article relating to a social group, no member of which is known to, or targeted by, the vilifier.

34. Further vilification can (but need not) be defined as involving incitement of the public/third persons to feel or behave in a particular way; harassment occurs only between the harasser and the person harassed. The NSWLRC in its report commented:

> 'the rationale for including a public element is that the prohibition is not directed against conduct causing personal offence or humiliation, but against conduct which may incite third parties to act. So long as that rationale remains, the element of public activity is necessary. (7.17) ...in contrast, the RDA provisions are aimed at empowering victims of offensive, insulting, humiliating or intimidating conduct, not merely prohibiting the incitement of hatred. ... The Commissioner is therefore not satisfied that it is necessary to extend the prohibition of vilification beyond the incitement of others (7.110).

35. Provisions relating to harassment in the DDA (and other legislation) are restricted to particular circumstances, eg employment, provision of goods and services, education. There is no such restriction in relation to vilification.

CONSTITUTIONAL POWER

Section 12 of the DDA

36. Usually, a legislative provision that is not supported by a legislative power of the Commonwealth under the Constitution is invalid. However, section 12 of the Disability Discrimination Act provides for the application of the Act, by reference to the constitutional powers of the Commonwealth. As described in our advice of 10 February 1, section 12 of the DDA, which limits the application of the provisions prohibiting disability discrimination, ensures that the Act is within constitutional power. If a provision falls within the external affairs power (s.51(xxix) of the Constitution), it applies to the full extent of its terms. To the extent that the external affairs power (s.51(xxix) of the Constitution) cannot be relied upon to support the 'limited application provisions' in the DDA, those provisions will only operate in relation to discriminatory acts done by certain specified persons, or in certain specified places or circumstances, as set out in section 12.

37. This advice examines in detail whether a provision on vilification on the grounds of disability would be supported by the external affairs power (including on the basis of the matters listed in subsection 12(8)).

38. That would be the only power that could potentially support a provision of general application throughout Australia. However, some of the other powers relied on in section 12 could also provide some support to a provision on vilification on the grounds of disability, so as to allow for the partial application of such a provision, even in the absence of support from the external affairs power.

39. The Commonwealth, in our view, does have power under the Constitution to legislate in relation to vilification in the following circumstances:

- vilification that occurs in a Territory (section 122 of the Constitution; see subsections 12(3) of the DDA);
- (probably) vilification in relation to or by Commonwealth employees in connection with their employment as Commonwealth employees, and in relation to persons seeking to become Commonwealth employees;
- vilification by a foreign corporation, or a trading or financial corporation formed within the limits of the Commonwealth
- vilification in the course of, or in relation to, trade or commerce between Australia and a place outside Australia; or among the States; or between a State and a Territory; or between 2 Territories (eg an article in a newspaper sold nationally)

40. We note also that section 12 would have the effect that a provision that contravened a constitutional limitation would be ineffective. (See below on the implied constitutional freedom of political communication.)

External affairs power

41. The High Court has recognised the following potentially relevant aspects of the external affairs power:

- power to legislate on matters which are physically external to Australia
- power to change the domestic law of Australia so as to implement international agreements to which Australia is a party
- power to change Australian law so as to address matters of international concern

Power in relation to matters physically external to Australia

42. The Commonwealth has power to legislate in relation to matters physically external to Australia (*New South Wales v The Commonwealth ('Seas and Submerged Lands Act Case')* (1975) 135 CLR 337, *Polyukhovich v The Commonwealth* (1991) 172 CLR 501; *Horta v The Commonwealth* (1994) 181 CLR 183). This power would support legislation on vilification relating to conduct outside Australia. It may extend to conduct within Australia constituting vilification of persons outside Australia, but this is a difficult question, and further advice would need to be sought on this issue. (See subsections 12(13) and (14) of the DDA.)

Treaty implementation

43. To be supported by the external affairs power, in its treaty-implementation aspect, legislation must be capable of being reasonably considered appropriate and adapted to fulfilling the obligations (including reasonably apprehended obligations)

and benefits of the treaty. (See *Tasmanian Dam Case* (1983) 158 CLR 1 at 130-131, 172, 232, 259, *Richardson v The Forestry Commission* (1988) 164 CLR 261 at 289, 303; *Castlemaine Tooheys v SA* (1990) 169 CLR 436 at 473, *Victoria v Commonwealth* (1996) 138 ALR 129, at 146-148.)

International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights

44. Article 2 of the International Covenant on Civil and Political Rights (New York, 19 December 1966 (Australian Treaty Series 1980 No. 23) (the ICCPR) provides:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted.'

'Other Status'

45. We consider that disability is a 'status' for the purposes of Article 2(1) [and Article 26] of the ICCPR. (The Attorney-General's Department has taken this view in the past.) [The grounds for this view are strongest in the case of disabilities of the type referred to in the definition of the term 'disabled person' in Article 1 of the 1975 Declaration on the Rights of Disabled Persons, ie 'any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of a deficiency, either congenital or not, in his or her physical or mental capabilities'.]

46. However, Article 2 does not establish a general obligation to legislate to protect disabled persons, nor to prohibit discrimination against them. Rather it requires

Parties to ensure the rights recognized in the ICCPR without discrimination. Thus, Commonwealth legislation to prohibit discrimination based on implementation of obligations pursuant to Article 2 of the ICCPR must be restricted to ensuring the rights set down in other provisions of the ICCPR. The same arguments apply to Article 2 of the International Covenant on Economic, Social and Cultural Rights (New York, 19 December 1966) (ATS 1976 No. 5), which guarantees non-discrimination in relation to the rights set out in the ICESCR.

47. When conduct that would constitute vilification also constitutes discrimination against a disabled person or persons, in relation to a right guaranteed by the ICCPR or ICESCR, it can be prohibited on that basis. So, for example, vilification that amounts to discrimination in relation to the right to work can be prohibited as discrimination (and is currently prohibited by section 15 of the DDA).

48. In order to decide whether there is constitutional power to prohibit vilification more generally, it is necessary to consider whether the ICCPR or ICESCR provides for rights that would be relevant to legislation prohibiting vilification as such. We note the following provisions:

> Article 17
>
> 1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks.
>
> Article 19
>
> ...
>
> 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.
>
> Article 20
>
> ...
>
> 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.
>
> Article 26 provides:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Scope of Article 17

49. Article 17 provides that 'no one shall be subjected to ... unlawful attacks on his honour and reputation'. Further, 'Everyone has the right to the protection of the law against such interference or attacks'.

50. It might be argued that vilification of a person or social group constitutes an unlawful attack on the honour and reputation of the person or social group vilified, and that therefore Australia has an obligation to legislate to ensure 'the protection of the law against such ... attacks'. There are some difficulties with this argument.

51. First, Article 20(2) deals expressly, and clearly, with the obligation to prohibit by law advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. It does not seem logical that the Parties would have included that specific provision, while intending that a similar obligation on the grounds of 'other status' would be impliedly imposed by Article 17.

52. Accordingly, while we think there would be an argument that Articles 17 and 2 provide sufficient basis for legislating to prohibit vilification in the sense of advocacy of hatred or incitement to hostility on the basis of disability, on balance we think there would be a significant risk that the argument would not succeed.

53. However, we have considered whether Article 17 might support legislation dealing with other forms of 'vilification'. In particular, we have considered whether it might support legislation dealing with behaviour that offends, insults, humiliates or intimidates, or defames, a person or group on the ground of disability.

54. The fact that Article 17, in the same sentence as referring to attacks on honour and reputation, requires protection of 'privacy, family, home or correspondence' suggests that Article 17 is concerned with attacks on the honour and reputation of the individual, rather than a group.

55. Article 17 refers to a right to be free of 'unlawful attacks', rather than providing that attacks on honour and reputation should be made unlawful. This can be contrasted with Article 20, which expressly requires certain conduct to be 'prohibited by law'. It can also be contrasted with the first part of Article 17 which prohibits 'arbitrary or unlawful interference with his privacy, family, home or correspondence'. The predecessor to Article 17 of the ICCPR was Article 12 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948:

> Article 12.

> No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

56. The practice within the UN has been to make declarations, which are not in themselves legally binding, and then to refine the wording once it is to be included in a binding treaty. This appears to have happened when the relevant wording of Article 12 was picked up in Article 17 of the ICCPR. In that process States made the decision to add the word 'unlawful' which had not previously been included in Article 12 of the Universal Declaration. The relevant right in international law should now be regarded as that in Article 17. It might be argued that Article 17 does not create an obligation to make attacks on honour and reputation unlawful by legislation.

57. A General Comment adopted by the Human Rights Committee (HRC) (which is not legally binding, but is intended to assist States Parties in fulfilling their reporting obligations under the ICCPR) states, in relation to this part of Article 17:

> 1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.
>
> 2. In this connection, the Committee wishes to point out that in the reports of States parties to the Covenant the necessary attention is not being given to information concerning the manner in which respect for this right is guaranteed by legislative, administrative or judicial authorities, and in general by the competent organs established in the State. In particular, insufficient attention is paid to the fact that article 17 of the Covenant deals with protection against both unlawful and arbitrary interference. That means that it is precisely in State legislation above all that provision must be made for the protection of the right set forth in that article. At present the reports either say nothing about such legislation or provide insufficient information on the subject.
>
> 3. The term 'unlawful' means that no interference can take place except in cases envisaged by the law. Interference authorized by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the Covenant.
>
> 4. The expression 'arbitrary interference' is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression 'arbitrary interference' can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.
>
> ...

> 11. Article 17 affords protection to personal honour and reputation and States are under an obligation to provide adequate legislation to that end. Provision must also be made for everyone effectively to be able to protect himself against any unlawful attacks that do occur and to have an effective remedy against those responsible. States parties should indicate in their reports to what extent the honour or reputation of individuals is protected by law and how this protection is achieved according to their legal system.

58. This commentary indicates that, in the view of the HRC, it is intended that legislation is to be enacted to protect persons from attack. Of course, in Australia, defamation laws would provide protection in cases of attacks on individual reputation.

59. In our view it is possible that Article 17 could be relied on to support some form of legislation to protect individual disabled persons against unjustified attacks on their 'honour and reputation'. We point out that the relevant part of Article 17 relates to an 'attack'. That term implies that the offending words or conduction are specifically directed towards a person (or possibly a group of persons) with some harm in mind. Moreover the reference to the term 'honour and reputation' also seems to imply something more serious than, for example, ill feeling as a result of an insensitive joke or remark. 'Reputation' clearly refers to the opinion of a person held by others. Arguably, it is appropriately dealt with by the law of defamation. 'Honour' also in our view relates principally to the opinions of others, but may also relate to a person's own feelings. It might be argued that causing offence, humiliation or insult is an attack on a person's 'honour'. We point out that causing such feelings is an element of 'harassment' (see paragraphs 27 to 30).

60. Further, if legislation were to deal with such conduct, the nature of the redress to be provided would only fall within the external affairs power as the implementation of a treaty obligation if it was appropriate to give effect to the treaty obligation. Penal provisions in our view would be unlikely to be accepted by the High Court as satisfying this test. Civil remedies such as compensation or apology, on the other hand, may be within power.

61. A difficulty in seeking to rely on Art 17 as a constitutional basis is that it contains no criteria for any legislation to give effect to it.

Articles 19 and 26 ICCPR

62. Article 19 (with or without Article 2 or 26) of the Covenant, dealing with freedom of expression, does not provide any basis for a prohibition of vilification. Article 19 might support general Commonwealth legislation protecting freedom of expression, except to the extent allowed by paragraph 3 of Article 19. Such a law might include an exception for vilification of the disabled. However, Article 19 cannot be seen as a positive source of power to legislate to prohibit vilification. However, if a Court did find a power to prohibit vilification exists under other provisions of the ICCPR, such as Article 17, that power would be subject to Australia's obligations under Article 19.

63. Article 26, in our view, prohibits discrimination by legislation, including in its application, and discrimination by courts in administering the law. It does not require legislation to be enacted to prohibit discrimination or other breaches of the ICCPR.

Convention on the Rights of the Child

64. The Convention on the Rights of the Child (New York, 20 November 1989) (the CROC) expressly provides that Parties must ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind, irrespective of disability (Article 2). As with the ICCPR, however, the rights to be ensured do not appear to include a right to be free of vilification. We note that Article 19 requires Parties to take all appropriate measures 'to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child'. While this provision, combined with Article 2, might support legislation preventing verbal abuse of a child with a disability within the home, we do not think that it would support more general legislation regarding public vilification. Article 23 deals specifically with the rights of disabled children. Article 23(1) provides:

> States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

It might be argued that this would support legislation preventing vilification of disabled children, on the basis that vilification of disabled children would tend to be harmful to their dignity, and would discourage self-reliance and participation in the community. This is not clear, however. In any case, if there were such support it would clearly be limited to legislation to protect persons under 18. We can look further at the question of a provision on vilification in relation to children, based on the Rights of the Child Convention, if you wish.

Other international agreements

65. We note that we have considered the ILO Convention (No. 111) concerning Discrimination in respect of Employment and Occupation (Geneva, 25 June 1958) and the ILO Convention (No. 159) concerning Vocational Rehabilitation and Employment (Disabled Persons), Geneva, 20 June 1983, but do not consider that they could provide the constitutional basis for the type of provision you are concerned with. We have not found any other relevant treaty to which Australia is a party.

Proposed convention

66. We note that the first steps have been taken for the negotiation of an international convention to protect and promote the rights and dignity of persons with disabilities. In December 2001, the UN General Assembly established an Ad Hoc Committee to consider proposals for such a convention. At its second session in June 2003, the

Ad Hoc Committee recommended to the General Assembly that a convention be elaborated, and established a working group to prepare a draft text which would be the basis for negotiation in the next session of the Ad Hoc Committee. In its report to the General Assembly, the Ad Hoc Committee also recommended that its third session be held in New York in May/June 2004. (See website of the OHCHR) (http://www.unhchr.ch/disability/convention1.htm#2nd) If such a Convention is adopted, and if Australia becomes a Party to it, the Commonwealth will have 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. Conclusion and entry into force of such a Convention, however, is likely to be some years away.

International concern

67. In relation to the 'external affairs' power, Stephen J in *Koowarta v Bjelke-Petersen* ((1982) 153 CLR 168 at p.217 said that:

> A subject-matter of international concern necessarily possesses the capacity to affect a country's relations with other nations and this quality is itself enough to make a subject-matter a part of the nation's 'external affairs'.

68. Brennan J in *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 561 cited that statement, but commented that 'not every subject of international dialogue or even of widespread international aspiration has the capacity to affect Australia's relations'. Brennan J said:

> One purpose of the external affairs power is to furnish the Commonwealth with legislative authority to ensure that Australia acts in accordance with standards expected of and by the community of nations, even though those standards are not, or have not yet achieved the status of, obligations in international law. The observation of those standards may rightly be regarded as a matter of international concern. However, unless standards are broadly adhered to or are likely to be broadly adhered to in international practice and unless those standards are expressed in terms which clearly state the expectation of the community of nations, the subject of those standards cannot be described as a true matter of international concern. It may be that there are few occasions when the external affairs power is enlivened by the existence of a matter of international concern without a corresponding obligation in international law, but whether the enlivening factor be an obligation or a concern it is necessary to define it with some precision in order to ascertain the scope of the power. ((1991) 172 CLR 501 at 561)

69. We have considered whether vilification on the basis of disability is a matter of international concern, in the relevant sense, so as to attract the external affairs power.

70. We note that, in deciding whether proposed legislation would be supported by the external affairs power as a matter of 'international concern', some caution is

advisable. We point out that that comments by individual High Court Justices on the 'matter of international concern' principle were not relevant to the outcomes in the cases concerned. There has been no decision of the High Court as to the validity of any particular piece of legislation on the basis of that principle. The scope of the principle remains unclear, and it is likely that there is a wide range of views within the current High Court as to what is sufficient to establish 'international concern'. The High Court is also likely to tend towards a narrower approach to the 'international concern principle' in a case in which the Commonwealth is legislating on a matter within the power of the States, and where coercive powers or penal provisions are involved.

71. In the case of *Koowarta v Bjelke-Petersen*, Stephen and Mason JJ considered that international concern in relation to racial discrimination was demonstrated by a history over a number of years of international instruments on the subject which were either binding or had a high level of solemnity. (However, the case was decided on the basis of treaty-implementation.) Merkel J in the Federal Court, in a decision relating to the application of provisions of the DDA, has also held that discrimination on the basis of disability is a matter of international concern on which the Commonwealth has power to legislate (*Souliotopoulos v La Trobe University Liberal Club* (2002) 120 FCR 584).

72. A number of international instruments refer to the rights of disabled persons. We have already referred to a number of treaties. In addition, several declarations dealing with such rights have been adopted by the UN General Assembly, which are not legally binding, but which may indicate the existence of international concern. These include the 1959 Declaration of the Rights of the Child (Principle 5), the 1971 Declaration of the Rights of Mentally Retarded Persons (General Assembly resolution 2856 (XXVI) of 20 December 1971), the Declaration on the Rights of Disabled Persons (Proclaimed by General Assembly resolution 3447 (XXX) of 9 December 1975) (the 1975 Declaration), the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (UN General Assembly Resolution 46/119 of 17 December 1991), the Declaration on Social Progress and Development, General Assembly resolution 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969) (Article 19(d)), and the Standard Rules on the Equalization of Opportunities for Persons with Disabilities in 1994 (annex to General Assembly resolution 48/96 of 20 December 1993).

73. Probably the most relevant is the 1975 Declaration, which includes the following clauses:

> 1. The term 'disabled person' means any person unable to ensure by himself or herself, wholly or partly, the necessities of a normal individual and/or social life, as a result of deficiency, either congenital or not, in his or her physical or mental capabilities.
>
> ...
>
> 3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities,

> have the same fundamental rights as their fellow-citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.
>
> 10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

74. On the basis of these instruments, it appears that discrimination on the ground of disability, at least in the sense of the term 'disabled person' as used in Article 1 of the 1975 Declaration, is a matter of international concern. This was also the view of Merkel J in *Souliotopoulos v La Trobe University Liberal Club.*

75. However, to be valid under the external affairs power, legislation on a matter of 'international concern' must be limited to the precise subject of concern. It seems clear from the instruments we have referred to that protection from discrimination on the ground of disability, at least in certain areas such as employment, is a subject of international concern. The instruments may also provide evidence that the right of disabled persons to adequate care is a subject of international concern.

76. However, 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 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.

77. It would be of assistance in establishing international concern if it were shown that a large number of other countries had legislation prohibiting vilification on the basis of disability, and that such vilification was 'recognized universally or generally to be abhorrent' (*Koowarta case*, 39 ALR 417 at 464), so that lack of a prohibition in Australia would affect Australia's relations with other countries. While we have not undertaken an exhaustive search, our research does not suggest that this is the case.

78. As we have indicated, an international convention to protect and promote the rights and dignity of persons with disabilities is in the early stages of negotiation. This is some evidence of the existence of international concern in relation to these matters. However, we are not aware of any evidence that the convention will deal with vilification. In any case, the extent to which a convention that has not yet been concluded could be relied on as indicating 'international concern' is doubtful.

79. Therefore, we do not think there is any significant evidence of international concern, in the relevant sense, with regard specifically to vilification of disabled persons that

would be sufficient to support legislation to prohibit vilification on the ground of disability or impairment.

80. We point out that section 12 of the DDA is 'ambulatory', ie it has effect according to the state of affairs at the time of the conduct with which the court is concerned. This means that if, when a vilification provision is enacted, it is not within the external affairs power, but later it is supported by that power, the application of any vilification provision would extend accordingly. Thus, if a new treaty imposes an obligation to prohibit vilification, or if evidence develops that prevention of vilification has become a matter of 'international concern', a provision previously enacted could acquire wider application without any need for the DDA to be amended. (It would of course be necessary to consider whether, as a matter of legal policy, it is appropriate to legislate in this way.)

Relevant constitutional limitations

81. As a matter of constitutional law, legislation can be held invalid if it is inconsistent with the implied constitutional freedom of political communication. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court set out a test for determining whether a law infringes the implied freedom of political communication (the Lange test), relevantly stating (at 567-568):

> … two questions must be answered before the validity of the law can be determined. First, does the law effectively burden freedom of communication about government or political matters, either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people (hereafter collectively 'the system of government prescribed by the Constitution'). If the first question is answered 'yes' and the second is answered 'no', the law is invalid.

82. The likelihood that a provision on vilification will burden communication about government and political matters, would be greatly lessened if the types of exception for fair reporting etc that are found in State legislation, and s.18C of the Racial Discrimination Act, are included. However, it is possible that there will still be some such restriction on communications about governmental or political matters. In considering whether a particular restriction is consistent with the constitutional freedom it will be necessary to show that it is directed at a legitimate end, and that a particular restriction is 'reasonably appropriate and adapted' to serving a particular legitimate end.

83. We also recall our comments above, that any provision relying on the external affairs power, and especially on Article 17 of the ICCPR, would need to be consistent with article 19 of the ICCPR. In particular, any restriction on freedom of expression would need to be 'necessary' 'for respect of the rights or reputations of others' or, possibly 'for the protection of ... public order (ordre public)'.

Yours sincerely

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