

# TRANSCRIPT

## LEGISLATIVE ASSEMBLY LEGAL AND SOCIAL ISSUES COMMITTEE

### Inquiry into Anti-Vilification Protections

Melbourne—Thursday, 25 June 2020

*(via videoconference)*

#### MEMBERS

Ms Natalie Suleyman—Chair

Mr James Newbury—Deputy Chair

Ms Christine Couzens

Ms Emma Kealy

Ms Michaela Settle

Mr David Southwick

Mr Meng Heang Tak

#### WITNESS

Mr Felix Walsh, Policy and Law Reform Officer, Disability Discrimination Legal Service.

**The CHAIR:** I declare open the Legislative Assembly Legal and Social Issues Committee's public hearing for the Inquiry into Anti-Vilification Protections in Victoria. Please ensure mobile phones have been switched to silent and that the background noise is minimised.

I acknowledge the traditional owners of the land on which we are meeting and pay my respects to their elders past and present and the Aboriginal elders of other communities who may be here today.

All evidence taken at this hearing is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Assembly standing orders. Therefore the information you provide during the hearing is protected by law. However, any comment repeated outside the hearing may not be protected. Any deliberate false evidence or misleading of the committee may be considered contempt of Parliament. All evidence is being recorded, and you will receive a proof version of the transcript following the hearing. All transcripts will be made public and posted on the committee's website.

Today we welcome and thank from the Disability Discrimination Legal Service Mr Felix Walsh, Policy Officer. You have up to 10 minutes to present to the committee, followed by questions. Thank you so much, Felix, for joining us today.

**Mr WALSH:** Thank you very much for the opportunity. I think we at the DDLS are quite excited about this, and we think it could have a really beneficial impact for the disabled community. I thought an easy way to start off would just be to introduce myself and the DDLS as a way to conceptualise the perspective that we can provide and also the kinds of questions that we may be able to answer. I am the Policy and Law Reform Officer there, and the DDLS itself is a community legal centre. We serve exclusively the Victorian community of disabled people, and we operate exclusively within the discrimination area. So we only deal with the *Equal Opportunity Act* and the *Disability Discrimination Act*. I think it is important to note that we do not actually consider ourselves to be a representative body. Rather we consider ourselves to be a service there to support and help disabled people when they are dealing with the legal system. We do, however, have strong relationships with disabled people's organisations and representative bodies, so I do think we are quite well informed on the issues that are faced by the disabled community. We also do have some good, practical knowledge on the difficulties faced in using the legal system for disabled people and also, I suppose, the limitations in using the legal system to achieve change.

The way I thought I might deal with this is that there are kind of three broad topics that I would like to talk about. The first is whether disability should be included at all. The second is the nature of the Act as it sits at the moment and some problems that we have with it, and finally just some other issues that we think are not necessarily directly raised by the Act or the proposed amendments but more are to do with the wider issues. I might stop after each of those and just see if there are any questions. Otherwise I will just keep on going.

So the first question is whether disability should be covered at all. I think it is important to note here that the inclusion of disability into vilification laws is not wildly innovative. It has already happened in a range of jurisdictions in Australia, with the ACT and Tasmania as the obvious examples. It is pretty common around the world in different jurisdictions. The UK has had theirs for a number of years now. Also, while not directly applicable to Victoria, the fact that Australia is a signatory to the Convention on the Rights of Persons with Disabilities—and one of those articles within the convention is to do with awareness raising and requires states to take steps to combat stereotypes, prejudices and harmful practices relating to persons with a disability—I think we see as something that is pretty reasonable and almost an expectation that there be some protection provided for disabled people and a signal to the community that this is no longer okay.

I suppose moving to the question of whether there is a problem with disability in Victoria or disability vilification in Victoria, I think the first thing to note is it is really hard to give you an accurate picture on this in relation to the data and information. This is because it is not a particularly well researched or understood area, and so it is very much relying on anecdotal evidence and also the experiences of other jurisdictions around the world. In that situation we would say that the problems that we see relating to the disabled community in Victoria are not Victorian problems. They are global problems, and so the experiences of other jurisdictions are really useful here.

In relation to that I think it is important to look at the UK. The UK have already got disability vilification, hate speech laws. In the UK they receive probably about 300 complaints given to the police per year, and there has been a significant increase in the last couple of years where it has jumped from about 200 to 300. Some more research in the UK suggests that about 40 per cent of disabled people faced or experienced direct online hate speech. It is important in the same research that they noted that there is a spectrum in disability and there are certain disabilities where the nature and characteristics of it mean that those people are more prone and vulnerable to receiving hate speech online. So in that research they found that 75 per cent of people with cognitive disabilities—autism, as an example—had received either online or offline hate speech.

Looking towards the Australian experience, if you look to the ACT and Tasmania, in both jurisdictions disability is the number one attribute for vilification complaints as well as discrimination complaints. This is important to consider because in Victoria disability is the number one attribute in relation to discrimination complaints, and I think it is reasonable then to say, ‘Well, it’s going to be likely the same for vilification’.

So I think that, in my mind, establishes that there is a problem, and the second thing that I think it is important to establish is: vilification law is about group harm, really—harming someone based on being part of a group. The question is: is disability like the other attributes in this sense? Using a recent example in the UK I think you can say that. In that situation a young disabled woman in the UK had a private photo of hers taken from her Instagram. It was photoshopped and then placed on Facebook in a way that mocked her because of her disability. This was then shared with 68 000 other people. Thousands of comments were made on it. It was then picked up and made into a TikTok trend, which is continuing. I raise her situation for two reasons. It talks to the problems about online vilification and to the problem that she ran into: she asked Facebook to take this down, she asked TikTok to take this down and she got no response from them.

The second thing I would like to say about that is the group harm aspect. So what she did was in response she wrote an open letter, and I might just read out just a couple of words that she said, because I think it just captures what is going on here. She said:

In the past few years, I have lost the ability to walk and endured multiple surgeries . . . But nothing compares to being looked at and laughed at by thousands of strangers. On top of that, I was subjected to overwhelming levels of hatred found in the comments on your post and I had to read that people think I should just ‘wheel myself off a cliff’ or that someone should ‘take one for the team’ and murder me in my sleep. I have spent the last few days battling with really dark thoughts about myself and my life because of what these people have said about me.

The problem that disability has is this: she has encapsulated what she feels from that response, but the problem is that other disabled people see that and they see the societal attitudes toward her and the prejudices and they think that that applies to them as well—and, to be frank, it probably does; there are people in society who think that about disabled people. So that plays into this fear that many disabled people have that the way that people in society treat them is reflective of the whole community, and it makes it really difficult to engage in that community again.

I think, in my mind, that talks about why I think disability should be included within the Act, and I think unless you have got any questions I will move on to, I suppose, the aspects of the Act that we have some thoughts on, I suppose.

**Ms COUZENS:** Thanks, Felix, for your presentation today. We really appreciate it. You have covered some really interesting ground, actually. Do you see a need for better data collection on the experiences of people with disabilities and vilification?

**Mr WALSH:** We do. One of the problems that we have is that I can tell you that there are plenty of people in the disabled community who have experienced some kind of vilification or hate speech but there is no central body with that information. One of the things that we really like about the *Equal Opportunity Act* is that there is so much data picked up by the VEOHRC. Not all of that is readily available, and we think that that can be a problem, but it gives a central source that has some kind of powers to get this information. The reason that we think picking up that information [inaudible] is because you cannot really come up with a solution if you do not really understand the problem as it is, and so we know that there are certain people or certain disabilities that are particularly prone to being targeted. We know that there is a general kind of prejudice in society towards people with disabilities, but we do not really have an understanding about where these kinds of situations come up, the level of the problem or any of that kind of stuff, and so we think that there is a problem with data collection.

**Ms COUZENS:** In terms of your experience with people who have a disability and feel they have been vilified in some way, do they, from your experience, report it to the police? And if so, how effective is that when they do actually report it? It might be, for example, a person in a wheelchair gets attacked by somebody and thrown out of their chair. Do the police see that for what it is, or do they just see it as an assault?

**Mr WALSH:** Yes and no. There are problems here. The first thing to note is the problems that you are talking about there are not new problems. The problems have existed for yonks, and the problem is that we have only really started to conceptualise that we need to be having a response to this from a society perspective or police perspective. What that has meant for disabled people in the past is that they will raise a complaint through an authority figure, whether that is the police, whether that is the school they are in or whatever, and they will not get much of a response. What that does is it creates a situation where the disabled person feels that it is better for them to do their best to move past the problem rather than trying to take a complaint to make sure it never happens again blah, blah, blah, blah, blah. This is a problem that we have with all kinds of authority figures, but there is a problem—you know, some of the most vulnerable people in the disabled community are those who live in shared accommodation settings. There is always this weird divide when raising a complaint to the police about, ‘Whose responsibility is it?’. Should the police be taking the response, or should it be the care provider? Or, if it is in relation to a school, is it a police response or is it a school response? Sometimes—and again this is anecdotal because I do not really have the information for it—there is a problem that you run into where both parties just kind of put their hands up and say, ‘Try somebody else. Go back to the other person’. So I think it is hard to give you a proper answer to that, other than anecdotally that is a problem.

**Ms COUZENS:** Do you see education as being a preventative tool?

**Mr WALSH:** We do, and this was something I was going to touch on as well. It is a problem to understand vilification as a thing in and of itself. It really plays upon existing prejudices and cultures and all that kind of stuff that already exist in society. To challenge that really requires education, and more to the point—

**Ms COUZENS:** Maybe you need to answer the door.

**Mr WALSH:** Sorry about that. I suppose what I am getting at is that it is an education problem. We think that under the *Equal Opportunity Act* one of the great things about it is the educative role that the VEOHRC plays. We think that that is a really great thing. We have got a few concerns about just putting this under the *Equal Opportunity Act*, but we think that to be really effective in this you need to be focusing on the underlying problem, which is the prejudice and not how it plays out, which is the vilification.

**Ms COUZENS:** Thanks, Felix. I appreciate your time.

**Mr WALSH:** Pleasure.

**Mr TAK:** Thank you, Felix. I think part of my question already has been answered, but I just want to know a little bit more. Felix, what sort of support is currently available for people with disability that might have experienced vilification or hate conduct?

**Mr WALSH:** By that, are you asking about the problems that we face in dealing with the legal system?

**Mr TAK:** Legal.

**Mr WALSH:** There are a couple of problems here. Most of our experience is to do with discrimination law so I will talk about that experience, but I think a lot of the same problems are going to crop up. One of the problems is that the Australian approach to this has always been reactive. You have to wait until there is an actual problem or an actual experience of vilification before anyone will do anything. That is necessary but it is not going to change anything very quickly, so what you really need is a proactive approach, which is a separate issue.

In relation to the reactive system, to have an effective system in this you need to enable people to actually use the system, and for disability—and in our opinion it is probably going to apply for other groups as well—there is a really incredible burden in expecting already systemically disadvantaged groups to be able to push through a litigation process. This is particularly the case in an area of law where there is a clear intention from Parliament that it should be as much self-represented as possible, that there is no need for legal representation.

What we find is that we have got disabled people who may not understand the system very well, they do not have the time resources, they do not have the labour resources, they do not have the knowledge resources, they do not have the financial resources and they are expected to do this. This is a haphazard way to do it, so there will be some disabled people who can do it but not everyone. What we think would be a really important measure to consider is trying to assist representative bodies to be able to do this in their own right rather than tying it to an individual complainant. So these bodies are under-resourced as it is, but they are in a better position—they have got multiple people who can take part of the role, they have got financial resources, they have got time resources.

We also think it responds to a fear, and again we think this probably extends out beyond the disabled community—because of the history of neglect in this area in the way complaints are dealt with there is a fear of victimisation. So when a complaint is made and nothing happens it gives a signal to the perpetrator that you can do this again and nothing is going to happen, and often they will take it out on the individual that is complaining and make it worse, so we think that if you enable representative bodies to do this it will take the pressure off individual complainants. We also think it will deal with the problem of the fear, either in reality or hypothetical, of victimisation occurring from a complaint.

**The CHAIR:** I just had a question. The committee understands that disability is a protected attribute under the civil and anti-vilification laws in Tasmania and the ACT. Do you have any information on how effective such schemes are in practice to protect people with disability?

**Mr WALSH:** I think there are a couple of things to note. There is a difference in the approaches taken by both of these provisions. Under the ACT provision they have taken a more similar approach to Victoria's, in that it is about incitement rather than the harm effect, I suppose. Tasmania has got both; they have got an incitement provision and a harm provision, and the reason I say that is that one of the problems with the *Racial and Religious Tolerance Act* is that it hardly ever gets used. We have got the same experience in the ACT, where there have been two claims in relation to disability in the last two years, which is a very small number but it is not out of step with what the other attributes are. Race has only been raised nine times in the last two years; sexuality has only been raised twice as well. That talks about the problems with the Act itself, I think. If you look to Tasmania where they have got both, it is more approachable from an applicant point of view, so they are looking at more like 90 claims per year in relation to disability. It is still a bit too early to say whether it is actually having a practical impact on the ground, whether vilification speech is going down or going up or doing not much, but we do know from the two experiences of those approaches that if you take just the incitement approach without having a harm-based element you are not really going to be able to assist all that many people, I do not think. I suppose many more organisations have already spoken to you about the problems with the incitement test versus the harm-based test. I can talk to you about that if you like, but I am sure that you have already heard it all before.

**The CHAIR:** Thanks, Felix. Felix, thank you so much for taking the time to present to us today. The next steps will be that the committee and members will deliberate on all submissions and evidence gathered in this inquiry and we will then put forward some strong recommendations to government. You can keep up to date in relation to the progress of the committee on our website. But again thank you so much for taking the opportunity to present to us.

**Mr WALSH:** Could I just make one more comment, if that is okay?

**The CHAIR:** Sure.

**Mr WALSH:** My guess is that it is probably something that has not been raised before. We have a slight problem with the way that the private conduct offence is formulated in the current Act. I suppose, in talking about the Victorian Act, the approach that they have taken is an intention-based approach. So both parties to the vilification—the perpetrator and the victim—if in the circumstances it can be assumed objectively that they want it kept between themselves, then it is assumed to be private conduct. Now, the problem that we have with that—and again we think it applies to the disabled community, but we think it will apply to other groups as well—is that because of the internalised normalisation of the process of vilification, in the sense that as a disabled person you are just going to have to put up with it that this happens from time to time and the best approach to it is to move past it rather than to fight it and trying to get something changed, objectively when you look at that intention at that moment, they actually both want to keep it private at that point in time. The

victim chooses the moment—for example, in the back office of the workplace, the boss says to the disabled employee, ‘If I was your mother, I wouldn’t have had you’, and that is clearly vilification speech, but it looks to me like it would fit that private conduct offence. And the boss in that situation has chosen that moment because it is semiprivate and the disabled person just wants to move past it. And we think that obviously in the workplace we want these places to be safe. So we have a problem with that.

The approach taken under the *Racial Discrimination Act* is to look at public places, and the problem that we have with that is that for disabled people, particularly the most vulnerable, so those in supported accommodation facilities, these are both public and private spaces. They are private in the sense that the disabled person lives there—it is, you know, where they spend their days and whatever—but it is also a place of work. So how do you see that—is it a public or a private place? If it comes to be a private space, then you are denying the most vulnerable, the most in need of protection, of any protection. We are not really sure how we would use that or deal with that problem. I think the only thing that we would say is that we would encourage that the private conduct offence has almost like a presumption that if there is unwelcome conduct—if the conduct is unwelcome—that there is an assumption that it is intended not to be kept between the two people, unless it is established otherwise, I suppose, is what I am saying. I think that is about all I wanted to say.

**The CHAIR:** Thanks, Felix. Has that concluded your presentation? Again I take this opportunity to thank you for all the work that you do and of course for being here on behalf of Disability Discrimination Legal Service. Again, as I said, we will continue on with the deliberations until we provide some strong recommendations to government as part of a report. But again thanks for the opportunity to hear from you and for all the work that you do.

**Mr WALSH:** Thank you very much for the opportunity.

**Witness withdrew.**