

# Disability Discrimination and the Bar

(A paper presented to a seminar on 8 June 2005 by the  
Equal Opportunity Committee of the NSW Bar Association, Sydney)

## Introduction

The point of the seminar is to inform you of some perspectives on disability issues and to arm you as to how to manage them either personally or in the conduct of your practices.

The seminar is organised by the 2005 Equal Opportunity Committee of the NSW Bar Association. Its charter is to, *inter alia*:

“Promote and ensure equal opportunity for any person wishing to come to the Bar or at the Bar.”

The seminar will build on or extend issues covered in the CPD seminar of 30 April 2003 titled “*Disability Issues for the Bar - Effective Representation of People with Disabilities*”.

This seminar will also have a practical, management emphasis.

## Discrimination

Disability discrimination is but one of many ways by which discrimination and harassment can present a barrier to entry into and practice of a barrister. Other categories or grounds of direct or indirect discrimination that are regulated (and outlawed) by state or federal laws include:

1. Sex ; Sexuality; Transexuality
2. Sexual Harassment; Marital Status
3. Pregnancy; Breastfeeding; Family/Carer duty
4. Race; Age; Physical Features
5. Religious or Political belief or activity
6. Trade Union activity; Criminal Records - Spent convictions
7. Associates of the above

A ready guide to the area is contained in Discrimination Law and Practice, second edition, Federation Press, Sydney, by Chris Ronalds SC and Rachel Pepper. As they put it (at page 1):

“Discrimination laws provide a series of rights, remedies and redress for certain, specified acts. These acts are made unlawful, that is, they are made a breach of the civil law.”

As the flyer for this seminar states, nearly 20% of the NSW population have disabilities (Australian Bureau of Statistics (1998)). Under state legislation, all service providers are required to provide their services in a non-discriminatory manner.

This seminar will review disability issues for the Bar including, as a practical matter, some

types of assistance that can be offered to, or reasonable adjustments that can be made for barristers, their clients and witnesses by both the courts and chambers.

As is also indicated on the flyer, attendance tonight should satisfy the "special requirement" of the CPD program that points must be gained by barristers at least once every three years on the topic of management of barristers' practices in certain areas, including discrimination law and related issues (see clause 142, *Legal Profession Regulation 2002*).

## **Disability Discrimination Law in a Nutshell**

At the federal level, the relevant legislation is the *Disability Discrimination Act 1992* (Cth). Discrimination issues there are dealt with by the Human Rights and Equal Opportunity Commission ("HREOC") and, if necessary, the Federal Court of Australia or the Federal Magistrates Court, where a complaint has not been able to be conciliated, or has been terminated by the Commission President (Justice John von Doussa QC).

In New South Wales, the relevant Act is the *Anti-Discrimination Act 1977* (NSW) ("the AD Act"). It is on the internet in full at <http://www.legislation.nsw.gov.au/>. The Office of the Anti-Discrimination Board investigates and conciliates complaints. The President of the Anti-Discrimination Board is Mr Stepan Kerkyasharian. If the complaint cannot be resolved, the President will refer it to the NSW Administrative Decisions Tribunal ("ADT"), Equal Opportunity Division for a full-blown hearing (just like a court case) (see s 94 AD Act).

The relevant Part of the NSW Act Part 4A "*Discrimination of the Ground of Disability*", primarily in ss 49A to 49D.

The word "disability" is defined in section 4(1) in the following terms:

**disability** means:

- (a) total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
- (b) the presence in a person's body of organisms causing or capable of causing disease or illness, or
- (c) the malfunction, malformation or disfigurement of a part of a person's body, or
- (d) a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- (e) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

Part 4A applies (s 49A) to a disability:

- a. that a person has, or
- b. that a person is thought to have (whether or not the person in fact has the disability), or
- c. that a person had in the past, or is thought to have had in the past (whether or

- d. not the person in fact had the disability), or  
 that a person will have in the future, or that it is thought a person will have in the future (whether or not the person in fact will have the disability).

What constitutes discrimination on the ground of disability is the subject of section 49B of the NSW Act which provides:

- (1) A person (**the perpetrator**) discriminates against another person (**the aggrieved person**) on the ground of disability if, on the ground of the aggrieved person's disability or the disability of a relative or associate of the aggrieved person, the perpetrator:
- (a) treats the aggrieved person less favourably than in the same circumstances, or in circumstances which are not materially different, the perpetrator treats or would treat a person who does not have that disability or who does not have such a relative or associate who has that disability [*known as **direct** discrimination* - see Ronalds SC and Pepper page 33], or
  - (b) requires the aggrieved person to comply with a requirement or condition with which a substantially higher proportion of persons who do not have that disability, or who do not have such a relative or associate who has that disability, comply or are able to comply, being a requirement which is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply [*known as **indirect** discrimination* - see Ronalds SC and Pepper, page 42].

There are further deeming provisions in section 49B, particularly as to disabilities of or relating to vision, hearing or mobility and those accompanied by a seeing-eye dog.

The Part declares that discrimination on the grounds of disability is unlawful in the areas of:

1. In work (for employment applicants and employees, contract workers, commission agents, partnerships, local government councillors, industrial organisations, trade or professional qualifying bodies, employment agencies - ss 49D-K);
2. In education (s 49L);
3. In the provision of goods or services (s 49M);
4. In accommodation (s 49N); or,
5. In registered clubs (s 49O).

There are some **exceptions** specifically provided for under the Part, such as in relation to: public health; drug addicts; superannuation & insurance and sport (ss 49P-R).

Some exceptions are built into other provisions, for example, in discrimination at work, an employer may discriminate in determining who should be offered employment here only if (having regard to all of the circumstances) (s49D(4) of the AD Act) the aggrieved person :

- (a) would be unable to carry out the inherent requirements of the particular employment, or
- (b) would, in order to carry out those requirements, require services or facilities that are not required by persons without that disability and the provision of which would impose an *unjustifiable hardship* on the employer.

“Unjustifiable hardship” for the would be employer is defined in Section 49C as :

In determining what constitutes unjustifiable hardship for the purposes of this Part, all relevant circumstances of the particular case are to be taken into account including:

- (a) the nature of the benefit or detriment likely to accrue or be suffered by any persons concerned, and
- (b) the effect of the disability of a person concerned, and
- (c) the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.”

Some other general exceptions to the Act as a whole are contained in Part 6. They relate to acts done under statutory authority (in other words, it is lawful to discriminate on the grounds of disability (or other grounds) if it is otherwise lawful under an Act or Regulation or other statutory authority) - section 54; charities - s 55; religious bodies - s 56; voluntary bodies, s 57; and, places providing housing accommodation for aged persons - s 58.

## The Process

An aggrieved person’s rights to complain to the Anti-Discrimination Board (“**ADB**”) are under section 88 of the AD Act. It must be in writing and made to the President of the ADB and *must* be lodged within 6 months after the date on which the contravention of the AD Act or the regulations which is the subject of that complaint is alleged to have been committed. As from 2 May 2005, the time limit was extended by Parliament to **12 months** from the date the act of discrimination took place. [NB: The Federal Scheme provides a complaint must be lodged with HREOC within 12 months].

The President will investigate the complaint (s 89 AD Act). He will turn you down if there is some good reason why the complaint should not go ahead (s90).

The President can conciliate a complaint (s 92) with no right to representation (but leave can be sought - s93).

If not resolved, the President will refer the complaint to the ADT for a full-blown hearing

(see s 94 AD Act).

The powers of the Tribunal in the main are set out in s 113 of the AD Act which provides in part:

- (1) After holding an inquiry, the Tribunal may:
  - (a) dismiss the complaint the subject of that inquiry, or
  - (b) find the complaint substantiated and do any one or more of the following:
    - (i) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 95, order the respondent to pay to the complainant damages not exceeding \$40,000 by way of compensation for any loss or damage suffered by reason of the respondent's conduct,
    - (ii) make an order enjoining the respondent from continuing or repeating any conduct rendered unlawful by this Act or the regulations,
    - (iii) except in respect of a representative complaint or a matter referred to the Tribunal for inquiry as a complaint pursuant to section 95, order the respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by the complainant, ... or
    - (v) decline to take any further action in the matter.

Both the Anti-Discrimination Board (ADB) and the Human Rights and Equal Opportunity Commission (HREOC) processes are very much informal and conciliation based. There are pros and cons of the ADB and HREOC one would need to think about which route to take on any complaint. One of the key distinctions between filing a formal complaint with the ADB or with HREOC is that there are different limitation periods applying to the filing of formal complaints with those bodies. For the ADB, it is 6 months (now, 12 months as from 2 May 2005) from the date on which the discriminatory act took place, while for HREOC, it is 12 months from that date.

In NSW, there is a limit of \$40,000 damages available. In the Federal scheme, there is no such monetary limit. Also, on the Federal route, there is greater exposure to the other side's costs in the Federal or Magistrates' Courts.

Circulated tonight is a contact sheet with the details set out of some legal practitioners with experience in disability discrimination matters who might also provide free or pro bono legal representation in such matters.

## Hearing Impairment and the Bar

One in five Australians - over three million people - have a significant hearing loss. Hearing loss is common. As you grow older, there is a good chance you will not hear as well.

Hearing loss can happen before birth, at any age, suddenly or gradually. It can be acquired by congenital factors or through exposure to excessive noise or to certain medications or illnesses.

It is invisible. It is rarely obvious as with vision impairment is signaled by a person wearing spectacles. No white cane or wheelchair or obvious instrument heralds it. Indeed, many people go to great lengths to hide it or pretend it is not happening to them. Some even deny it altogether.

A hearing loss can result if there is a problem at any point in the hearing pathway - in the outer, middle or inner ears, or in the complex auditory nerve pathway to the brain.

Hearing loss can be:

- a. congenital; or
- b. acquired - pre-lingual (before fully developed speech) or post-lingual (after the development of speech);
- c. conductive (bone deafness); or
- d. sensorineural (nerve deafness) or a combination of both.

Further, around 10 per cent of the population experience persistent **tinnitus** (ringing or noise in the ears) which is often triggered or made worse by emotional events, bereavement, work and family stress, accident and injury (not necessarily of the ear), retirement, or moving to a much quieter environment.

Hearing loss is measured in decibels (dB) and usually described in terms of degree of impairment for hearing conversational speech.

Conductive hearing loss can be acquired or congenital and is caused by blockage or damage in the outer and/or middle ear. A conductive hearing loss can often be helped by medical or surgical treatment.

Sensorineural hearing loss can be acquired or congenital and is caused by damage to, or malfunction of, the cochlea (sensory part) or the hearing nerve (neural part). A principal feature of it is that hearing is usually deficient in the higher end range - so that consonants are often missed or misheard, whereas vowel sounds, which are lower, are better heard. This changes the way in which words are heard (if they are, indeed, heard at all).

The main hearing loss categories are:

**Mild hearing loss, 21-45 dB**

A degree of hearing impairment where individuals have some difficulty hearing soft speech and conversations, but manage to hear clear voices in quiet surroundings.

**Moderate hearing loss, 46-65 dB**

A degree of hearing impairment where it is difficult for individuals to understand conversational speech, particularly in the presence of background noise. A good indication of a moderate hearing loss would be the need to significantly turn up the volume on the TV or radio.

**Severe hearing loss, 66-90 dB**

A degree of hearing impairment where normal conversational speech cannot be understood.

**Profound hearing loss, 91 dB+**

A degree of hearing impairment where normal conversational speech cannot be understood.

Loss of hearing is often a gradual process. Some of the early warning signs are:

- you can hear but not understand;
- you find it hard to hear in noisy situations or groups of people;
- you think people mumble;
- you need turn the TV up louder than others or,
- you do not always hear the doorbell or the phone.

The most important matter to note with hearing loss is that it must be individually assessed and treated. No two hearing losses are quite the same. Unlike glasses, for example, no “one size fits all”.

There are a number of services provided by the various state and federal agencies for barristers, clients & witnesses in courts and tribunals.

Also distributed tonight is a “cheat sheet” of various services or facilities available in Sydney City Courts and Tribunals and contact points for you to be aware of as to how these services might be accessed.

8 June 2005

## **Bibliography - Sources**

Hearing Australia (Commonwealth Department of Health)

<http://www.hearing.com.au/>

National Acoustic Laboratories (NAL)

<http://www.nal.gov.au/>

Oticon Australia Pty Ltd

[http://www.oticon.com.au/eprise/main/Oticon/AU\\_en/\\_index](http://www.oticon.com.au/eprise/main/Oticon/AU_en/_index)

The State Legislation on internet in full at

<http://www.legislation.nsw.gov.au/>

The Administrative Decisions Tribunal: Equal Opportunity Division at

[http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt\\_6](http://www.lawlink.nsw.gov.au/adt.nsf/pages/adt_6)

The Anti-Discrimination Board at

<http://www.lawlink.nsw.gov.au/adb.nsf/pages/index>

Decisions of the ADT are at

<http://www.lawlink.nsw.gov.au/caselaw/caselaw.nsf/pages/adt>

or at the alternative site at

<http://www.austlii.edu.au/au/cases/nsw/NSWADT/>

Human Rights and Equal Opportunity Commission

<http://www.hreoc.gov.au/>

NSW AG's Disability Strategic Plan

[http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll\\_corporate.nsf/pages/attorney\\_generals\\_department\\_publications](http://www.lawlink.nsw.gov.au/Lawlink/Corporate/ll_corporate.nsf/pages/attorney_generals_department_publications)