

FREE AND EQUAL: AN AUSTRALIAN CONVERSATION ON HUMAN RIGHTS

SUBMISSION TO THE AUSTRALIAN HUMAN RIGHTS COMMISSION

3 December 2019

The Australian Centre for Disability Law (“ACDL”) welcomes the opportunity to contribute to the Australian Human Rights Commission’s conversation about human rights. ACDL is a specialist Community Legal Centre, our vision being one of a society in which persons with disability live with dignity, and in which their human rights and fundamental freedoms are recognised, respected, protected and fulfilled. In order to achieve this vision, the ACDL provides specialist legal advice and advocacy services where our clients have experienced discrimination and in other areas of law relevant to disability.

ACDL provides free legal advice, information and referrals and representation to people with disability in relation to discrimination and other areas of civil law that affect people with disability. Our legal services are directed to vulnerable and disadvantaged clients who often experience disadvantage in other areas of their lives. ACDL also promotes and advances the human rights of people with disability in Australia through its human rights legal work.

ACDL also seeks to promote the importance of non-discrimination against people with disabilities through extensive community legal education programs.

1. WHICH HUMAN RIGHTS MATTER TO ACDL?

There are a number of broad and fundamental rights that must be recognised and upheld for people with disabilities including the right to non-discrimination. The Convention on the Rights of Persons with Disabilities (CRPD) is an international treaty that identifies the rights of people with disabilities. We firmly endorse recognising and upholding all of the rights outlined in that document.

The following human rights have consistently been raised by ACDL clients:

Article 5 – Equality and non-discrimination -Ensuring the prohibition on discrimination on the basis of disability, and a guarantee to people with disabilities of equal and effective legal protection against discrimination on all grounds.

As noted above, ACDL specialises in providing legal advice on disability discrimination and therefore considers this right as particularly important. As outlined below, disability discrimination law can be complex and difficult to navigate and there is a need for changes to the law.

This is specifically exemplified in the recent case of *Sklavos v Australian College of Dermatologists*, which has raised concern over the application of the *Disability Discrimination Act 1992(Cth)* (“the DDA”) in relation to providing reasonable adjustments for people with disability. In this case the Federal Court found that a person with a disability must show that they are disadvantaged by a failure to provide a reasonable adjustment, and that the reason for the failure to provide the adjustment was *because of* the person’s disability. The case raises concerns about the ability of the DDA to adequately protect the human rights of people with disability. ACDL is calling for the DDA to be amended to provide clarity on the requirement to make reasonable adjustments for people with disability.

Another area of concern to ACDL is that people with disability are often ineligible for jury service on the basis of their disability. The exclusion of people with disability from jury service means that juries are not composed of the full diversity of the Australian community and that defendants with disability cannot face a trial by their peers.

Case study – Equality and non-discrimination

J.H. was born deaf and uses Australian Sign Language (Auslan). J.H was summoned to attend jury service at the Western Australia District Court in 2014. After informing the Department of the Attorney general that she required an Auslan interpreter, J.H. was told she was excused from jury duty as the Court was unable to provide the necessary means to enable her to serve effectively as a juror. J.H made a complaint of disability discrimination under the WA Equal Opportunity Act which was unsuccessful. J.H. then made a human rights complaint to the UN Committee on the Rights of Persons with Disabilities (the Committee) claiming that the WA government failed to provide reasonable accommodation for her disability. The Committee found that the WA government failed to fulfil its obligations under Article 5 of the CPRD.

Recommendation 1: The Federal Government amend the DDA to make it clear that organisations must make reasonable adjustments for people with disability.

Recommendation 2: All States and Territories adopt the necessary amendments to their legislation to enable people who are deaf or have other disabilities to perform jury duty.

Article 9 – Accessibility - ensure that persons with disabilities have access to the physical environment, to transportation and to information and communications technologies.

People with disabilities often find that they are unable to access public transport or they can only do so for part of their journey. As a result people with disability are restricted in their ability to engage in community activities and access services. This is a particular issue in

regional and remote areas. The DDA includes Transport Standards to assist full realisation of accessible transport, however implementation of these standards has been slow and inconsistent.

Case Study – Accessibility

Gary (real name changed) uses a wheelchair and catches the train to work every day. His nearest station is a suburban railway station, Tempe, however it was not accessible until the government started undertaking refurbishment work on the stairs at the station. During this time a temporary ramp was installed at the station which allowed Gary to access it. When the refurbishment was finished State Rail closed off the ramp but no lift had been installed with the refurbishment. Gary contacted the media and ACDL got involved, giving a radio interview on the issue. As a result of the advocacy the government changed its decision and re-opened the ramp to allow wheelchair access.

Recommendation 3: All transport providers prioritise and coordinate the improvement of accessibility of services for people with disability and give a commitment to compliance with the Transport Standards.

Article 14 – Liberty and Security of the Person – ensuring persons with disabilities, enjoy the right to liberty and security of person and are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

The issue of indefinite detention is one of particular concern to ACDL. People with disability, predominantly those with intellectual disability, may be detained in prison or psychiatric facilities despite being found not guilty of a criminal charge or if they are found ‘unfit’ to be tried due to their disability. People with disability in this situation can be detained for the duration of the maximum period they would have spent in prison if they were found guilty; or they can be held in prison for an indeterminate sentence that can significantly exceed the maximum period of a custodial sentence for the same offence. The Australian government estimates there are approximately 100 people detained across Australia in prisons, psychiatric units and forensic detention services under mental impairment legislation.¹ Indefinite detention is disproportionately experienced by Indigenous people with disability.²

¹ Commonwealth of Australia (2016) Senate Standing Committee on Community Affairs, Report: [Indefinite detention of people with cognitive and psychiatric impairment in Australia](#).

² First Peoples Disability Justice Consortium, [Aboriginal and Torres Strait Islander Perspectives on the Recurrent and Indefinite Detention of People with Cognitive and Psychiatric Impairment](#), April 2016, First Peoples Disability Network.

Case study – Liberty and Security of the person

Marlon Noble is an Aboriginal man with intellectual disability. He spent ten years in a Western Australian prison without ever being found guilty of a crime. Mr Noble was charged with sexually assaulting two girls in 2001, but has never faced trial after he was deemed 'unfit to plead'. His lawyer estimates that if he had been convicted he would have only served about five years in prison. There appears to be no evidence that the crimes he was charged with ever actually occurred. He was released in January 2012 under stringent conditions that limit his ability to lead a productive life in the community, despite never being convicted of the crime he was charged with.

Recommendation 4: All governments ensure there is consistent legislation across Australia to regulate the deprivation of liberty of people with disability and that they are fully consistent with human rights under the CRPD.

Article 16 – Freedom from exploitation, violence and abuse – ensuring all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse.

Many people with disability are effectively forced to live in institutions or residential care facilities to receive the supports they need for their disability. People in these environments are at higher risk of physical and sexual violence and verbal, emotional, psychological or financial abuse as well as neglect, poor care and harassment perpetrated by co-residents and support workers. It is extremely difficult to leave these environments as there are often limited alternative housing and support options.

Case Study – Freedom from exploitation, violence and abuse

Sean (real name changed) has an intellectual disability and lives in a disability group home. Sean has been the victim of numerous serious physical assaults while living in the house resulting in extensive bruising to his body including a black eye. Sean is non-verbal and has difficulty communicating what happened to him. In two cases the police were involved but the matters did not go to court due to Sean's inability to give evidence at a trial. The disability service undertook an investigation and as a result Sean was segregated into a small part of the house separated from other residents. This was done without consulting Sean's mother despite her having guardianship responsibility for restrictive practices for Sean. The service also refused to give any information or incident reports about their investigations to Sean's mother. Sean's mother has lodged a complaint with the NDIS Quality and Safeguards Commission.

Recommendation 5: Ensure adequate housing stock for people with disability and suitable oversight of organisations that provide care to people with disability.

Article 18 – Liberty of Movement and Nationality – ensuring the rights of persons with disabilities to liberty of movement, to freedom to choose their residence and to a nationality.

In Australia people with disability, and families of people with disability, consistently have their visa applications denied because they are unable to meet the strict health requirements under the *Migration Act 1958* (Cth). This means that a person with a disability or their family could have been living in Australia for many years, contributing to the economic and social life of the community, but they will be deported because of a failure to meet the health requirements.³ Asylum seekers and people with disability living in Australia on non-permanent visas are not eligible to access the National Disability Insurance Scheme (NDIS). The Age and Disability Support Pensions have a 10-year qualifying residence period,¹ leaving migrants with disability at an increased risk of a range of human rights violations.

Recommendation 6: Remove the exemption in the DDA as it applies to the *Migration Act* to ensure that Australia’s treatment of migrants with disability is not discriminatory.

Article 19 - Living independently and being included in the community – Ensuring that people with disabilities live in the community with the freedom to choose where and with whom they live, that they are not obliged to live in a particular living arrangement, and they have access to a range of support services including personal assistance to support living and inclusion in the community.

Many people with disability, including NDIS participants are forced to live in institutions, residential, congregate care, and aged care facilities in order to receive social and personal care supports.

ACDL is particularly concerned about young people forced to live in aged residential care nursing homes due to the under supply of appropriate housing and support options for young people with disability with higher and more complex support needs. According to the Interim Report from the Royal Commission into Aged Care Quality and Safety, over the 2017–18 financial year, a total of 2187 young people entered residential aged care. That figure equates to 42 young people, on average, entering residential aged care every week.⁴

³ Disability Rights Now 2019: UN CRPD Review of Australia CRPD, Factsheet 7,1.

⁴ Royal Commission into Aged Care Quality and Safety, Interim Report: Neglect, 31 October 2019, Vol 1, 234.

The Royal Commission heard a number of accounts from younger people who have been, or remain, in residential aged care who spoke of the social isolation, neglect, loss of function, sense of hopelessness and grief associated with their time in aged care which it stated raised real concerns about the extent to which younger people living in residential aged care are enjoying this right. The Commission concluded 'Australia now finds itself with a human rights issue that is costing people their independence, dignity and wellbeing.'⁵ The Royal Commission outlined a number of priorities for action including:

- Improve data collection in relation to younger people in residential aged care;
- Avoid new admissions to residential aged care from hospital;
- Fund independent and individualised advocacy for younger people in residential aged care;
- Increase the supply of Specialist Disability Accommodation; and
- Provide the care that is needed for younger people such that they access equivalent levels of care that they would receive in the community.⁶

Recommendation 7: Commit to the Australian Human Rights Commission recommendation that by 2025 there should be no young people with disabilities in Australia living in old aged care institutions.

Recommendation 8: The immediate implementation of the recommended priorities for action in the Interim Report from the Royal Commission into Aged Care.

Article 24 – The right to education - Ensuring that people with disabilities have access to education, including access to primary and secondary school education, reasonable accommodation of the special requirements associated with disability, and the presence of individual support measures to maximise the academic and social development of individuals with disability.

ACDL is told many stories of children with disability in schools being subjected to restrictive practices including seclusion under the guise of 'behaviour management' policies and practices. We are told that children are being locked into small seclusion rooms or left alone in classrooms due to what is considered bad behaviour. Parents are told that they must medicate their children before they are allowed to attend school and children are often only allowed to attend school for very short periods of the day. Children as young as 5 and 6 years old are being expelled from schools due to what is seen as problematic behaviour but which is often linked to their disability.

⁵ Ibid, 252.

⁶ Ibid, 248.

In its 2019 National Education Survey, Children and Young People with Disability Australia (CYDA) found that 'students with disability are routinely excluded in their education, with many being segregated from 'mainstream' schools and classrooms, not attending school full-time, refused enrolment and excluded from school activities. Suspensions and expulsions are also familiar practices, showing the lack of understanding and support for students with disability'⁷.

It is our experience that the Disability Standards for Education 2005 (the Standards) do not adequately ensure that children with disabilities are able to access appropriate inclusive education. ACDL recommends that a review is conducted of the Standards and that the DDA be amended to include the recommendations of this review.

Case Study – Education

Blake (real name changed) is an 11 year old boy with autism, ADHD and anxiety, He attends a specialist disability school however he is only allowed to attend school for 15 minutes a day. During those 15 minutes Blake must say good morning or hello politely or smile. He must give "normal" answers to questions and he must walk "normally" which means not to flap his hands, and not to skip, hop, jump or run. His mother must stand at the school gate during this time in the line of sight. Blake's mother has been told that Blake must be able to do this for four days in a row before the school will consider increasing the time Blake can attend. His mother believes that the school is setting Blake up to fail as the actions the school wants to prohibit are manifestations of Blake's disability. ACDL recently helped Blake make a complaint to the Australian Human Rights Commission.

Recommendation 9: In conjunction with people with disability conduct a review of the Disability Standards for Education 2005 with the view to amending the DDA in accordance with any recommendations from the review.

Article 25 – Health – Ensuring that people with disabilities have access to the same health care programs as others in the community as well as specialised health services needed specifically due to their disabilities.

Many people with disability have poor health. This is due to a number of factors, such as cost, limited availability of services, communication difficulties, the complexity of health problems and a lack of multidisciplinary focus and specialist skill in the health care system. According to the World Health Organisation persons with disabilities face a range of barriers

⁷ CYDA Submission to the Disability Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Education of children and young people with disability, October 2019, 2.

in accessing health care services, including cost, accessibility, stigma and discrimination and lack of or inadequacy of services and resources.⁸

The National Disability Insurance Scheme

Many people with psycho-social disability are not eligible for the NDIS due to the fluctuating nature of their disability. This can result in them receiving fewer supports for their mental health than before the NDIS came into effect. The process of applying for the NDIS can be traumatising, costly, and the level of evidence required is not possible to obtain for very many people living with serious mental illness.

Case Study – Access to the NDIS for people with psychosocial disability

Mary (not her real name) has a psychosocial disability as well as an intellectual disability. She lives alone community housing and has very little support from services. Mary's only outing was to attend church once a week where she socialised with the other parishioners. Mary had no medical evidence of her disabilities and she was refused access to the NDIS. Included in its reason for refusal the NDIA stated that Mary attends church and socialises there so she is able to socialise in the community. An advocacy organisation was appointed to assist Mary who helped her access a psychologist to assess her cognitive impairment, and collect evidence on her psychosocial disability. After receiving this extra evidence Mary was immediately assessed as eligible for the NDIS.

Recommendation 10: Ensure there is adequate support and funding for people with disability to apply for the NDIS including assistance to access the necessary documents.

Article 27 – Work and employment – Prohibiting discrimination on the basis of disability with regard to all matters concerning employment, including recruitment, continuance of employment, career advancement and safe and healthy working conditions.

People with disability in Australia are more likely to be unemployed, or underemployed than those without disability and often have more difficulty remaining in employment due to lack of flexibility of employers. Disability discrimination legislation requires that employers make reasonable adjustments for their employees however ACDL hears of many cases where this does not occur.

Case Study – Employment

Irene (real name changed) works as an Occupational Therapist at a medical facility. Due to a recent injury to her wrists Irene gave her employer a medical certificate requesting adjustments for her disability including not to lift heavy objects and to

⁸ World Health Organization, World Report on Disability (2011). https://www.who.int/disabilities/world_report/2011/report.pdf

have rests if walking long distances. Her employer then asked her to provide a substantial amount of medical information and sent her for an independent medical assessment. The assessment report was inconclusive and recommended that Irene do a workplace assessment. Despite this her employer commenced termination action, forcing her to take leave and suggesting that she re-deploy to an administration role for less pay. ACDL gave Irene advice about her rights under discrimination law and as a result she insisted to her employer that she undertake a workplace assessment. The assessment found that Irene could do the inherent requirements of her role and she has been re-instated as an occupational therapist.

Recommendation 11: Provide funding for education and training programs for employers on discrimination and the rights and obligations of people with disability in the workforce.

2. WHAT ARE THE BARRIERS TO THE PROTECTION OF HUMAN RIGHTS IN AUSTRALIA?

2.1 Inconsistent and complex discriminatory legislative regimes

An individual can make a claim of discrimination on the basis of their disability at a Commonwealth level under the *Disability Discrimination Act 1992* ("the DDA"), at a state level under the *Anti-Discrimination Act (NSW)* (similar acts apply in other Australian states and territories) or, if the act of discrimination is related to employment, under the *Fair Work Act 2009 (Cth)*. While this regime should provide a comprehensive set of protections against discrimination, inconsistencies and exceptions in the various pieces of legislation add complexity to the process of bringing a legal claim. This can act as a barrier to upholding the rights of people with disabilities through the legal system.

There are also gaps in existing discrimination law in a number of areas. For example existing Commonwealth and most State/Territory anti-discrimination legislation does not protect against systemic and intersectional discrimination and disability hate crimes, and there are no effective legislative remedies to address intersectional discrimination. Further, the DDA provides an exemption for certain provisions within the *Migration Act 1958 (Cth)*, which means that Australia's migration arrangements and treatment of disability are unable to satisfy the equal protection obligations under human rights international treaties.

An example of this complexity and inconsistency arises from the *Anti-Discrimination Act 1977 ("the ADA")* (NSW). While the legislation applies broadly to prevent discriminatory conduct in educational institutions, private education providers are not bound by the ADA. A victim of discrimination is only able to seek recourse under the Federal DDA. Similarly, the ADA contains a provision relating to assistance dogs, but only dogs that assist people with a

disability that impedes their vision, hearing or mobility. This excludes assistance animals that support individuals who suffer from episodic and serious medical crises (e.g. epilepsy) or people who experience psychiatric disorders (e.g. PTSD, hallucinations, panic attacks). A person with an assistance animal which alleviates a disability other than relating to vision, hearing or mobility is only able to seek recourse under the Federal DDA.

As these examples indicate, the system of legislation is not comprehensive and is not readily accessible or navigable by a lay person who might want to bring a legal claim. This issue is compounded if an individual has been the victim of intersectional discrimination involving aspects of their identity other than their disability.

2.2 Limited access to courts, legal advice and representation

In order to navigate the legislative regime effectively, people with disabilities are reliant on solicitors and advocates to assist them to draft and commence legal action. Unless this work is undertaken by organisations like the ACDL, engaging legal support can be prohibitively costly. If a discrimination matter does not resolve at the conciliation stage and the matter proceeds to the Federal Court, applicants are at risk of having a costs order made against them by the court. This can effectively act as a barrier for applicants to take matters to court and deters litigation. Further, compensation awards in discrimination law are historically low. As a result, even if a person is successful at court, their legal fees may be higher than the compensation awarded.

A consequence of this is that case law in the area of disability discrimination is scarce which means there is little guidance on the prospects of taking a successful claim to court. This can dissuade litigation that would allow further clarity for people to be able to claim their rights.

2.3 Legislation is not pro-active

Another significant barrier to the protection of the human rights of our client group is that the anti-discrimination legislative regime in Australia is reactive rather than pro-active. It places the onus on an individual to bring a claim after being subjected to discrimination. By contrast, a legal instrument such as a bill of rights would be better suited to protecting the rights of people with disabilities by placing a positive obligation on employers, education institutions and governments to make accommodations for, and to actively seek to avoid, acts of discrimination. A positive obligation could also be incorporated into anti-discrimination legislation.

3. HOW SHOULD INDIVIDUALS, BUSINESSES, COMMUNITY ORGANISATIONS AND OTHERS BE ENCOURAGED AND SUPPORTED TO MEET THEIR RESPONSIBILITY TO RESPECT HUMAN RIGHTS?

3.1 Training and education

People with disabilities are often a silent minority in the community. As a result, members of the community, businesses and individuals often do not recognise the challenges and discrimination faced by ACDL's client group. In order to remedy this, there should be programs in place that provide training and education about the experiences of people with disability, the challenges that they face and their rights under discrimination legislation. These programs should be implemented at schools, in work places and in government departments in order to provide information to a cross-section of the community. They should be developed and presented in conjunction with people with disabilities at the grass roots level.

ACDL has already taken steps to achieve this by partnering with people with disability to run and attend disability awareness and discrimination workshops. However, greater funding and support for these programs is required to ensure they are developed and implemented on a systemic level rather than an ad hoc one.

4. OPPORTUNITIES FOR THE GOVERNMENT TO FACILITATE THE REALISATION OF RIGHTS

There are a number of ways in which the government can facilitate the realisation of the rights to which people with disabilities are entitled. We have provided a detailed outline of three of these opportunities for the purpose of this submission.

In our experience, instances of discrimination are multi-faceted. That is, there might be a legal issue at play (for example, a school refusing to cater to the accessibility needs of a pupil), and a structural issue (for example, insufficient funding at the school to improve the accessibility of facilities). These two issues might then be aggravated by a third factor (such as the pupil's location in a regional area) that affects that pupil's right to education. This indicates that there are both structural and legal factors that lead to discrimination against people with disabilities, as well as very specific fundamental rights that must be upheld to address discrimination. It is important to consider all these issues as a comprehensive whole to facilitate the realisation of rights.

4.1 Incorporate the Convention on the Rights of Persons with Disabilities into a Commonwealth Bill of Rights

We believe that one of the most effective ways in which the government can facilitate the realisation of our client's rights is by engaging in legislative reform so that Australia meets its

obligations under the CRPD. This would be best realised through establishing a comprehensive, judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD and other human rights treaties.

Recommendation 12: Establish a judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD.

4.2 Strong and consistent legislation across Australia

As noted above, the complex regime of sometimes inconsistent legislation acts as a barrier to the protection of the human rights of people with disabilities in Australia. Ensuring that this legislation is consistent, and taking steps to simplify the legislative regime is therefore a significant way in which the rights of people with disabilities can be realised. The following reforms are suggested:

Recommendation 13: Ensure that discrimination laws across Australia appropriately cover all areas of public life;

Recommendation 14: Strengthen discrimination laws to address intersectional discrimination, to enable representative complaints by Disabled Persons Organisations and advocacy organisations;

Recommendation 15: Enable complaints regarding vilification and hate crimes on the basis of disability.

4.3 Increase funding for organisations supporting people with disabilities

Government must continue to fund legal centres like ACDL to continue to defend individual rights and to help create good case law in the discrimination area as well as to educate the community about rights and obligations under discrimination legislation. It is also vital that government ensures that all people with disability are able to access independent advocacy services to assist with accessing the NDIS and asserting their human rights and fundamental freedoms under the CRPD.

Increased peer managed mental health services and programs that support people with psychosocial disability regardless of NDIS eligibility is also vitally important as state funded services are pulling out of this service provision.

Recommendation 16: Increase funding for legal services, advocacy service and mental health services for people with disability.

Summary of Recommendations

Recommendation 1: The Federal Government amends the DDA to make it clear that organisations must make reasonable adjustments for people with disability.

Recommendation 2: All States and Territories adopt the necessary amendments to their legislation to enable people who are deaf or who have other disabilities to perform jury duty.

Recommendation 3: All transport providers prioritise and coordinate the improvement of accessibility of services for people with disability and give a commitment to compliance with the Transport Standards.

Recommendation 4: All governments ensure there is consistent legislation across Australia that regulates how people with disability can be deprived of their liberty and that they are fully consistent with human rights under the CRPD.

Recommendation 5: Ensure adequate housing stock for people with disability and suitable oversight of organisations that provide care to people with disability.

Recommendation 6: Remove the exemption in the DDA as it applies to the *Migration Act* to ensure that Australia's treatment of migrants with disability is not discriminatory.

Recommendation 7: Commit to the Australian Human Rights Commission recommendation that by 2025 there should be no younger people with disabilities in Australia living in old aged care institutions.

Recommendation 8: Immediately begin implementing the suggested priorities for action in the Interim Report from the Royal Commission into Aged Care.

Recommendation 9: In conjunction with people with disability, conduct a review of the Disability Standards for Education 2005 with the view to amending the DDA in accordance with any recommendations from the review.

Recommendation 10: Ensure there is adequate support for people with disability to apply for the NDIS including assistance to access the necessary documents.

Recommendation 11: Provide funding for education and training programs on discrimination and the rights and obligations of people with disability in the workforce.

Recommendation 12: Establish a judicially enforceable Human Rights Act that incorporates Australia's obligations under the CRPD.

Recommendation 13: Ensure that discrimination laws across Australia appropriately cover all appropriate areas of public life;

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Recommendation 15: Enable complaints regarding vilification and hate crimes on the basis of disability.

Recommendation 16: Increase funding for legal services, advocacy service and mental health services for people with disability.

Thank you for this opportunity to submit to the AHRC. We look forward to contributing further to the national conversation on human rights as this project continues.

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