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### ADJ Consultancy Services

To: Australian Law Reform Commission  
Level 40, MLC Tower  
19 Martin Place  
Sydney NSW 2000  
(GPO Box 3708 - Sydney NSW 2001)

From: Adam Johnston, Proprietor, ADJ Consultancy Services

CC: Not Applicable

Date: 31 December 2013

Re: Review of Equal Recognition Before the Law and Legal Capacity for People With Disability

*But (charity) is not a solution: it is an aggravation of the difficulty. The proper aim is to try and reconstruct society on such a basis that poverty will be impossible. And the altruistic virtues have really prevented the carrying out of this aim. Just as the worst slave-owners were those who were kind to their slaves, and so prevented the horror of the system being (realised) by those who suffered from it, and understood by those who contemplated it...Charity degrades and (demoralises)...Charity creates a multitude of sins.*

*Oscar Wilde, "[The Soul of Man Under Socialism](#)."*

Questions 1 and 2 I do not place much store in international conventions and treaty documents. No sovereign State can truly oblige another to observe such documents. It is only through broad acceptance of a practice or standard (or, in the reverse, broad condemnation of conduct; e.g. whaling in the Southern Oceans) that an international norm develops. And, even when a signatory adopts an international convention to the extent of its incorporation into domestic jurisprudence, the level of adherence and/or enforcement can rely on many factors.

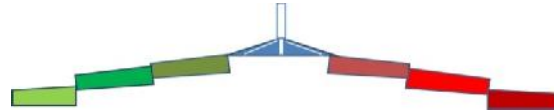
The first of these can be political willingness, reflected in the resourcing of relevant agencies. Domestic cultural norms can be important and, the

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COMMONWEALTH LOBBYIST NO.: LR2013000559

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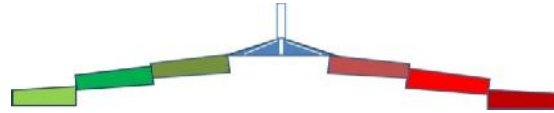
broad terms of many conventions can leave much up to an individual reader's interpretation as to what an Article requires. Judicial views, the lobbying of interest groups and, the public credibility of international institutions can also play their part.<sup>ii</sup> For all these reasons, I generally dismissed the role of conventions some time ago,<sup>iii</sup> and concur with the view of the late Sir Harry Gibbs. The former Chief Justice of the High Court has said:

*For one thing, treaties are often expressed in terms of broad generalities...To apply their terms literally, and without appropriate qualifications, may have unfortunate consequences...Further, our law is not necessarily less fair and just than the law laid down by international treaties.*

*Indeed, the English-speaking countries of the common law world have set a standard of liberty and democracy which most other countries have failed to attain. Some argue that globalisation, as it is called, is a reason why Australia should make its law conform to international standards. The facts that trade has been liberalised, and communication and travel accelerated, do not mean that we should attempt to bring our law into harmony with those of every country with which we trade and communicate and to which we travel, except, perhaps, so far as is necessary to facilitate trade, travel and communication. Perhaps the hankering for international norms indicates a lack of faith in our inherited institutions – a failing of post-modern attitudes.*

*It is, of course, quite another matter if Parliament, acting judiciously, considers it desirable to legislate to incorporate a treaty in our law. That would be part of the democratic process, whereas the adoption of a treaty by judicial fiat would encroach on the field which, in our democracy, is the province of the elected legislature.<sup>iv</sup>*

As someone with a disability, I struggle to see any great connection between my life and these conventions. My submission regarding this inquiry's release of draft terms of reference sought to make this point, as



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well as alert the ALRC to the structural working underclass of people with disabilities, being maintained by a combination of government policy (at State and Federal level), alongside the charitable organisations and their (government subsidised) Special Business Enterprises (SBEs), which claim to support people with disabilities.<sup>v</sup>

Thus, while I am as far from a socialist as one could be, Oscar Wilde's words<sup>vi</sup> nonetheless struck a chord with me. Charity does indeed degrade and demoralise,<sup>vii</sup> particularly when you realise that by design, many of the agencies of the State of which you are supposedly a citizen, are only too happy to cast you off, into the care of various charities for the term of your natural life, simply on the basis of your disability. This must be confronted and challenged, before a modern day form of slavery, currently known as charity, becomes further institutionalised, to the point where you are more readily identified as a client of a charitable service, rather than as a citizen. In many ways, this is already happening.

This is in part what drove me to prepare a submission to the NSW Parliament's Public Accounts Committee's (PAC) inquiry into the *Efficiency and Effectiveness of the NSW Audit Office*.<sup>viii</sup> My objective was to bring any charity in receipt of public funds (designated for the provision of services) within the legislative ambit of the Auditor. It should very much be in the public's interest to know why, where and how so many of their tax dollars find their way into the hands of charities; and whether these dollars are well spent? There is a growing body of questions swirling around charitable integrity, financial and otherwise and, many queries over just how much of the funds (be they donated or granted) reach those for whom they are intended.<sup>ix</sup>

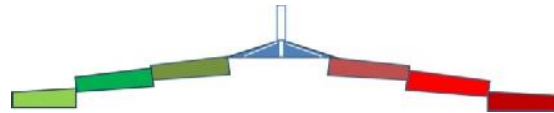
Despite this, the combined impact of the NSW Government's stated aim of outsourcing many community and disability services,<sup>x</sup> the growth in charities already engaged in service delivery on all governments' behalf<sup>xi</sup> and, the apparent pressure for this process to continue,<sup>xii</sup> seems to provide this policy outcome with unstoppable momentum. Any consideration of service recipients as public citizens (with some inherent connection to the State or civic community) seems to have been pushed to one side. Fortunately, the PAC, the NSW Independent Commission

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Against Corruption and, the NSW Legislative Assembly's Community Services Committee have all made recommendations calling on the Government to allow the Auditor to "follow the dollar" into charity bank accounts.<sup>xiii</sup>

This addresses the question of fiscal accountability, but still leaves many people with disabilities as virtual civic castaways, reliant on the charitable sector.<sup>xiv</sup> To me, this is unacceptable; it appears the government<sup>xv</sup> would prefer me, and many like me to live in the shadows, outside the public square. It seems I should be satisfied with the vagaries of international conventions and, the generalised clichés and motherhood statements of a *National Disability Strategy*. This is all far from adequate, if I am indeed a citizen, rather than a mere object of publicly subsidised charity and pity.

Questions 3  
and 12

The NDIS perpetuates this design flaw, of placing people with disabilities outside the public square. It is a centralised bureaucracy, which will take all those "misguided enough" to sign up to its participant plans and, then give these plans to "approved providers" to implement. Who will these "approved providers" be? More than likely, many (if not all) of them will be the same charities as exist now; who will provide much the same service, in much the same way as they do now.<sup>xvi</sup> As the saying goes: *The more things change, the more they stay the same.*<sup>xvii</sup>

Appendix 2 is my analysis of the NDIS legation and, my multiple recommendations for its reform (including the possibility of allowing the Bill to lapse, when this was still technically feasible). My view of it remains unchanged and, I for one will avoid becoming a participant for as long as possible; though fearing that governments and charities will find it convenient, the National Disability Insurance Agency (NDIA) will likely become the "one stop shop" or "national clearinghouse" for all disability services. This will oblige all of us with disabilities to deal with the NDIA by default, whether we wish to or not.

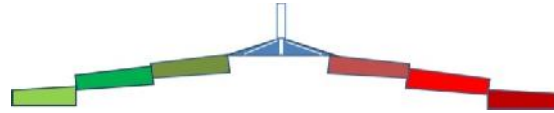
The comparator is disability employment services. All those with disabilities who are assessed as being capable of employment are obliged

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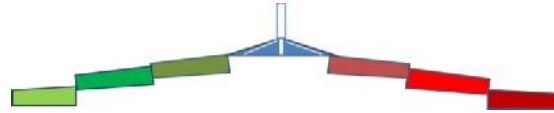
to sign onto the books of a registered Disability Employment Services Provider (DESP), approved by the Federal Department of Employment;<sup>xviii</sup> failure to do so will terminate your benefit payments.

In theory, this all sounds reasonable – the reality is markedly different. As a jobseeker, you enter a world where you have binding, legal commitments to attend meetings, interviews and training; a failure to undertake any of these activities constitutes a “breach”. By contrast, the contracts that DESP’s enter with government, as well as potential employers for their “clients” are little more than Heads of Agreement or Memoranda of Understanding. These set out broad principles, expectations and targets, but few if any legally binding outcomes. I have always found this inherently inequitable, but noted an equal reluctance amongst legislators and policymakers to do an awful lot about it.<sup>xix</sup>

The spending on these services, regardless of effectiveness, seems to ebb and flow with the prevailing fiscal outlook. For example, in my own experience, money one provider is prepared to spend covering my transport costs suddenly isn’t available with another, while one educational course will be subsidised as another remarkably similar course is not. In short, the only thing that is consistent about disability services outlays and provision is the consistently high rate of inconsistency.

And, it seems the NDIS will be much the same, for as the funding envelope shrinks (in real terms), goods and services that might have initially formed part of an individual’s plan will be redesignated as beyond the Scheme’s scope. I am under no illusions that the funding “envelope” referred to by Senator the Hon. Mitch Fifield means an absolute amount of money in gross terms, which will not be adjusted for inflation, the Consumer Price Index (CPI), or any other factor.<sup>xx</sup> This means that individuals under the NDIS will find their purchasing power eroding over time.

I do not fault the Senator for wanting services delivered cost effectively and efficiently. Rather, expecting all governments to turn to the charitable sector to provide much of the delivery infrastructure and



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workforce, I ask: where will the efficiencies come from? The charitable sector will have (as it already has, in many respects) the political, practical and strategic leverage over a vulnerable clientele<sup>xxi</sup> and, an administrative state which has left itself (and its citizens with disabilities) doubly exposed.

Having divested themselves of much of the capacity to directly provide goods and services, governments have gifted the charitable sector (particularly the larger businesses) an all too easy opportunity to become the price and service standard setters; leaving those recipients who can still meet the increasingly restricted NDIS criteria of the future, to be price takers. Governments themselves are likely to find a growing tail of people with complex disabilities and expensive co-morbidities, whose needs have either exceeded their NDIS allocation, or are outside its terms altogether. What will happen to these people, as well as those who are disappointed when they truly see the difference between what the NDIS promised and, what it ultimately delivers?

I acknowledge that while undertaking a DESP inspired small business course, I established ADJ Consultancy Services, with the view that some of these disappointed people will come to my consultancy for advice and assistance. Sadly, I think there will be plenty of disappointment to go around and, while the charities will deny it, they will be the cause of some of the angst. This conclusion is based on my personal experience with the charitable sector, as outlined in this submission and, the appendices which accompany it.

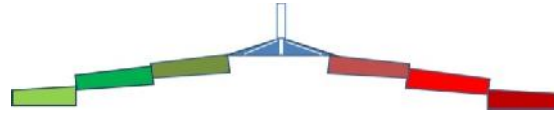
Change will require substantial administrative and legal reform, some of which is outlined in my submission to the Federal Government's Commission of Audit.<sup>xxii</sup> This must include charities losing public funding and, also losing tax-exempt status. To fail to do this perpetuates the status quo, where disability equates with lifelong dependence on charitable, publicly subsidised bodies. This model cannot be sustained indefinitely, on an intellectual, humanitarian or financial basis; as Australia is discovering in parallel, when it comes to policy regarding ongoing taxpayer subsidies to the car industry – such things must have an end date.

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The required transition is also epitomised by the personal journey of former Federal Treasurer and Deputy Liberal Leader, the Hon. Peter H. Costello AC. In her biography, Tracey Aubin writes:

*While Costello had been a committed social democrat (in the early to mid-1970s) he was beginning to question the basic precepts of the movement. Bob Carr remembers the day in 1979 when Costello picked him up at Tullamarine and drove him to Monash – a lengthy trip. On the way they discussed policy issues and the role of social democrats, and Carr remembers Costello asking him a key question: at what point, as the public sector in the economy grew, would social democrats say that had achieved their goal? Says Carr: “I thought that you couldn’t have had a question that went more to the heart of the challenge to social democrats. The fact that was asking it meant he’d gone beyond the propaganda I was pumping out and was thinking for himself, asking the tough questions and perhaps being attracted to a conservative rather than a social democratic position...I mean, what does social democracy mean when the public sector is so huge you can’t increase it any further as a percentage of the economy because you can’t tax people any more?”<sup>xxiii</sup>*

Similar hard questions (starting with: “Where does the money come from?”) need to be asked of the policy makers in the disability sector, the sector itself and, its largely charitable infrastructure; particularly when it comes to the NDIS. However, few seem willing to do this and, as a consequence little seems to change. For their part, international conventions might be useful, but for the true gulf between the standards allegedly prescribed by international law and, the reality of daily life for many with disabilities. Equally, for all the reasons Sir Harry Gibbs outlined, there seems reason to doubt the robustness of international institutions.

Furthermore, international law is the province of State parties; no individual has standing to lodge a claim. Even if a person could file a claim in their own name, international courts and tribunals are appellate

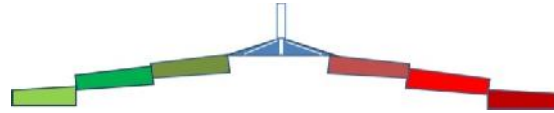
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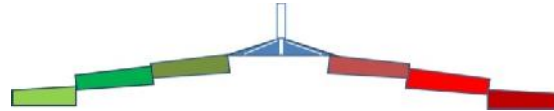
bodies, expecting claimants to navigate domestic courts first. How many people with disabilities (or their families) have the resources for such litigation? As a result, despite what some over-zealous advocates of the NDIS have claimed,<sup>xxiv</sup> there was and is never going to be a social democratic or social welfare Nirvāṇa courtesy of the NDIS, or international legal covenants.

For all of these reasons, I concur with Sir Harry Gibbs' view about placing more reliance on almost 1000 years of British constitutional development, rather than the vulgar modernity of United Nations international conventions. If you look through the prism of Westminster constitutionalism, you see how far disability services have departed from this historic legal form and legal norm.

So let's bring service guidelines and contracts out of the shadows of Executive discretion and administrative fiat. Service receipts should be able to enter contracts for funding and services which they are legally entitled to enforce, while neither governments nor charities should be able to rely on unenforceable guidelines or agency rules. All such documents should be resolved into Regulations, tabled in Parliament and subject to disallowance. This restores both parliamentary sovereignty and public citizenship for those with disabilities.<sup>xxv</sup>

Given my comments above, you will probably not be surprised that I think a vital framing principle should be "citizenship". People with disabilities may already be citizens of Australia in a legal sense, but whether many experience it in a practical sense is less clear. While personally not having any statistics to back this claim, I am sure many people with disabilities are not enrolled to vote. As a regular booth worker for my local Liberal Party branch, I am a fixture which many residents have associated with State and Federal elections for the past 20 years. I see and am seen by many, but see few who have obvious disabilities. While some people may routinely choose to use pre-poll/postal ballots, I suspect many do not vote. Possibly, for those who know they should enrol but don't, it is a low order priority amid the challenges of daily living with a disability.





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Similarly, while it said that many with disabilities now “live in the community,” whether a group home where people with disabilities happen to reside is part of the wider community, or merely an enclave for certain persons, is an open question. I would never choose to live under such conditions; fortunately one does not have to make such a choice.

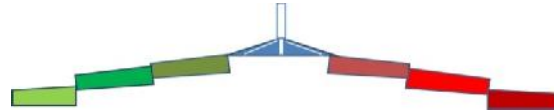
But certainly, my mother and I are putting plans in place, which we hope will be so ultimately self-contained in wills, care directives and like documents that no NDIS, no court, no government and no case manager would dare to override our instructions. This is a fear all people with disabilities and their families have at some time. Government tends to see our alleged vulnerable status, as a cause for us to become objects over which it shall have unhindered dominion, much like a piece of real property. You then find, to use a colonial analogy, a range of squatters occupying your daily life in a way few other citizens would be expected to tolerate, or would be likely to tolerate.<sup>xxvi</sup>

There is a final framing principle on which I want to close – “cure”. That is: cure of disability in all its forms and, elimination of it from the human condition altogether. Most of my submissions beat this tone, with increasing volume and urgency.<sup>xxvii</sup>

So why do policy makers, advocates and commentators think it is acceptable to settle for a national care scheme, instead of aiming higher? The answer is: I don't know, because none of those who asked me in the past (the Productivity Commission included) have listened to a word I've said to them. All I can say is: what is proposed is, when scrutinised, indistinguishable from failed initiatives of the past – and not for me.

Yours faithfully,

Adam Johnston



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## Endnotes

<sup>i</sup> Quotation taken from <http://abetterworldisprobable.wordpress.com/2012/01/01/oscar-wilde-on-the-problems-of-charity/> as at 26 December 2013; Oscar Wilde, *The Soul of Man Under Socialism*, (1891), <http://www.marxists.org/reference/archive/wilde-oscar/soul-man/index.htm> as at 26 December 2013

<sup>ii</sup> In my view, you only have to look to places like Syria to see the negligible impact of the United Nations and its related bodies and, as a consequence, wonder about its credibility

<sup>iii</sup> For example, see my second submission to the Productivity Commission's *Disability Care Inquiry*, pp. 2-3, [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0016/100726/sub0186.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0016/100726/sub0186.pdf) as at December 28, 2013

<sup>iv</sup> Sir Harry Gibbs, *Teoh: Some Reflections*, Sir Samuel Griffith Society Papers, Volume 15, Chapter 7, Adelaide, 2003, <http://samuelgriffith.org.au/docs/vol15/v15chap7.pdf> as at 26 December 2013

<sup>v</sup> See generally, Appendix 1

<sup>vi</sup> See endnote i, above; I also excuse Mr Wilde his views, on the basis that he did not live to see the brutality and other excesses of communism cum socialism which marked the 20<sup>th</sup> century

<sup>vii</sup> The failure to pay some of the country's most vulnerable workers a reasonable wage, as demonstrated by the Federal Court case of *Nojin v Commonwealth of Australia* [2012] FCAFC 192, optimises this degradation. See Appendix 1, pp. 2-4 of 9

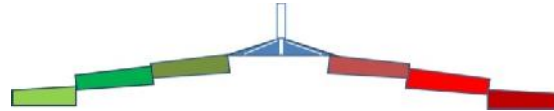
<sup>viii</sup> See generally, *Final Report, Efficiency and Effectiveness of the Audit Office of NSW*, [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/7A16B6D80EF9244CCA257BEA0023D739?open&refnavid=CO3\\_1](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/7A16B6D80EF9244CCA257BEA0023D739?open&refnavid=CO3_1) as at 27 December 2013

<sup>ix</sup> E.g.: Rachel Browne, Michaela Whitbourn, Revealed: the high cost of being charitable, December 21, 2013, <http://www.smh.com.au/national/revealed-the-high-cost-of-being-charitable-20131220-2zqvc.html#ixzz2odEDiQ69> as at 27 December 2013. Ms Whitbourn penned a telling op-ed piece: *Many charities still banking on a lack of transparency*, December 20, 2013, <http://www.smh.com.au/comment/many-charities-still-banking-on-a-lack-of-transparency-20131220-2zpcp.html#ixzz2odRQxbb4> as at 27 December 2013. This is not the first time that questions have been raised about the charitable sector, nor will it be the last. For example, see: Jonathan Marshall, *Special investigation: Charities use the hard sell*, The Sunday Telegraph, February 19, 2012 12:00AM, <http://www.dailytelegraph.com.au/news/special-investigation-charities-use-the-hard-sell/story-e6freuy9-1226274694765>; Jonathan Marshall, *Charities outsourcing fundraising to Legacy Marketing unaware of 'highly offensive' tactics*, The Sunday Telegraph, February 19, 2012 12:00AM, <http://www.dailytelegraph.com.au/news/charities-outsourcing-fundraising-to-legacy-marketing-unaware-of-highly-offensive-tactics/story-e6freuy9-1226274706619>; Staff Writer, *Oxfam's 'death squad'*, The Sunday Telegraph, March 04, 2012 12:05AM, <http://www.dailytelegraph.com.au/news/oxfams-death-squad/story-e6freuy9-1226288305850>; Jonathan Marshall, *St Vincent's Hospital in Melbourne used confidential medical files to get donors*, The Sunday Telegraph, March 04, 2012, 12:00AM, <http://www.dailytelegraph.com.au/news/st-vincents-hospital-in-melbourne-used-confidential-medical-files-to-get-donors/story-e6freuy9-1226288220475>; Jonathan Marshall, *Top 10 Aussies a rich target for charities*, The Sunday Telegraph, March 04, 2012 12:13AM, <http://www.dailytelegraph.com.au/news/top-10-aussies-a-rich-target-for-charities/story-e6freuy9-1226288311751>; Jonathan Marshall, *The tricks charities try to cash in on the vulnerable, elderly and dying*, The Sunday Telegraph, March 04, 2012 12:00AM, <http://www.dailytelegraph.com.au/news/the-tricks-they-try-to-cash-in-on-the-dying/story->

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<sup>x</sup> E.g.: *NSW Reveals Latest Disability Services Policy*; Posted: Thursday, December 5, 2013 - 09:05, Pro Bono Australia - See more at: <http://www.probonoaustralia.com.au/news/2013/12/nsw-reveals-latest-disability-services-policy#sthash.gjHrDEVc.dpuf> as at 26 December 2013; and also see the conditional approval given to the policy by the NSW Legislative Assembly by its Community Services Community, *Outsourcing Community Service Delivery (Inquiry)*

<https://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/C6782566488D8117CA2579B90006B615> as at 26 December 2013

<sup>xi</sup> See for example, Productivity Commission 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra, Chapter 12, [http://www.pc.gov.au/data/assets/pdf\\_file/0007/94570/16-chapter12.pdf](http://www.pc.gov.au/data/assets/pdf_file/0007/94570/16-chapter12.pdf) as at 26 December 2013, p. 297 (1 of 52)

<sup>xii</sup> Though I question how truly compelling the rationale for this policy position is. In its Executive Summary, the Legislative Assembly Community Services Committee said in part:

*The continuing process of outsourcing human service delivery to non-government organisations is now an established trend internationally, as well as in NSW and is likely to accelerate into the future. Indeed, in the period from 2000 to 2012, the NSW Department of Family and Community Services increased its funding to the non-government sector by 150%, from \$800M to \$2.3B.*

*In this context, the Legislative Assembly Committee on Community Services resolved in February 2012 to inquire into and report on the outsourcing of housing, disability and home care service delivery from the Government to the non-government sector in NSW, with a focus on its current status and with a view to providing guidance for its future evolution.*

([https://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/89a082dfe5e9aaecca257c280018805c/\\$FILE/Executive%20Summary.pdf](https://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/89a082dfe5e9aaecca257c280018805c/$FILE/Executive%20Summary.pdf) as at 26 December 2013

<sup>xiii</sup> Legislative Assembly Community Services Committee, *Outsourcing Community Service Delivery*, Report 2/55

[https://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/89a082dfe5e9aaecca257c280018805c/\\$FILE/List%20of%20Recommendations.pdf](https://www.parliament.nsw.gov.au/Prod/Parliament/committee.nsf/0/89a082dfe5e9aaecca257c280018805c/$FILE/List%20of%20Recommendations.pdf) as at 27 December 2013 - RECOMMENDATION 6:

The Committee recommends that the NSW Auditor-General be given legislative authority to examine and audit the accounts of NGOs in receipt of government funding for the provision of housing, disability and home care services.

Public Accounts Committee, *Efficiency and Effectiveness of the Audit Office of NSW*,

([http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/7a16b6d80ef9244cca257bea0023d739/\\$FILE/Efficiency%20and%20effectiveness%20of%20the%20Audit%20Office%20of%20NSW.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/7a16b6d80ef9244cca257bea0023d739/$FILE/Efficiency%20and%20effectiveness%20of%20the%20Audit%20Office%20of%20NSW.pdf) as at 27 December 2013) - RECOMMENDATION 5: The Committee recommends that the Public Finance and Audit Act 1983 be amended to enable the Auditor-General to 'follow the dollar' by being able to directly

audit functions performed by entities, including private contractors and other non-government organisations, on behalf of the State in the delivery of government programs.

NSW Independent Commission Against Corruption, *Funding NGO Delivery of Human Services in NSW: A Period Of Transition: Position Paper*, December 2012,

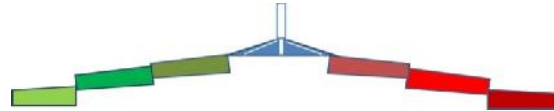
[http://www.icac.nsw.gov.au/component/docman/doc\\_download/4044-funding-ngo-delivery-of-human-services-in-nsw-a-period-of-transition](http://www.icac.nsw.gov.au/component/docman/doc_download/4044-funding-ngo-delivery-of-human-services-in-nsw-a-period-of-transition) (as at December 27, 2013) - **Recommendation 1:** That legislation be

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amended to provide the NSW Auditor-General with power to inspect, examine and audit the accounts of NGOs that have been provided with government funding.

<sup>xiv</sup> I discuss this at some length in my submission to the PAC at

[http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/\\$FILE/Submission%20No%207.pdf](http://www.parliament.nsw.gov.au/prod/parlament/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/$FILE/Submission%20No%207.pdf) as at 27 December 2013

<sup>xv</sup> The phrase is here used in general reference to all Australian governments, at all levels of the Federation

<sup>xvi</sup> This will leave many disabled and/or elderly people particularly vulnerable. In Appendix 4 (my submission to the Legislative Assembly's Community Services Committee's inquiry into outsourcing of human services), I attempt to outline the failings in policy and practise of giving the charitable sector an ever-growing role in service provision. It was here I first began to seriously consider that the public citizenship of those with disabilities (including my own) was being significantly eroded by the outsourcing policy. Add this to a negative experience as a member of a charitable board and, perhaps this explains why the committee did not publish my submission, or call me as a witness.

However, the submission was written in April 2012 and, there is nothing in it that I am not prepared to defend, either publicly or privately, then or now. I suspect the suppression had more to do with the parliamentary committee's unwillingness to be seen publicly criticising a charity, or the charitable form. But, it is this lack of an effective critique which worries me as a citizen, a solicitor and, as someone with a disability who has been actively involved in public policy for a number of years.

In my view, governments of all hues and at all levels of the Australian Federation are rushing into many outsourcing arrangements. Concerning human or social services, policymakers seem to have an unduly idealised, uncritical view of the charitable sector and, the motivations of those who work in it. Therefore, it can be difficult to make many people ask any truly difficult questions, pertaining to the integrity, probity or long-term economic viability of the charitable "business model". The ALRC is at liberty to deal with Appendix 4 as you see fit, though I thought it important that you be able to consider it as part of this inquiry. Publicly available documents raising my concern about outsourcing to the charitable sector include: The Treasury's Review of the Not-For-Profit Sector

<http://www.treasury.gov.au/~media/Treasury/Consultations%20and%20Reviews/2011/Review%20of%20Not-for-profit%20governance%20arrangements/Submissions/PDF/Johnston%20Adam.ashx> as at 29 December 2013; NSW Department of Premier and Cabinet, *Submission to the Panel of Constitutional Experts Regarding Recall Elections*

[http://www.dpc.nsw.gov.au/\\_data/assets/pdf\\_file/0008/131120/06\\_Johnston.pdf](http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0008/131120/06_Johnston.pdf) as at 29 December 2013.

Finally, for a more general, academic critique of outsourcing and its potential pitfalls see: Jocelyn M. Johnston and Amanda M. Girth, *Government Contracts and "Managing the Market": Exploring the Competition Costs of Strategic Management Responses to Weak Vendor*, Administration & Society 2012 44: 3, originally published online 13 September 2011, DOI: 10.1177/0095399711417396 - The online version of this article can be found at: <http://aas.sagepub.com/content/44/1/3> Downloaded from aas.sagepub.com by guest on November 29, 2013. Also note: Jocelyn M. Johnston and Amanda M. Girth, *Contract Management in Thin Markets: Examining transaction costs and contract effectiveness*, Draft Conference Paper,

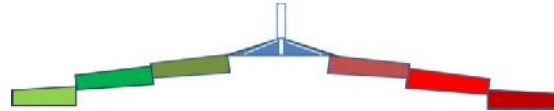
<http://www.maxwell.syr.edu/uploadedFiles/conferences/pmrc/Files/Johnston%20Contract%20managem>

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[ent%20in%20thin%20markets%20Examining%20transaction%20costs%20and%20contract%20effectivene ss.pdf](#) as at 29 December 2013

<sup>xvii</sup> Usually attributed to French critic, journalist and novelist Jean-Baptiste Alphonse Karr - "plus ça change, plus c'est la même chose" — "the more it changes, the more it's the same thing", usually translated as "the more things change, the more they stay the same," (Les Guêpes, January 1849). See [http://en.wikipedia.org/wiki/Jean-Baptiste\\_Alphonse\\_Karr](http://en.wikipedia.org/wiki/Jean-Baptiste_Alphonse_Karr) as at December 27, 2013

<sup>xviii</sup> Now the Department for Social Services

<sup>xix</sup> See generally, Appendix 3. It is my submission to an inquiry held by the Senate of the previous Parliament (and now no longer available on-line). It charts my history, growing frustration and piling administrative difficulties with the DESP system. Read the first document and, you gain a potted summary of the appendices that follow it. Read the entire manuscript from back to front and not even I can fail to notice the change in my tone. I am well and truly over being bound, legally, vocationally and by convention of my disability to the charitable sector. Yes, there are some well-meaning, well-intentioned and competent types, but there are also far too many bumbling half-wits who, but for the charitable sector, would not be employable themselves.

Having initially thought that no notice at all was taken, either of my submission or a few complaints to the Department, I took some comfort in learning from my current employment agent recently, that after about 70 weeks, policy now requires a client's "engagement" with a DESP to be reviewed. The conclusion reached is that if work has not been found after this time, the client should seek a new provider. The positive aspect is that there is finally a real performance deadline put on DESP organisations. The negative aspect (for the client) is the need to find a new DESP annually. If you are a medium to long-term unemployed jobseeker, this process could eat up time and money you don't really have, mandatorily seeking out a fairly generic range (and limited number of) service providers

<sup>xx</sup> See Louise Yaxley, *Govt says NDIS will not be part of funding cuts*, The World Today, Wednesday, December 18, 2013 12:10:00, <http://www.abc.net.au/worldtoday/content/2013/s3913774.htm> as at 28 December 2013. Ignoring the article's headline, this quotation from Senator Fifield is significant:

LOUISE YAXLEY: Labor has seized on the Government's comments that the National Disability Insurance Scheme's initial rollout is more expensive than expected.

But Senator Fifield defends the need to examine those extra costs.

MITCH FIFIELD: The Coalition is **committed to the announced funding** for the scheme. **But we're determined to make sure that the scheme is delivered within the funding envelope** and we're determined to ensure that the funding gets to the people who need it. We want to make sure that the overheads of the scheme and the administration don't take dollars away from people with disability. **(emphasis added)**

Now there's absolutely nothing wrong with making sure that a scheme is delivered efficiently and delivered well.

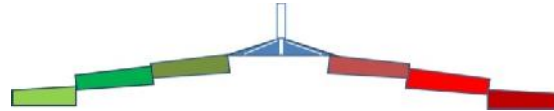
<sup>xxi</sup> See for example, my first submission to the Productivity Commission's *Disability Care Inquiry*, at [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0009/99486/sub0055.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0009/99486/sub0055.pdf) as at 29 December 2013. This relates my experience with a bullying charitable/not-for-profit broker of personal care and support services. Only a couple of Ministerial letters curbed the relevant case officer's behaviour and ultimately,

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removed her and her organisation from our lives. Mum and I could not have been happier, after all the angst and distress this woman had caused us, as she alleged worked in “our best interests” as case officer. This shows how empowering third parties to decide what constitutes other persons’ “best interests” can lead to perverse and obnoxious outcomes, implemented by people who are often as equally odious in their person.

However, without my legal training, and experience from employment as a Complaints Officer for the NSW Ombudsman, I would not have had the confidence (or knowledge of government) to launch my own Ministerial complaint. Many people with disabilities do not have my good fortune in this regard and, will likely be trapped in sub-standard and potentially abusive arrangements which could never be argued as representing their “best interests”. I certainly regarded the treatment my mother and I received at the hands of the case officer as a form of abuse.

<sup>xxii</sup> See generally, Appendix 5

<sup>xxiii</sup> Tracey Aubin, *Peter Costello: A Biography*, Harper Collins Publishers, 1999, pp. 64-65

<sup>xxiv</sup> See for example, Productivity Commission, Transcript of Proceedings at Sydney on Tuesday, 20 July 2010, at 9.31 AM, Continued from 19/7/10, Inquiry into Disability Care and Support - Ms P. Scott, Presiding Commissioner, Mr D. Kalisch, Commissioner, Mr J. Walsh, Associate Commissioner, pp. 751-758 (34-41 of 99), [http://www.pc.gov.au/\\_data/assets/pdf\\_file/0018/100674/20100720-sydney.pdf](http://www.pc.gov.au/_data/assets/pdf_file/0018/100674/20100720-sydney.pdf) as at 30 December 2013. I was actually quite concerned by some of the evidence given by Ms Given and Mr French of the Disability Discrimination Legal Centre (DDLC). It might represent the ideal that people with disabilities to receive the goods and services as of right, when they need them and how they need them. However, I would never expect this to happen in the real world of limited resources and fixed budgets. I would equally, never leave the impression that the establishment of an NDIS somehow miraculously eliminates real world waiting lists and shortages. This quotation from the DDLC’s Fiona Given underlined for me, the unreality of the DDLC position:

*“...With human rights principles in particular to eliminate institutional models of service it must also enable the development of new elements of the disability support system where needed programs and services do not presently exist. The scheme must be entitlement based. The scheme must not be subject to any form of means test. Eligible persons ought be entitled to assistance as a right and receive assistance at the point of qualification. They should not face the delays and compromises associated with cash-start discretionary schemes...”* (p.752 [35 of 99])

I did not take these propositions seriously, but worried for those who might, as well as their reaction when expectations go unfulfilled

<sup>xxv</sup> See generally, Appendix 2, Appendix 3 and Appendix 4, where I argue against non-justiciable guidelines being used by governments and charities alike, in preparing for the delivery of NDIS services, in the delivery of care and support services and, in the delivery of employment services. Unenforceable guidelines deny disability service clients (or their families) the ability to seek meaningful, legal redress against organisations which fail to deliver what they promise. The same guidelines, by their very nature, excuse the Executive of responsibility, whereas the tabling of Regulations supports the principle of Ministerial responsibility

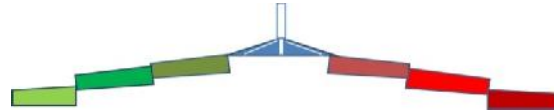
<sup>xxvi</sup> See generally, Appendix 6. Then Prime Minister Julia Gillard asked Father Frank Brennan to prepare a report on human rights in Australia, some years ago. This is the submission I wrote to the Brennan Committee arguing that all governments and the welfare state itself had significant encroached on human

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rights. I stand by these remarks, with the “squatters” being exemplified by the roles played by case managers referred to in the Appendix.

<sup>xxvii</sup> Appendix 1, pp. 8-9 of 9; Appendix 2, pp. 15-18 of 18; Appendix 3 (of little relevance, as it concerned employment services); Appendix 4, pp. 20-21 of 21; Appendix 5 (principally concerns restoring the Federal budget, but I would hope that more money is allocated to scientific research, rather than going to charities); Appendix 6, p.8 of 30