

Defending secret voting for people with vision impairments

Fittler v New South Wales Electoral Commission and Anor (No. 2) [2008] NSWADT

By Joanna Shulman

Voting privately and independently is something many Australians take for granted. However, this right has not been afforded to people with vision impairments in NSW. The recent ADT decision in *Fittler v NSW Electoral Commission* [2008]¹ marks a turning point in the public recognition of the difficulties faced by vision-impaired citizens in participating actively in the democratic process. By declaring that the NSW Electoral Commission unlawfully discriminated against Mr Fittler, who is blind, by failing to provide him with a Braille ballot paper, the NSW Electoral Commission was forced to reconsider its position in relation to future elections. Indeed, following this decision, the Electoral Commission made available Braille ballot papers in the 2008 local government elections. However, since Australia's ratification in June 2008 of the Convention on the Rights of People with Disabilities (CRPD), are Braille ballot papers enough to ensure equal voting rights for people with disabilities?

SUMMARY OF THE FACTS AND FINDINGS

Facts

Mr Fittler claimed that the Electoral Commission indirectly discriminated against him on the ground of disability in the provision of services when it failed to provide him with a ballot paper for the Randwick City Council election in March 2004 printed in an alternative format. He made a request for such a ballot paper some four weeks prior to the election and only received a response (which was a refusal to his request) the day after the election. Mr Fittler brought a disability discrimination complaint before the Administrative Decisions Tribunal (ADT), arguing that the Electoral Commission required him to complete a ballot paper which was in Roman script, and that this requirement was one with which he could not comply by virtue of his disability, and which was unreasonable.

In order to make a finding of unlawful discrimination, the ADT had to consider whether the discrimination was in an area of activity governed by the Act, that the conduct was discriminatory on the basis of his disability, and whether the defence of unjustifiable hardship was made out.

The area of activity

Conducting or providing a service is an area of activity which is covered under s49M of the *Anti-Discrimination Act*. Characterisation of the service provided is an issue that is often the source of argument in discrimination cases.² In this case, the Electoral Commission agreed that it was providing a service, but disputed Mr Fittler's characterisation of the services provided.³ The ADT concluded that the Electoral Commission's narrow characterisation of its service as providing a ballot paper that conformed with the legislative requirements was incorrect. The ADT found that the relevant regulation at the time, the *Local Government (Elections) Regulation 1998 (NSW) (LGER)*, provided that to enable a person to vote, the Electoral Commission provided *inter alia* a means for recording a person's attendance to vote, the ballot paper on which a person could record their vote, and the venue and means for the person to complete the ballot paper. Further, Clause 73 of the LGER provides that a voter is to be alone in 'an unoccupied space' and privately record their vote before folding the paper so as to 'conceal the vote marked on it'.⁴ The ADT concluded that the legislature intended that a person record their vote without any other person knowing what it is. The ADT went on to say that this implicitly demanded privacy and, thus, the service provided by the Electoral Commission not merely enabled a person to vote, but to vote privately, so that nobody was aware of their vote.⁵

Indirect discrimination

In *Fittler*, as in many discrimination cases, at issue was the complex question of defining the requirement and condition

to prove indirect discrimination.⁶

The ADT noted that, in providing Mr Fittler and all other electors with only one means of voting privately (the use of a ballot paper on which words were printed), the Electoral Commission required Mr Fittler to mark his vote on an ink-printed ballot paper. He could not do this, because he could not see to read the ballot paper.

In determining whether the requirement had a discriminatory effect, the ADT concluded that the consequence of not voting privately was a serious one, because the activity was a dimension of a person's right to participate on an equal footing in Australia's democratic process. The ADT heard uncontested expert evidence from Mr Bryan Mercurio of the Faculty of Law, University of NSW, that the 'right to vote in secret is now such a well-established, deep-rooted principle that many view absolute secrecy of the ballot as a necessary ingredient to maintaining democratic integrity'. It adopted Mr Mercurio's opinion that 'voting with assistance at the polling station means that voters are denied the rights and protections associated with the secret ballot'.⁷

Unjustifiable hardship

The Electoral Commission had said that it would be too difficult and expensive to make Braille ballot papers available on request across NSW. The ADT rejected this assertion and said that all the Electoral Commission had to do to provide the service to Mr Fittler in a non-discriminatory manner was to make available a Braille ballot paper for Mr Fittler's own use.⁸ The ADT concluded that it had no evidence that the commissioning of a ballot paper in Braille would have caused any hardship to the Electoral Commission, and that even if the degree of difficulty did constitute a hardship, it was not unjustified.⁹

The ADT concluded that the Electoral Commission had imposed on Mr Fittler a discriminatory requirement in failing to make private voting available to him, and that this requirement was not reasonable. The imposition of the requirement was not made necessary by the law governing elections, and it would not have been an unjustifiable hardship to provide that service in a non-discriminatory manner. In those circumstances, the Electoral Commission had unlawfully discriminated against Mr Fittler. The ADT awarded him \$5,000 in compensation.¹⁰

The case of *Fittler* prompted the Electoral Commission to make voting more accessible for people with vision impairments by providing Braille ballot papers for the 2008 state government election.

THE CONVENTION ON THE RIGHTS OF PEOPLE WITH DISABILITY – IS THE NSW ELECTORAL COMMISSION DOING ENOUGH?

However, a few months after the *Fittler* decision was handed down, Australia ratified the CRPD on 17 July 2008.

Article 29 provides that states must:

- i) ensure that voting procedures, facilities and material are appropriate, accessible and easy to understand and use;
- ii) protect the right of persons with disabilities to vote

- by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate; and
- iii) guarantee the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice.

Unfortunately, the decision to provide Braille ballot papers was a policy change and not a legislative one, and there is no guarantee that the NSW Electoral Commission will continue to provide accessible ballot papers.

Additionally, while Braille ballot papers are a step forward, at a recent inquiry into the 2007 NSW state government elections, people with vision impairments reported that Braille ballot papers were not necessarily the solution.¹¹

Indeed, technology has moved on since the *Fittler* case. Electronic voting has been employed on a trial basis in the ACT, with success. Electronic voting benefits people who are vision-impaired, but also those who are unable to cast a vote due to physical disability. By reading instructions to voters electronically, electronic voting also assists those who cannot effectively follow written instructions in completing a ballot paper, due to intellectual or learning disability, and even people with poor English.

Electronic voting would greatly increase the franchise of people with disability, and would ensure Australia's compliance with the CRPD. ■

Notes: **1** *Fittler v New South Wales Electoral Commission and anor* (No. 2) [2008] NSWADT. Mr Fittler was represented on a pro bono basis by Ms Kate Eastman of Counsel and the Disability Discrimination Legal Centre NSW. **2** See, for example *W v City of Perth* [1997] HCA 30 per Kirby J at 70: 'Characterising the service in question can itself involve the acceptance of a definition which will effectively determine the complaint of discrimination according to whether a wide or narrow focus is adopted.' **3** *Fittler*, at [10]. **4** *Local Government (Elections) Regulation* 1998 (NSW) (LGER) [now repealed]. **5** *Fittler*, at [21]. **6** Section 49 B(1)(b) ADA defines indirect discrimination as 'requiring 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'. **7** 'Transparency and Elections in Australia: The Role of Scrutineers in the Australian Electoral Process' in G Orr, B Mercurio, and G William (eds) *Realising Democracy*, Federation Press, Sydney, 2003, 216 at 222: 'An assisted vote is not a secret vote.' **8** *Fittler*, at [97]. **9** *Fittler*, at [99-102]. **10** *Fittler*, summary conclusion of the ADT at [103]. **11** *Fittler*, 'Corrected Transcript, Report of Proceedings before Joint Standing Committee on Electoral Matters Inquiry into 2008 Local Government Election', Sydney, 27 August 2009, at p60.

Joanna Shulman is the Director and Principal Solicitor for the NSW Disability Discrimination Legal Centre.

PHONE (02) 9310 7722 EMAIL jshulman@ddlcnsw.org.au