Kate Eastman
Barrister

16 January 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

BY FAX: 6277 5794

Dear Committee Secretary

**Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008**

Thank you for the extension until 16 January 2009 to provide a submission.

I enclose a submission on behalf of Kate Eastman and Ben Fogarty.

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# Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008

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Dear Committee Secretary

We thank the Committee for the opportunity to make a submission on *the Disability Discrimination and Other Human Rights Amendment Bill* 2008 ("**the Bill**"). We also thank the Committee for the extension of time to provide this submission.

Our submission does not provide a detailed overview of all of the provisions which are the subject of the proposed amendments. We have focused on particular amendments which we consider are critical to the effective operation of the *Disability Discrimination Act 1992* (Cth) ("**the Act**"). We would be happy to discuss these matters with the Committee in further detail at a proper hearing.

In summary, we support the proposed amendments to the Act. In particular, we think that the Act should be clear and consistent in its application. The object of the Act is to protect and advance the rights of people with disabilities, so it is important that this law is accessible to people with disabilities and its provisions are easily understood.

In 1993, the now late Justice Lockhart made the following observation in the context of the *Sex Discrimination Act 1984 (Cth):*

> *Anti- discrimination legislation must be understood, not only by statutory bodies that enforce it, but by all sections of the community because the implications and effects of the legislation could touch us all. It is important that the legislation is not approached and construed with fine and nice distinctions which will not be comprehended by any except experts in the field; nor is there any need for them.*

*Human Rights and Equal Opportunity Commission v Mount Isa Mines Limited and Ors* (1993) 46 FCR 301 at 326.

These observations are relevant to the Act.[1]

**Proposed changes to the *Disability Discrimination Act 1992* (Cth)**

**1. Reference to the 2007 Convention**

1.1 We welcome the express reference to the *Convention of the Rights of Persons with Disabilities* ("**the Convention**") finalised in New York on 30 March 2007 and ratified by the Australian Government on 18 July 2008 in the proposed paragraph 12(8)(ba) of the Act. Although we note that, unlike the *Racial Discrimination Act* 1975 (Cth) and the *Sex Discrimination Act* 1984 (Cth), the Act does not include the Convention as a schedule to the Act. We would recommend that the text of the Convention be included as a schedule to the Act.

1.2 We also recommend that the Act include an express provision that the Act be interpreted and applied in a manner which is consistent with the Convention and other international human rights instruments referred to in paragraph 12(8). We note section 30 of the *Human Rights Act 2004 (ACT)* which includes a simple provision to the following effect:

> ***Interpretation of laws and human rights***
>
> *So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.*

The Act could include a provision to the following effect:

> ***Interpretation of the Act***
>
> *So far as it is possible to do so consistently with its purpose, this Act must be interpreted in a way that is compatible with the instruments referred to in subsection 12(8).*

**2. Definition of 'disability'**

2.1 We support the amendment of the definition of 'disability' to reflect the High Court's decision in *Purvis v State of New South Wales* (2003) 217 CLR 92 that a 'disability' includes the manifestations of the disability including behaviour.[2]

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[1] See Submission of the Law Council and NSW Bar Association to the Committee's *Inquiry into the effectiveness of the Commonwealth Sex Discrimination Act* 1984 in eliminating discrimination and promoting gender equality.

2.2 In addition to this proposed amendment, we would also support an amendment which makes it clear that 'disability' also includes:

(a) characteristics that are imputed to a disability, which is different to an 'imputed disability'; and

(b) characteristics that appertain generally to a disability.

This language would provide greater consistency with State discrimination laws.[3]

## 3. Reasonable adjustment and the definition of direct disability discrimination

3.1 We support an amendment to the Act which provides for 'reasonable adjustment'.

3.2 In its present form the Act is concerned with the concept of 'formal equality'.[4] It fails to address the concept of 'substantive equality'. The Act fails to provide an effective remedy to address substantive inequality.

3.3 The concept of formal equality means that people are treated the same regardless of the relevant characteristic. As has been noted on many occasions,[5] treating unequals the same serves to entrench discrimination and discriminatory practices. In the area of disability, measures designed to achieve substantive equality are required. The concept of substantive equality recognises that differential treatment is necessary to ensure an equal outcome and thereby differential treatment is not necessarily unfair or unfavourable discrimination. An amendment to the Act to provide for substantive equality is the most pressing amendment required.

3.4 However, we have concerns about the drafting of the proposed section 5. We think the proposed text is confusing and unclear. It conflates the two distinct concepts of formal equality and substantive equality. We think it would be preferable to retain a provision which addresses less favourable treatment because of a person's disability, namely formal equality, as a separate protection.

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2 See [5], [11] per Gleeson CJ, [67] – [80] per McHugh and Kirby JJ, [209] – [212] per Gummow, Hayne and Heydon JJ and [272] per Callinan J.

3 Compare section 49B(2) of the *Anti-Discrimination Act* 1977 (NSW).

4 See *Purvis* at [201] – [208] ] per Gummow, Hayne and Heydon JJ.

5 The Hon. Justice Mary Gaudron, The Mitchell Oration 1990, *"In The Eye Of The Law: The Jurisprudence of Equality"*, 24 August 1990.

3.5 In this respect, we think the proposed text for section 5(1) is unclear. The language is not consistent with other Commonwealth discrimination laws or State discrimination laws. The key problem in direct discrimination cases is the identification of a 'comparator' and the 'circumstances' in which the comparison of treatment is to be assessed. We recommend that the direct discrimination test be simplified by removing the 'comparator' element. The focus should be on the reasons why certain treatment has occurred. If there is a clear causal nexus between the treatment and a person's disability, that should be sufficient to demonstrate 'direct discrimination'.

3.6 We think that there should be new provision which specifically and separately addresses substantive equality. The provision should make it unlawful to fail or refuse to provide reasonable adjustment. For example, we note section 24 of the *Anti-Discrimination Act* (NT) makes it unlawful to fail to accommodate a special need:

> ***24. Failure to accommodate special need***
>
> *(1) A person shall not fail or refuse to accommodate a special need that another person has because of an attribute.*
>
> *(2) For the purposes of subsection (1) -*
> *(a) a failure or refusal to accommodate a special need of another person includes making inadequate or inappropriate provision to accommodate the special need; and*
> *(b) a failure to accommodate a special need takes place when a person acts in a way which unreasonably fails to provide for the special need of another person if that other person has the special need because of an attribute.*
>
> *(3) Whether a person has unreasonably failed to provide for the special need of another person depends on all the relevant circumstances of the case including, but not limited to -*
> *(a) the nature of the special need;*
> *(b) the cost of accommodating the special need and the number of people who would benefit or be disadvantaged;*
> *(c) the financial circumstances of the person;*
> *(d) the disruption that accommodating the special need may cause; and*
> *(e) the nature of any benefit or detriment to all persons concerned.*

3.7 In the context of the Act, we think the proposed amendment of section 5 to include paragraphs 5(2) and 5(3) will lead to confusion and make it difficult to apply in practice. We strongly recommend a separate provision along the following lines:

> *(1) A person shall not fail or refuse to make a reasonable adjustment for a person with disability.*
>
> *(2) For the purposes (1), in determining whether a person has failed or refused to make a reasonable adjustment, all relevant circumstances of the particular case must be taken into account, including the following:*

(a) *the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;*
(b) *the effect of the disability of any person concerned;*
(c) *the financial circumstances, and the estimated amount of expenditure required to be made, by the first person;*
(d) *the availability of financial and other assistance to the first person;*
(e) *any relevant action plans given to the Commission under section 64.*

3.8 The failure or refusal to make reasonable adjustments could then be defined as a species of 'unlawful discrimination' for the purpose of the *Human Rights and Equal Opportunity Commission* Act 1986 (Cth): section 3.

3.9 We also think it is important that any amendment of the Act to deal with reasonable adjustment also takes into account the language of the *Disability Standards for Education 2005* - see Part 3.

3.10 The final comment we make about reasonable adjustment is that the concept must recognise the need for co-operation between the employer, service provider, etc and the person with disability. In many instances, the employer, service provider, etc may not know what adjustments are required and the nature of such adjustments. The employer, service provider, etc will need to obtain information from the person concerned or even third persons before reasonable adjustments may be made. If there is a failure or refusal on the part of the person with disability to co-operate with the employer, service provider, etc to make adjustments, then there should be no grounds for complaint that there had been a failure to make such adjustments. We think that the amendment of the Act should include some reference to the need to ensure cooperation in the process and the burden does not rest exclusively with the employer, service provider, etc.

## 4. Indirect discrimination – section 6

4.1 We support the proposed amendments to section 6 of the Act with respect to removing the existing requirement that the requirement or condition be one 'with which a substantially higher proportion of persons without the disability comply or are able to comply' in order to prove indirect discrimination. We also support an amendment which makes the Act consistent with the approach taken to establishing indirect discrimination under the *Sex Discrimination Act.*

4.2 With respect to the text of the proposed amendment to section 6 and the references to reasonable adjustment in paragraph 6(2)(c), we repeat the observations made above in paragraph 3.4 above. Again, we do not think the concept of indirect discrimination should be confused with measures which are needed to achieve substantive equality.

## 5. Unjustifiable hardship

5.1 We support the proposed amendments to provide an unjustifiable hardship exception to all areas of discrimination (save for harassment and victimisation). We also support the onus resting with the person seeking to rely on unjustifiable hardship to prove such hardship.

5.2 We note that there is limited case law on the meaning and application of unjustifiable hardship. There appears to be a common misunderstanding that the provision is primarily concerned with cost or financial hardship. We think it is important that the Act make it clear that unjustifiable hardship is concerned with a range of circumstances beyond financial circumstances. The Act should recognise that unjustifiable hardship may arise because of compliance with other statutory provisions – Commonwealth and State – in relation to occupational health and safety obligations and other common law obligations.[6] At present the Act does not assist employers, service providers or people with disability to reconcile a range of competing, and at times conflicting, statutory obligations. Alternatively, there should be a specific provision dealing with this matter.

We would like to have commented on a wider range of provisions in the proposed amendment, but in the interests of providing a submission to the Committee within the time provided, we have focused on our key areas of concern.

We welcome the opportunity to address the Committee at any upcoming public hearings on the points raised and recommendations made in this submission.

Yours faithfully,

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**St James Hall Chambers**

Ben Fogarty
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[6] *Barry Johnson v State of New South Wales (Department of Education and Training)* [2006] NSWIRComm 275