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

6 February 2009

Dear Sir or Madam

Submission to the Inquiry into the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008- Questions on Notice

The NSW Disability Discrimination Legal Centre (**NSW DDLC**) appeared at the Senate Standing Committee Inquiry into Legal and Constitutional Affairs Public Hearing into the *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008* (**the Bill**) on 21 January 2009.

We have taken two questions on notice and what follows is our response to those questions.

1. Question on Notice: How can the exception in s45 (2) of the Bill, relating to Special Measures be made clearer?

1.1. Background

The *Disability Discrimination Act 1993* (Cth) (**DDA**) currently provides for an exemption for 'special measures,' that is, measures that are reasonably intended to benefit an individual with a disability. The exemption aims to protect 'special needs' services and facilities for people with a particular type of disability from being challenged by people who do not have that disability. This principal is from international law, as noted in the Convention on the Rights of People with Disability in Article 5(4) which provides that ' Specific measures

which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.'

The Bill adds an exception to the special measures exemption so that the special measures exemption does not apply:

(a) in relation to discrimination in implementing a measure referred to in that subsection if the discrimination is not necessary for implementing the measure; or
(b) in relation to the rates of salary or wages paid to persons with disabilities.

1.2 NSW DDLC's Response

In theory, we support the Bill's amendments as it clarifies that it is still unlawful to discriminate in the administration of a beneficial program. This was an issue that has caused some controversy in case law.[1]

However, we are concerned that the phrase 'implementing a measure' is ambiguous. For example, it is unclear as to whether charging a service fee for a particular service which is offered only to people with a disability would fall within the section. Current mobility parking schemes charge people with disabilities a fee to use the scheme on top of any fee required at the parking site. People without disabilities are not required to pay an added fee to be able to park their car. This is confusing because in the absence of a comparator, it is difficult to ascertain whether a service fee is part of the measure or implementation of the measure, and therefore whether it is discriminatory.

The Explanatory Memorandum for the Bill Provides:

> "In Recommendation 12.4 the Productivity Commission proposed that the exemption be limited to the establishment, eligibility criteria and funding criteria of these measures but not extend to general acts done in their administration.
> The new subsection (2) would implement this recommendation by limiting the exemption in two ways. First, the exemption is limited to the discrimination necessary to implement the measure for the benefit of the person with the disability. Other forms of unlawful discrimination are not exempted. This ensures the protection of the Disability Discrimination Act extends to general acts done in the administration of the special measures; for example, non-discriminatory access to the premises[2]."

[1] See *Richardson v ACT Health and Community Care Service* (2000) 100 FCR 1, 5 [24] and *Catholic Education Office v Clarke* (2004) 138 FCR 121.
[2] At Paragraph 101.

If this is the intention of the Bill, the clear wording of the Productivity Commission's Report and the Explanatory Memorandum is preferable to that used in the Bill.

It is NSW DDLC's position that Section 45 (2) be amended to provide that the exemption be limited to the establishment, eligibility criteria and funding criteria of the special measure only.

Recommendation : Section 45 (2) be amended to provide that the exemption be limited to the establishment, eligibility criteria and funding criteria of the special measure only.

2. Question on Notice- How can Section 9 (1) (f) be improved so as to provide more certainty in relation to unregistered assistance animals.

2.1 Background

As currently drafted, the DDA prohibits discrimination in relation to assistance animals, defined by s 9(1) (f) of the Act as 'any animal trained to assist the aggrieved person to alleviate the effect of the disability.'

The Bill expands on the definition of assistance animal in Section 9 (2) by describing an assistance animal as,

' a dog or other animal:

(a) accredited under a law of a State or Territory that provides for the accreditation of animals trained to assist a person with a disability to alleviate the effect of the disability; or

(b) accredited by an animal training organisation prescribed by the regulations for the purposes of this paragraph; or

(c) trained:

(i) to assist a person with a disability to alleviate the effect of the disability; and

(ii) to meet standards of hygiene and behaviour that are appropriate for an animal in a public place'

The amendment proposed by the Bill is in direct response to widespread criticism of the lack of clarity in the DDA's definition of assistance animals, by the Courts, applicants and respondents.

Most recently, in the case of *Forest v Queensland Health* [2007] FCA 936, Justice Collier said she had a "genuine concern about the operation of s.9(1)(f) as presently drafted," [3] and its potential consequences including that:

[3] [2007] FCA 936.

- "any animal (for example, a capuchin monkey or a Shetland pony) could be an assistance animal;
- an inherently dangerous animal (like a dingo) could be an assistance animal;
- assistance animals do not need to be trained to be obedient, non-aggressive or well-behaved in public;
- assistance animals do not have to meet hygiene standards;
- assistance animals do not have to be in the manual control of their owner;
- the apparent lowering of training and behavioural standards for assistance animals may undermine public confidence and acceptance of the guide-dog regime, which has attracted national and international recognition over several decades; and
- the lack of clarity in the legislation precipitates confusion and conflict between owners of assistance animals and service providers." [4]

These concerns were also raised by Dr Sev Ozdowski OAM (the acting Disability Discrimination Commissioner) in a Human Rights and Equal Opportunity Commission report in 2003, which called for reform of the assistance animal provisions under the DDA.[5]

2.2 NSW DDLC's Response

While the Bill's proposed amendment to the definition provides for greater certainty for both applicants and respondents in relation to defining whether an animal is an assistance animal and deals with many of the issues raised in *Forest v Queensland Health*, we said in the Public Inquiry that we are concerned that it did not go far enough.

Our concern is that where an animal is trained to alleviate the effects of a person's disability, but is not formally accredited, there is little guidance for applicants or respondents to assess whether it will meet the requirements of section 9(2)(c)(ii).

The issues this presents and protracted delays this leads to are highlighted by a recent case run by NSW DDLC. NSW DDLC represented a client in the Federal Magistrates Court in relation to a situation where his animal (a dog) was trained personally by the Applicant since it was a pup to alleviate the effects of his psychological disability, to obey a wide range of instructions and to behave appropriately in public. The Applicant wanted to fly with his assistance animal accompanying him in the cabin. He had in fact done this on at least two occasions in the past with the Respondent airline and there had been no behavioural or other adverse problems. The Respondent, having developed and implemented a new policy covering travel by what it described as 'Guide Dogs and other service animals' now refused to allow the animal to travel with the Applicant in the cabin unless it was formally accredited.

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[4] [2007] FCA 936. For a summary of that case, please see Fogarty, B. ' Who Let the Dogs in?', *NSW Law Society Journal*, December 2007 at 68. Please note that elements of this decision were overturned by the Full Federal Court in *Forest v Queensland Health* (2007) 161 FCR 152 . Regardless, the comments referred to above are still relevant.

[5] "Report Following Consultations on Section 9(1)(f) of the *Disability Discrimination Act 1992* Dealing with Assistance Animals Other than Guide Dogs and Hearing Dogs", HREOC, 18 November 2003.

NSW DDLC was unable to find an accreditation body in Australia willing to accredit an animal that it had not trained itself from birth. Accordingly the only chance the Applicant had to ever fly on this airline with his assistance animal was to proceed with the matter and let the Federal Magistrate determine, inter alia, whether the assistance animal was appropriately trained and whether the Respondent airline was unlawfully discriminating against the Applicant in imposing this requirement. The lack of certainty, the fear that the Respondent airline would appeal any adverse decision at first instance and the risk of significant adverse costs for the Applicant if he did not prevail compelled him to withdraw the matter and discontinue the proceedings.

Our client's situation is not an uncommon one. There are several reasons why people may choose to train their assistant animal themselves including that there may be no formal training organisation which trains animals to perform tasks for people with particular disabilities and that the demand for formally trained assistance animals exceeds supply.[6] Other reasons include the cost involved. Many of our clients rely on the Disability Support Pension and the high cost of training and accreditation is prohibitive.

In the absence of formal State and Territory accreditation schemes, and in this regard we note Queensland is the only State which currently has such a scheme, respondents and applicants are unable to assess whether an animal meets the 'accreditation' requirement to be classified as an assistance animal for the purpose of the DDA – unless, of course, with recourse to litigation.

In his report, Dr Ozdowski noted calls by a number of disability groups, transport and health care providers for the development of standard guidelines or training competencies to be developed at a national level. In noting that the DDA should not be amended at that stage to develop national guidelines, he did recommend that the DDA be amended to provide for regulations to be made specifying the nature of evidence sufficient or required to be provided to show that an animal is an assistance animal and is appropriately trained - so that the DDA can recognise further developments towards appropriate regimes for recognition and regulation in this area as they occur. [7]

It is NSW DDLC's prima facie position that this recommendation be adopted in the Bill, that is, that it provide for regulations to be made specifying the nature of evidence sufficient to prove an animal is appropriately trained. In this regard though, we note that new section 31 of the Bill, which gives the Minister the power to make Disability Standards, probably caters for this. Should this not be the intention of the drafters in relation to section 31, NSW DDLC recommends that the Bill be amended to provide for such regulation to be made.

In the interim, and in the absence of standard guidelines at the national level, some small changes to the Bill relating to the onus of proof, would provide more certainty for applicants

[6] See 'Community Law Reform- Assistance Animals Consultation Paper 6' , Victorian Law Reform Commission (2008).
[7] Footnote 5 above at p 14.

and respondents and clarify whether an animal is an assistance animal in situations where it is unable to be accredited. For the purposes of the definition, it should be made clear that once an applicant provides evidence that the animal is trained to alleviate the effects of their disability, the onus should then shift to the respondent to prove that the animal does not meet standards of 'hygiene and behaviour that are appropriate for an animal in a public place.'

This shift in onus would encourage individual respondents, most of whom are large transport or health providers, to turn their minds to the question of whether an animal is trained to a requisite standard, prior to refusing entry to the applicant. As noted above, where an applicant cannot provide accreditation evidence, respondents often simply determine, without considering the training or behaviour of the animal in question, that it is not an assistance animal.

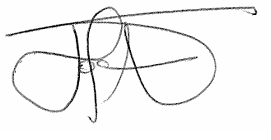
Shifting the onus to the respondent, so that they are forced to consider this question, would encourage respondents to develop their own criteria and test the animal according to that criteria. For example, an airline may decide that the most appropriate means of testing an animal's standard of hygiene and behaviour is to bring in an animal trainer to observe the animal in a simulated plane cabin. This will mean that the respondent company or organisation will itself determine a means by which to satisfy itself that the animal is trained to a necessary standard, without recourse to litigation.

Should there be disagreement about either the standard of behaviour, hygiene or training, the parties will then have recourse to litigation to determine that issue.

Further, as accreditation schemes further develop, it is anticipated that the respondent will be able to either have their scheme approved by the accreditation body, or that the applicant will have a means by which to have their animal accredited more generally.

Recommendation : Section 9(2)(c) be amended to provide that the onus is on the Respondent to prove that the animal is not trained to meet standards of hygiene and behaviour that are appropriate for an animal in a public place.

Yours Sincerely,



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About *NSW Disability Discrimination Legal Centre (NSW DDLC)*

NSW DDLC was established in 1994 to help people with disability understand and protect their rights under disability discrimination law. We do this through the delivery of direct legal services to people with disability, delivery of community legal education and undertaking policy work. NSW DDLC aims for a society where people will be able to participate in all aspects of life through the:

- removal of barriers;
- elimination of discrimination;
- empowerment of people with disabilities;
- promotion of awareness; and
- the ability to exercise rights.

NSW DDLC's objectives are:

- To promote community awareness of the potential to use discrimination laws to advance the rights of people with disabilities;
- To provide legal services for people with disabilities, their associates and representative organisations, who have been discriminated against;
- To ensure the effective participation of people with disabilities in the management and operation of the Centre;
- To reform laws and change policies, practices and community attitudes that discriminate against people with disabilities;
- To develop and be involved in appropriate networks; and
- To maintain the necessary infrastructures and administration systems in order to further the Centre's aims and objectives.

NSW DDLC has most recently been involved in the development of the Convention on the Rights of Disability at the United Nations level. We also convene the National Network of Disability Rights Legal Organisation.

NSW DDLC operates predominately on the basis of funding from the NSW and Commonwealth Attorney General's Departments. Please note that NSW DDLC will not be able to operate at its current level after June 2009 without further funding, as some of our funding is not recurrent. While we are appreciative of the funding we have received to date, we would welcome further recurrent funding in order to allow us to operate at our current level. More information about NSW DDLC and our work can be found at: http://www.ddlcnsw.org.au/