Submission Disability Discrimination Act Amendment Bill (Cth)
Senate Standing Committee on Legal and Constitutional Affairs
12 January 2009

Submission by:
Dr Belinda Smith
Faculty of Law
University of Sydney
173 – 175 Phillip Street
Sydney NSW 2000
belinda.smith@usyd .edu.au

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

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

Introduction

I welcome the opportunity to make a submission to the Senate Legal and Constitutional Affairs Committee on the *Disability Discrimination and Other Human Rights Legislation Amendment Bill* 2008 (the Bill). Given the relatively short period time made available for submissions, my comments are limited and I have not provided extensive referencing to international research which has informed my views.

In summary, I support the Bill and the comments I set out below provide reasons for such support and comments on drafting.

While the changes proposed in this Bill are supported and should not be delayed, they should not be seen as a total solution to identified limitations of our equality laws. There are grounds for undertaking further inquiry and consultation to improve equality laws in respect of persons with disability. These grounds include:

- The current Government's sensible decision to pursue harmonization of Australia's federal and state anti-discrimination laws should be informed by consultation and

comprehensive and internationally valid research into best practice and effective frameworks for addressing discrimination and promoting equality; and

- The enactment of bills of rights in the ACT and Victoria and renewed interest at a national level in the question of improving protection of human rights in Australia raises questions about the role and form of anti-discrimination statutes.

Other countries, such as Canada, the United States and South Africa, are demonstrating that problems of inequality and discrimination are not easily solved even with constitutional and statutory guarantees of substantive equality. The experiences of such countries illustrate that ongoing research, public discussion, and judicial and legislative engagement are required to develop and refine effective legal mechanisms over time. Their efforts remind us of how complex the problem is and how addressing the problems in Australia is going to be a long, ongoing process that requires progressive leadership, political commitment, public engagement, a great deal of research about the issues and options, and resources to implement recommendations. Hopefully this Bill is merely a first in getting Australia on the path to being an international leader rather than laggard in respect of equality and human rights generally.

In making this submission I draw on my academic research into Australian anti-discrimination laws and regulatory frameworks, equality, and regulatory theory. In my research I have focused on the *Sex Discrimination Act 1984* (Cth) but the similarity of provisions across anti-discrimination laws in Australia means that many of my findings are relevant also to the disability field. Relevant publications by me on anti-discrimination laws include:

- 'It's About Time – For a New Approach to Equality' (2008) 36(2) *Federal Law Review* 117-144.

- 'Australian Anti-Discrimination Laws – Framework, Developments and Issues' in Takashi Araki & Hiroya Nakakubo (eds), *New Developments in Employment Discrimination Law*, Kluwer International (2008).

- 'From *Wardley* to *Purvis*: How far has Australian anti-discrimination law come in 30 years?' (2008) 21(1) *Australian Journal of Labour Law* 3-29.

- **'**Not the Baby and the Bathwater – Regulatory Reform for Equality Laws to Address Work-Family Conflict', (2006) 28(4) *Sydney Law Review* 689-732.

- 'A Regulatory Analysis of the Sex Discrimination Act 1984 (Cth): Can it effect equality or only redress harm?' in Christopher Arup, et al (eds), *Labour Law and Labour Market Regulation - Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships*, Federation Press: Sydney (2006), 105-124.

I would be happy to provide any of these in electronic or hard-copy form.

I will not try to summarise all of the points in these articles, but draw on them - and my experience as a member of the Management Committee of the NSW Disability Discrimination Legal Centre - to make the following comments in respect of the Bill.

Approach and outline

Since Australia commenced legislating to address discrimination over three decades ago, there have been significant international developments in equality laws in other, comparable jurisdictions such as Canada and South Africa. Probably the most fundamental of these developments is an acknowledgement that equality must be understood and pursued in its substantive not merely formalistic form. In Canada, for instance, after 20 years of a statutory bill of rights that contained merely a formal equality guarantee, in 1985 this was abandoned as inadequate and the new constitutional Charter of Fundamental Rights and Freedoms contained a clear commitment to substantive equality (s.15). Opening doors, removing procedural barriers and treating all people the same are important steps, but reflect a formal conception of equality that may in fact entrench existing norms and disparities rather than enable the full and fair participation and dignity of all citizens to which we should aspire.

A related development in anti-discrimination laws in many comparable jurisdictions is a recognition that to achieve substantive equality, the original individual fault-based anti-discrimination laws needed to be complemented by some onus on organisations in society to undertake insitutional change. Blunt mechanisms such as simple quotas could be established to require organisations to ensure diversity in their ranks. However, more sophisticated approaches recognise that substantive equality is not about abandoning established criteria and merit but interrogating and challenging them to ensure they are not *unnecessarily* or *unreasonably* exclusionary and that the cost of enabling participating by all members of society are shared (as the benefits of inclusion are shared).

Generally legal changes acknowledging this have entailed shifting some of the responsibility for change from the victims of discrimination to those in positions of power in society, such as employers, education providers and public authorities.

A pattern around the world has seen the adoption of the individual complaints-led model and then its supplementation with the more proactive measures. This has meant addressing inequality not merely as a problem of individual acts of discrimination requiring a rights based response but also as a social, structural and cultural problem that requires institutional change. In respect of these trends, Australia has certainly lagged behind. In an international review of equality laws in 2004 it was noted:

> Within a global historical perspective, between 1950 and 1990, more sophisticated legal concepts and mechanisms developed to tackle indirect discrimination, promote equal pay between men and women, and facilitate affirmative action in the pursuit of greater equality. Such developments took place across Europe, Scandinavia, India, Canada and the USA. The

> measures introduced during the period were generally more complex than the pre-existing anti-discrimination laws. The latter were generally limited to retrospectively redressing an immediate wrong, rather than removing discriminatory practice across an organisation. … *Amongst industrialised nations, Australia and New Zealand have been the countries with the least developed labour market equality measures.*[1]

Australia's prohibition of both direct and indirect disability discrimination is an acknowledgement that discrimination may occur in the treatment or the effect of conduct and practices. However, the persistence of disability discrimination - as revealed by studies such as the Productivity Commission's 2004 review of the DDA and complaints made to Community Legal Centres, such as the Disability Discrimination Legal Centre – attest to the ineffectiveness of the current DDA framework. Some of the limitations of this Act can be attributed to narrow interpretations adopted by the courts that are contrary to the purposes of the Act.

On this basis, the Government is to be applauded for taking this first step of finally adopting recommendations made by the Productivity Commission to improve the DDA.

Comments in respect of specific provisions

Definition of Disability

- I support the proposed addition to the definition of disability in section 4(1) to make clear that behaviour that is a symptom or manifestation of the disability is part of the disability. This confirms the findings of the High Court in *Purvis v New South Wales (Dept of Education)* (2003) 217 CLR 92 ('*Purvis'*) and reflects a common sense understanding that behaviour caused by a particular disability should be treated as separable from that disability.

Definition of Direct Discrimination

- It is unclear why the wording of section 5(1) is to be changed to a formula that does not reflect the wording of any of the other federal anti-discrimination Acts.

- In the interests of harmonisation, the federal Acts should at least be consistent unless there is a clear justification for taking a different approach in respect of a particular ground. I submit that either the original wording be retained for now – to be reviewed as part of the harmonization program of review – or that the ACT model be adopted, as the Committee has recently recommended for the SDA.

- Comments on the reasonable adjustment provisions are made below.

Definition of Indirect Discrimination:

1 Paul Chaney and Teresa Rees, 'The Northern Ireland Section 75 Equality Duty: An International Perspective' in Eithne McLaughlin and Neil Faris, *The Section 75 Equality Duty – An Operational Review,* 2004, 8-9 (emphasis added).

- I strongly support the proposal to revise the definition of indirect discrimination in line with the reformed definition in the SDA and Age DA whereby the 'substantially higher proportion' test is changed to one of disadvantage and the burden for proving reasonableness shifts to the respondent. The need for these reforms in respect of the SDA was well-researched and supported and the rationale is equally applicable to victims of disability discrimination. Victims of disability discrimination come from traditionally disadvantaged groups and should not bear the full burden of proof in establishing barriers to equality and the need for change. These two changes will go some way to easing this burden on victims of disability discrimination.

- However, I submit that there are three problems with the proposed reforms to section 6.

    - Firstly, it is unclear why the wording does not more closely replicate the indirect discrimination provisions of the SDA or the Age DA. Enacting this provision would mean that, despite legislative reform, we would still have four different definitions of indirect discrimination at the federal level. If the Government is committed to harmonization of state and federal anti-discrimination laws, then it should start by ensuring consistency between the federal legislation.

    - Consistency is, of course, not the only criteria though. The model chosen should be the best one. This raises a second issue - it is unclear why the definition was reformed in line with the SDA and Age DA in respect of proportionality and reasonableness, yet it retains a compliance element.

    - The third problem relates to the wording and placement of the reasonable adjustments provision, as noted below.

<u>Reasonable adjustments</u>

- I strongly support the proposal to provide that failure to make reasonable adjustments amounts to discrimination. Such a provision acknowledges that to achieve substantive equality, organizations need to do more than simply apply their criteria consistently and treat everyone the same. An obligation to provide reasonable adjustments in effect distributes some of the burden for change across a range of actors in society.

- However, I submit that there are two problems with the proposed reasonable adjustments provision. Firstly, the wording of section 5(2) is very complicated. The complexity of the provision may undermine its normative impact because those who are bound by the duty will not readily be able to understand it. Secondly, I see no justification for inserting separate reasonable adjustment provisions within the direct and indirect discrimination definitions. Again, I think this merely adds to the complexity of the Act and runs the risk of promoting uncertainty and confusion rather than understanding and compliance.

- On this basis, I submit that the duty to make reasonable adjustments should be:

- Drafted in a clearer, more straightforward way and;
- Set out in a single provision that applies to both direct and indirect discrimination.

- If 'reasonable adjustments' needs to be defined, the definition should reflect the meaning of reasonable accommodation in the Disabilities Convention – 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.' (Article 2).

- The reasonable adjustments duty should make clear that employers (and other duty holders under the DDA) share some responsibility for reviewing and revising their requirements and practices so as to allow and enable persons with disability to participate equally.

Defences – unjustifiable hardship and inherent requirements

- I support the proposal to expand the availability of an 'unjustifiable hardship' defence. This, in conjunction with the reasonable adjustments duty should promote a focus on the options for enabling inclusion and participation and the appropriate balancing of costs and benefits across society. As the case of *Purvis* clearly demonstrated, the absence of such a balancing defence can lead to perverse reasoning that undermines the pursuit of equality.

- I strongly support the proposed clarification of both the onus of proof and the factors to be considered in determining unjustifiable hardship.

- Although less important, I also support the proposal to make an 'inherent requirements' defence more widely available and clarifying its application.

Other provisions

In brief, I also support the proposals to:

- Expand power to make standards under the Act;

- Removal of the 'dominant purpose' test from the *Age Discrimination Act 2004,* and

- Extend the period for taking a complaint to the Federal Court or Federal Magistrates Court.

I would be happy to clarify any of these points or respond to any queries in respect of this submission.

Dr Belinda Smith
12 January 2009