Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Dear madam/sir

Subject: **Inquiry into the Exposure Draft of the *Human Rights and Anti-Discrimination Bill 2012***

I am sorry that I could not submit this before your 21st December 2012 deadline for submissions to this Inquiry. For the following reasons I was not aware of your inquiry until that date:

- Nobody notified me that your inquiry was underway even though I, and the organisation that I am Convenor of, expressed interest at the outset in the revision/consolidation of the *Disability Discrimination Act 1992*;
- The Commonwealth funds peak bodies and systemic advocacy groups for various disability types, it discriminates against people with autism spectrum disorders (ASD) whose representatives are excluded from those groups and the Commonwealth Government refuses funding/support for systemic advocacy … or resources to monitor government announcements for notice of inquiries such as this (thereby the Government discriminates against people with ASD); and
- Given that the drafting of legislation has taken years, the submission period from 21st November, when the draft legislation was referred for "inquiry and report", to the 21st December 2012, when submissions must be received is ridiculously short.

Successive Attorneys-General ignored previous efforts to be heard on these matters (see http://a4.org.au/a4/node/619 for the most recent example).

I hope you are able to consider my submission anyway.

Unfortunately, I have not been able to conduct a thorough assessment of the proposed Bill in the limited time I was given and with my own personal resources. I may have missed or misinterpreted aspects of the proposed Bill. If so, I apologise.

I applaud aspects of the Bill, in particular:

- Section 3 (1) (a), the very broad Object "to give effect to Australia's obligations under the human rights instruments and the ILO instruments"
- the intention to continue an approach that is initially conciliatory and less adversarial.

The challenge for the Bill is to deliver on its Objects, especially Section 3(1)(b). My impression is that this Object is understated and under-recognised in the Bill. Section 3(1)(b) seems to be a major Object; it includes Section 3(1)(a) and 3(1)(d-f).

As I understand the proposed Bill, a complaint can be made to the Commission when an issue arises. If the Commission feels the complaint is worthy, then it will try to conciliate the complaint. If conciliation is fails, then the complaint can progress along one of two paths.

1. Matters of "unlawful conduct" that do not involve a Commonwealth Government agency can proceed to the Federal Court (which may not be affordable for vulnerable people like people with a disability); or
2. The Commission will decide complaints about the conduct of a Commonwealth government agency then send reports to the complainant and the Minister. It will be up to the Minister responsible for the Government agency to decide what action, if any, ensues.

The courts have a poor track record with existing discrimination legislation. To my knowledge, no court in Australia (federal or state) has decided finally a discrimination matter against a state agency. Not ever.

Some court decisions are extremely hard to understand (see http://a4.org.au/a4/node/375). For example, the High Court decision in *Purvis vs NSW* denies the right to education to any student with a disability who might be suspected of unwanted behaviour.

In the decision on *Walker vs Vic*, the court consistently describes the complainant's disability as *misconduct* … showing the court failed/refused to recognise/understand the nature of the complainant's disability. In this case, the court also regarded any adjustment needed to accommodate the student's disability as unreasonable.

The proposed Bill winds back international obligations to protect people with a disability. Previously, respondents to discrimination complaints could claim "unjustifiable hardship" to protect their action (as a basis for claiming their discrimination was "lawful" under Australian law … though international law says **all** discrimination is illegal) … but the proposed legislation will protect any action that might be "justifiable" to a court (that is uneducated in disability issues and sympathetic to an ordinary/normal respondent) for any reason whatsoever. The record of the courts in discrimination matters suggests any action that is not criminal conduct would be "justifiable" … so the proposed Bill offers little or no protection to the most vulnerable citizens, and will not "give effect to Australia's obligations under the human rights instruments and the ILO instruments", as is required under international law.

Note that the matters above (*Purvis vs NSW* and *Walker vs Vic*) are complaints about state government agencies, they are not complaints about the conduct of Commonwealth government agencies, so under the proposed Bill these matters would be treated pretty much the same as they are now.

I am not aware of any evidence or reason to believe that the proposed processing of human rights complaints about Commonwealth agencies would be more just than the existing (demonstrably unjust) system. The proposed system passes decisions on human rights matters over to the Minister who was ultimately responsible for the conduct. What would be the point? Possibly, a sympathetic or

repentant Minister could respond more favourably to a complaint than the current entirely negative response from courts.

The problem is not limited Australia's law; Australia's legal system denies justice to people with a disability. First, officers of the courts are not trained/educated in discrimination matters. Second, many decisions take far too long: delays in discrimination matters far exceed acceptable time frames. Complaints have taken over a decade to hear; and no matter the outcome, long delays deny justice for complainants.

The Human Rights part of the Bill relates to the conduct of federal government agencies; it does not protect Human Rights generally. It is not clear to me who can bring a Human Rights complaint: Section 88 appears to allow any person or "industrial association"[1] to bring a complaint. However, Section 88 (2) prohibits complaints related to "the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5)". Clearly, Section 88 is contrary to the Objects of the Bill.

The proposed Bill seems quite fragmented. Part of it is about Human Rights, parts of it are about discrimination, and other parts are about "racial vilification" (Section 51) or "sexual harassment" (Section 49), etc. The Bill and Australian law fail to protect other vulnerable people from vilification or harassment.

Section 117 (2) (b) affects a very short (12 month) statue of limitation on discrimination matters. This is unjust. This law is meant to protect vulnerable people, people whose vulnerability, lack of confidence, low self-esteem and for some their intellectual or cognitive disability may cause reluctance to complain or delay them in complaining.

I am sorry I do not have the time and resources to offer a more comprehensive analysis of the proposed legislation.

Yours sincerely

Bob Buckley

[1] What is this "industrial association" thingy? Why is it relevant?