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

By email: LegCon.Sen@aph.gov.au

Dear Mr Hallahan

Emily Howie of the Human Rights Law Resource Centre (**HRLRC**) and Melanie Schleiger, legal representative of the HRLRC, appeared before the Senate Legal and Constitutional Affairs Committee in relation to its inquiry into the Disability Discrimination and other Human Rights Legislation Amendment Bill 2008 (the **DDA inquiry**) in Melbourne at 9:00 am on Thursday 29 January 2009.

In the course of the public hearing a question was taken on notice. This letter provides a response to the question on notice, and also clarifies two other matters the subject of questions by the Committee during the hearing.

1. Additional grounds of discrimination that require protection

1. In the HRLRC's written submission to the inquiry we suggested that a broader inquiry is needed into all Commonwealth anti-discrimination legislation, which should consider, amongst other things, what additional grounds of discrimination require protection under

Commonwealth laws.¹ Senator Farrell asked what other grounds of discrimination we consider require protection under Commonwealth laws.

2. The HRLRC considers that Australian law should provide protection to all persons from discrimination on all the grounds that are currently protected by the treaties to which Australia is a party.

Particular grounds of discrimination to be prohibited

3. By ratifying various human rights treaties, Australia has committed to protecting persons from discrimination on a broad range of grounds. In addition to its commitment to ensure that persons with disabilities do not suffer discrimination,² Australia has ratified a number of treaties ensuring non-discrimination for all individuals in its jurisdiction on a broad range of grounds.³ For example, by ratifying the *International Covenant on Civil and Political Rights (ICCPR)*, Australia has committed 'to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (Article 2(1)).
4. Despite its commitments, Commonwealth anti-discrimination legislation only covers a limited number of grounds (such as race, sex, disability and age discrimination), leaving many grounds of discrimination that remain to be prohibited in Australian legislation. For example, Australia has committed to preventing discrimination on each the following grounds under international law, but has not implemented Commonwealth anti-discrimination legislation to prevent that discrimination:⁴
 - criminal record;⁵

¹ See paragraph 8(b) of the Human Rights Law Resource Centre's submission (submission No 20).

² *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008).

³ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force on 23 March 1976), Article 2; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 003 UNTS 3 (entered into force January 2, 1976), Article 2; *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981).

⁴ Save for the limited protection provided to employees of corporations, who cannot be terminated for a reason or for reasons including the employee's religion or political opinion (among other grounds): s659(2)(f) *Workplace Relations Act 1996* (Cth).

⁵ This is a protected ground under *ILO Convention Concerning Discrimination in Respect of Employment and Occupation* (No 111, 1958), to which Australia has been a party since 1974.

- political belief;⁶
- religious belief;⁷ and
- sexual orientation.⁸

This is by no means an exhaustive list of all the grounds requiring protection.

Prohibition of discrimination on the ground of 'other status'

5. However, in addition to enumerated grounds, it is important that anti-discrimination legislation also prevent discrimination on the basis of any 'other status' which is, in the context of the conduct in question, an irrelevant consideration. In fact, the Human Rights Committee has stated the definition of discrimination under the ICCPR:⁹

should be understood to imply **any distinction, exclusion, restriction or preference** which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth **or other status**, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. [emphasis added]

6. However, not all differentiation is unlawful discrimination. Discrimination will be lawful if the purpose of the discrimination is demonstrably reasonable and objective and the aim is legitimate.¹⁰
7. Australian law should prohibit discrimination on the basis of any 'other status', which allows for findings of differential treatment amounting to discrimination to be determined on a case by case basis. A ground of 'other status' acknowledges that differential treatment varies according to context and evolves over time, and that a flexible approach is needed.¹¹
8. The HRLRC submits that appropriate wording for the broad 'other status' provision would be that used in the South African *Promotion of Equality and Prevention of Unfair Discrimination Act 2000* which prohibits discrimination on the basis of 'any other ground [that] causes or perpetuates systemic disadvantage; undermines human freedom; or adversely affects the

⁶ This is an enumerated ground under ICCPR Articles 2, and 26.

⁷ This is an enumerated ground under the ICCPR, Articles 2 and 26.

⁸ The Human Rights Committee has found that 'sex' in articles 2(1) and 26 of the ICCPR is taken to include sexual orientation: *Toonen v Australia* (488/92). See also *Young v Australia* (941/00), [10.4].

⁹ Human Rights Committee, General Comment No 18: Non-discrimination : 10/11/89, [7].

¹⁰ Human Rights Committee, General Comment No 18: Non-discrimination : 10/11/89, [13].

¹¹ Committee on Economic, Social and Cultural Rights, *General Comment No 20*, above n 3, para 13.

equal enjoyment of a person's rights or freedoms in a serious manner comparable to discrimination on one of the listed grounds.¹²

Compounded discrimination

9. Compounded forms of discrimination exist where a person is discriminated against on two or more grounds (eg because they have a disability *and* they are a woman). The existence of compounded discrimination is well documented.¹³ For example, on a recent listening tour the Sex Discrimination Commissioner found that 'while there were a number of shared experiences among women, there were also stark differences based on other factors, including race, disability, age, sexuality and socio-economic status.'¹⁴
10. However, the *Disability Discrimination Act 1992* (Cth) (*DDA*) fails to acknowledge compounded forms of discrimination, as does Federal anti-discrimination legislation generally. Due to the separate nature of the Federal anti-discrimination statutes and the complexity involved in making complaints under two or more of these statutes, complainants will often decide to focus their complaint on just one ground, despite the compounded nature of the discrimination that they have suffered. For example in the case of *Ilian v Australian Broadcasting Corporation* (2006) 236 ALR 168, the applicant issued her complaint under the Sex Discrimination Act on the grounds of pregnancy, even though the discriminatory treatment was largely attributable to the applicant suffering post-natal depression, which caused her to take extended sick leave. By mischaracterising the grounds of discrimination, a person's experience of discrimination may be inaccurately addressed.
11. Australian anti-discrimination legislation should address compounded discrimination, for example by enabling issues of discrimination under different legislation (ie the Sex Discrimination Act, the Racial Discrimination Act and the Disability Discrimination Act) to be joined.¹⁵

¹² *Promotion of Equality and Prevention of Unfair Discrimination Act 2000*, s.1(1)(xxii)(b)

¹³ See also Committee on the Elimination of Racial Discrimination, General Recommendation No. 25: Gender related dimensions of racial discrimination, 20/03/2000; Human Rights Committee, *General Comment 28, Equality of Rights between Men and Women*, UN Doc CCPR/C/21/Rev.1/Add.10 (2000), [30]; Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Australia*, Thirty-fourth Session, 16 January – 3 February 2006, CEDAW/C/AUL/CO/5

¹⁴ Human Rights and Equal Opportunity Commission, *Gender Equality: What matters to Australian women and men*, (2008).

¹⁵ The issue of compounded discrimination was addressed in some detail in the HRLRC's Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Sex Discrimination Act 1984* (Cth).

2. Migration context

12. Senator Crossin asked a question about the application of the DDA in the migration context. To clarify the operation of the migration exemptions in the DDA, the Bill and as recommended by the Productivity Commission, we would state the following:
- (a) The DDA currently provides an exemption for any discriminatory provisions of the *Migration Act 1958* or regulations or anything done under those instruments (section 52). Therefore, it is currently lawful to discriminate on the basis of disability in the migration context.
 - (b) The Productivity Commission recommended that the exemption be narrowed so that only the provisions in the Migration Act or regulations which deal with issuing entry and migration visas to Australia are exempted from the application of the DDA.¹⁶ This would mean that the DDA would apply to all parts of the Migration Act and regulations, and all decisions under those instruments, except for those provisions and decisions that relate to the issuing of entry and migration visas to Australia. For example, the provisions and decisions concerning conditions of detention and registration and duties of migration agents would be subject to the DDA.
 - (c) However, the provisions in the Bill would oust the operation of the DDA from many areas covered by the Migration Act and regulations. The Bill proposes that all provisions of the Migration Act or regulations, and all acts 'permitted or required to be done' by those instruments will be exempt.¹⁷ This means that discrimination is allowed for all those acts permitted or required to be done under the Migration Act and regulations, which is clearly a broader class of acts than just the issuing of entry and migration visas (recommended by the Productivity Commission). Using the previous example, provisions and decisions concerning the registration and duties of migration agents and conditions of detention are presumably permitted or required under the Migration Act and regulations, and therefore the DDA would not apply to those provisions and decisions.
13. The Bill therefore provides a broader exemption than that proposed by the Productivity Commission, and therefore discrimination is allowed in a broader range of migration related areas to that recommended by the Productivity Commission.

¹⁶ Productivity Commission, *Review of the Disability Discrimination Act 1992*, (Productivity Commission Inquiry Report Vol 1, Report No 30), 30 April 2004, 348

¹⁷ Schedule 2, Item 75 of the Disability Discrimination and other Human Rights Legislation Amendment Bill 2008, proposed new section 52.

3. The rights of unborn children

14. Senator Barnett asked a question about whether fetuses or unborn children should have the rights set out in the DDA. We provide the following summary of international and comparative law jurisprudence on the question.
15. We note that at present the DDA does not apply to unborn children. This appears to be consistent with international jurisprudence, which does not extend full human rights protection to persons until the moment at which they are born.
16. Analysis of the text, background materials and interpretation of the *Universal Declaration of Human Rights*¹⁸ (*UDHR*), the ICCPR and the *Convention on the Rights of the Child*¹⁹ (*ICRC*) confirms that the right to life does not extend to fetuses.²⁰ The right to life attaches to persons at birth.
17. European jurisprudence has indicated that fetuses do not enjoy an unlimited right to life, and that any rights of the foetus would not outweigh the interests of the pregnant woman, as the foetus is intimately connected with and cannot be isolated from the pregnant woman.²¹ In *Vo v France*²² the European Court of Human Rights did not make a final determination on this issue, but stated that:
- at best, it could be regarded as common ground between States that the embryo/foetus belongs to the human race. The potentiality of that being and its capacity to become a person require protection in the name of human dignity, without making it a "person" with the "right to life".
18. We also note that the view of the current Australian Government is that the right to life under the ICCPR was 'not intended to protect life from the point of conception but only from the point of birth.'²³

¹⁸ GA Res. 217A(III), 10 December 1948.

¹⁹ 1249 UNTS 13, (entered into force on 2 September 1990).

²⁰ See extended analysis of the background to the drafting of the UDHR, ICCPR and ICCPR in Christina Zampas and Jaime M Gher 'Abortion as a Human Right – International and Regional Standards' *Human Rights Law Review* 8:2 (2008), 249, 262-268.

²¹ See for example *Paton v United Kingdom (X v United Kingdom)* (1980) 19 DR 244; (1981) 3 EHRR 48 at [7]-[9] and [23].

²² *Vo v France* (2004) Eur Court HR, No. 53924/00.

²³ Mr Peter Arnaudo, Attorney General's Department, *Hansard – Joint Standing Committee on Treaties Reference: Treaties tabled on 14 May and 4 June 2008*, 16 June 2008, Canberra, TR6. <http://www.aph.gov.au/hansard/joint/commtee/110940.pdf>

Yours sincerely



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