Submission:

United Nations Committee on the Rights of Persons with Disabilities

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Draft General Comment 5
Equality & Discrimination

Disability Discrimination Legal Service Inc

Villamanta Disability Rights Legal Service Inc.

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Introduction

The **Disability Discrimination Legal Service** ("DDLS") is a community legal centre that specialises in disability discrimination legal matters in Victoria. DDLS provides free legal assistance through information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability.

Villamanta Disability Rights Legal Service Inc. ("Villamanta") is a community legal centre that works only on disability related legal and justice matters for people who have a disability. Its priority constituency are people who have an intellectual disability and most of its legal casework is done for them. Villamanta provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy & law reform. The long term goals of Villamanta are to ensure that people who have a disability have the same rights and opportunities as other people and are equally included in the community; in particular, that they know about the law and are able to use the law to secure their rights.

We welcome the Committee's draft General Comment 5 on Equality and Non-discrimination and believe we are well placed to provide comment on that draft, having years of familiarity with Australia's domestic antidiscrimination legislation and the systems that support its use.

Currently we do not believe that Australia's *Disability Discrimination Act* and supporting legal Standards in areas such as education and access to premises achieve the aims and objectives of the Convention on the Rights of Persons with Disabilities.

We fully support the Committee's draft, however feel some parts could be strengthened, or more specifically address areas of particular weakness in Australian domestic legislation (or its interpretation). We respectfully submit our views below.

Paragraph 8 and 20 (a).

1. Numerous state and federal enquiries and reviews in the last five years have highlighted the abuse of adults and children with disabilities through the unnecessary use of restraint and seclusion. These abuses take place in adult disability service provision settings, and in mainstream and special schools. We believe it would be appropriate to mention these practices in the third sentence of paragraph 8, and the last sentence in paragraph 20 (a).

2. These are real and present dangers for people with disabilities in Australia. We refer to a government report released as recently as November 2015 [1]:

   Violence against people with disability in institutional and residential settings is Australia's hidden shame…The evidence of this national epidemic is extensive and compelling. It is a deeply shameful blight on our society and can no longer remain ignored and unaddressed. (Introduction)

   In relation to Australian schools:

   The committee was distressed to be presented with all too many harrowing accounts of small children suffering at the hands of the very people who should be educating them. It is hard to understand how strapping a child to furniture, or locking them alone in a room to scream themselves into exhaustion could be seen as a justifiable behavioural intervention. This is without doubt a national shame. S4.141

3. Despite recommendations of a Royal Commission into such abuse, our government has refused to establish such a Commission.

4. Violence against Australian people with the disabilities through so-called "behaviour management" approaches continues to present serious risks of injury and death to that group.

Paragraphs 25 and 27 Reasonable Accommodations

5. We refer to the references to "choices of the individual", "consultation" and "dialogue" in relation to decisions to be made about reasonable accommodations.

6. In our submissions, states parties require stronger guidance on where the priorities in decision making lie. Current interpretation in Australia reflects little respect for the choices and opinions of people with disabilities and their associates.

[1] *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*. Senate Community Affairs References Committee

7. The following is taken from a disability discrimination decision from *Walker v State of Victoria* [2011] FCA 258 at paragraph 284, discussing reasonable 'adjustments'.

   a) *The first is that both provisions require a school to consult a student or his or her parents about prescribed matters. They do not, however, require that such consultation take any particular form or occur at any particular time. Those involved may meet formally or informally. Discussions can be instigated by either the school or the parents. Consultation may occur in face to-face meetings, in the course of telephone conversations or in exchanges of correspondence.*

   b) *Once consultation has occurred* ***it is for the school to determine whether any adjustment is necessary in order to ensure that the student is able****, in a meaningful way, to participate in the programmes offered by the school.* ***The school is not bound, in making these decisions, by the opinions or wishes of professional advisers or parents.***

   c) ***The school*** *is also required to determine whether any reasonable adjustment is possible in order to further the prescribed aims .* (Emphasis added*)*

8. This decision, which has not been overturned in terms of how reasonable adjustments are to be decided upon in an educational sense, is a decision that is based on Australia's Disability Standards for Education, which is a clarifying piece of legislation that is meant to guide education authorities on their obligations under the *Disability Discrimination Act*.

9. As can be seen, the interpretation takes away any meaningful consultation with the person with a disability and their associates, and leaves the decision in the hands of people who are usually respondents in discrimination cases, and are hampered by a lack of resources, and disability knowledge.

10. We do not believe that this interpretation is commensurate with the objectives of either our domestic legislation, or the Convention. However it is clear that the slightest ambiguity in relation to setting out responsibilities regarding reasonable accommodations is not serving Australians with disabilities well.

11. We encourage the Committee to strengthen the sections to strengthen the role of people with disabilities and their associates in decision-making processes regarding reasonable adjustments in order that rigid interpretations such as the one above that disadvantage people with disabilities are more difficult to adopt.

12. Also in our submission, in terms of what constitutes a "reasonable accommodation", we believe this should specifically include "assessments" as an example. Assessments are often linked with the <u>determination</u> of what a reasonable accommodation might be. However, again, in educational discrimination case law, difficulties have arisen with courts narrowing what

can be considered to be reasonable accommodation, or “reasonable adjustment” as it is referred to in Australian legislation, again disadvantaging people disabilities.

13. The Victorian Government Department of Education and Training, has put forward the position, accepted by the courts, that one cannot claim an education plan or a behaviour plan as a reasonable adjustment unless the person with a disability can clarify what the content of such plans should be. This often cannot occur without some sort of assessment.

14. The Department of Education and Training is also putting forward the position that an assessment, in and of itself, cannot be a reasonable adjustment, but simply a tool by which a reasonable adjustment is decided upon. This has not been yet tested before the courts, but given the history of narrow interpretations of discrimination legislation by our courts, it would not be unsurprising if our courts adopted that view. This means that education authorities can simply never undertake an assessment (which according to them is not a reasonable adjustment), one can never arrive at what the content of a plan should be, and therefore never claim any sort of plan as a reasonable adjustment.

15. This is particularly salient for individual/families who do not have the finances to engage private practitioners to undertake assessments and write recommendations, but rely on government services to do so.

16. It is also particularly relevant to, for example, students with cognitive disabilities where the adjustments required are not as simple to articulate and conclude compared to those who have sensory or physical disabilities where the adjustment might be more tangible, or obvious.

17. For example it is easy for persons not expert in disabilities to comprehend adjustments such as sign language interpreters, ramps, software packages that convert written word into spoken word and someone.

18. However for persons with Autism Spectrum Disorder, Oppositional Defiant Disorder, Dyslexia, Attention Deficit Hyperactivity Disorder and other cognitive disabilities, reasonable adjustments are often not so clear, and often not so tangible.

19. Children with behaviours of concern that are a manifestation of their disabilities may need Functional Behaviour Assessments to inform written plans. While discrimination legislation in other countries, such as the USA, is sophisticated enough to mention such assessments in their legislation, countries such as Australia where the legislation is broad and open to interpretation will be relying strongly on your guidance. It is important that a General Comment such as this one assist to protect Australians with disabilities by providing clear examples on the breadth of reasonable adjustments that should be available to such people.

20. In our submission, we believe that specific mention of “assessments” and the importance of interpreting “reasonable accommodations” broadly and beneficially, are paramount.

Paragraph 63 Liberty and Security

21. Given the common practices of unnecessary restraint and seclusion of children with disabilities in schools across Australia, we believe that these practices should be mentioned in this paragraph. States continue to vigorously defend their rights in this regard and clearly students with disabilities need greater protection.

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