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Ms Jeanette Radcliffe
Committee Secretary
Community Affairs Reference Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Radcliffe

**Senate Community Affairs Reference Committee – Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings**

**Submission 131**

Thank you for your letter of 31 August 2015 and your email of 18 September 2015 inviting the Department of Education and Training (the Department) to respond to Submission No. 131 from Ms Julie Phillips received by the Senate Community Affairs Reference Committee (the Committee). Your 18 September 2015 email invited me to provide details of the prejudice likely to be caused by the unredacted publication in Submission No. 131 of 'case studies' that relate to ongoing litigation in the courts and complaints in the Australian Human Rights Commission.

The Department acknowledges that Disability advocacy groups are entitled to present their view on their experiences with the Department to the Committee. The Department notes the Committee's stated view that a matter being before the courts is not sufficient reason in and of itself to preclude publication of evidence by the Senate.

It is further noted that, while the Department has not made public statements about matters before the Courts or the Australian Human Rights Commission, the allegations made by Ms Phillips are currently in the public domain due to her posting a copy of Submission No. 131 on her Facebook page. This is a matter you have indicated is relevant in the Committee's decision as to whether or not to remove names of individuals or schools identified in Submission No. 131.

Accordingly, the Department no longer pursues its request that the names of schools identified in Submission No. 131 be removed by the Committee prior to publication. However, so that the Committee is presented with a balanced perspective, the Department draws the Committee's attention to the fact that many of the examples, assertions and case studies in Submission No. 131 relate to decided cases that were unsuccessfully litigated by clients of Ms Phillips.

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In each of the decided cases, a lengthy evidence gathering process was required, key staff including teachers, Principals, Regional support staff and Department psychologists were called by the parties to appear as witnesses, and evidence was tested under oath. Litigation is self-evidently stressful and unpleasant for all those involved, including parents, staff and other people associated with a student with disabilities.

During the proceedings the staff's credibility, professionalism and care for students' wellbeing were challenged in open court. It is relevant that in each of those decided cases, the Applicant was wholly unsuccessful in making out their claims of unlawful discrimination including, in many cases, allegations of failure to make reasonable adjustments for students with disabilities and, in some cases, restraint or other alleged abuse.

The public re-airing of these allegations without reference to the published decisions of the Court or Tribunal would be unfair and prejudicial to the dedicated and caring professionals at those schools.

I have attached for the Committee's reference copies of the Court and tribunal judgments involving individuals and/or schools who are the subject of assertions or allegations in Submission No.131. Many of the allegations made in Submission No.131 are taken directly from the Applicants' pleadings in these wholly unsuccessful disability discrimination claims:

| Attach No. | Case | Applicant's representative | Outcome |
|---|---|---|---|
| 1 | *HL (by his next friend RW) v State of Victoria (DEECD) and Karen Dauncey* [2015] VCAT 266 | Julie Phillips | Applicant wholly unsuccessful |
| 2 | *Kiefel v State of Victoria* [2013] FCA 1398 | Julie Phillips | Applicant wholly unsuccessful |
| 3 | *Abela v State of Victoria* [2013] FCA 832 | Julie Phillips | Applicant wholly unsuccessful |
| 4 | *Sievwright v State of Victoria* [2012] FCA 118 | Julie Phillips | Applicant wholly unsuccessful |
| 5 | *Walker v State of Victoria* [2011] FCA 258 | Julie Phillips | Applicant wholly unsuccessful |

By way of example only, the Department draws the Committee's attention to the disparity between the allegations made in Submission No. 131 in relation to Marnebek School and the findings of the Victorian Civil and Administrative Tribunal (VCAT), which tested the evidence of Ms Phillips' client in relation to these matters.

In Case Studies 1A and 3A in Submission No. 131, Ms Phillips refers to evidence raised by the Applicant (represented by Ms Phillips) in the decided case of *HL (by his next friend RW) v State of Victoria (DEECD) and Karen Dauncey* [2015] VCAT 266 (a disability discrimination claim made against the Department and the Principal of Marnebek School). VCAT found the allegations to be unsubstantiated and, following a lengthy hearing, dismissed the application in its entirety.

In the published judgment, Senior Member Megay made the following comments about the evidence about the alleged use of wrist straps, time-out rooms, seclusion, restraint, walls papered over and the like:

> *Even if the Tribunal were able to consider the claim, I would have difficulty upholding them on the basis of the evidence before me. Take, for example, the claim relating to the use of the wrist strap. Evidence was given about the existence of, and the use of, one or possibly two wrist straps. The Tribunal heard about the wrist straps from [8 witnesses]. From all of the evidence, disparate as it was, the only possible conclusion is that a wrist strap was used once or maybe twice in circumstances where there was a concern for HL's safety.*

By way of further example, the allegations in Submission No. 131 relating to Bulleen Heights School have already been raised by the Applicant (a client of Ms Phillips') in a decided case in the Federal Court of Australia: *Kiefel v State of Victoria* [2013] FCA 1398. The Applicant in that case was wholly unsuccessful in making out a claim of disability discrimination and was ordered to pay the costs of the State.

Justice Tracey made the following comments in the judgment about the actions of the staff of Bulleen Heights School:

> *The Department called 19 principals, teachers and aides who had been involved in [the Applicant's] education during the relevant period. It also led evidence from a psychologist and a speech therapist who worked at its schools. All presented as caring professionals who sought to provide [the Applicant] with the highest possible standard of education to the best of their abilities but, necessarily, subject to the limits of the resources available to them.*

Justice Tracey made the following comments in the judgment about the allegations made by the Applicant:

> *[The Applicant] argued that it was 'immaterial' whether any injury suffered by him occurred by reason of the deliberate or inadvertent acts of his teachers or aides. His case, as finally put, was that any injury to him or to staff was 'reflective of an unacceptable and critical situation.'*
>
> *The physical abuse of young children is reprehensible. ... The teachers and aides who were responsible for the care of [the Applicant] on the days on which it was claimed that he had sustained injuries while at school were called to give evidence. Without exception they impressed me as being dedicated and caring educators. Each displayed an understanding of [the Applicant's] disabilities and the manifestation of those disabilities in the school setting. ...*
>
> *I have no hesitation in accepting the evidence of these teachers and aides. Any physical contact they had with [the Applicant] was justified and proportionate to the occasion. Such contact often occurred as an instinctive reaction in order to protect [the Applicant] from falling or causing harm to others. It did not occur with the intention of inflicting physical harm on him. On the contrary, the physical contact was often necessary to avoid harm.*

As I set out in my response to Submission No. 78, the Victorian Government is committed to further improving and strengthening support for all children and young people with disabilities in our schools and to ensure they are treated with dignity and respect at all times. I refer you to that response for information about the activities of the Department, which we consider were not accurately reflected in the information contained in Submission No. 131.

If you would like further information, you may contact Kate Rattigan, Executive Director, Legal Division, Department of Education and Training, on [redacted] or by email: [redacted]

Yours sincerely

**Gill Callister**
Secretary

29/7/2015



VICTORIA State Government

**The Julie Phillips**
**Disability Advocate**

17 October 2015

Ms Jeanette Radcliffe
Committee Secretary
Community Affairs Reference Committee
Parliament House
Canberra ACT 2600

Dear Ms Radcliffe

I write in relation to the Department of Education and Training ("DET") response dated 29 September 2015, to my submission to the Committee.

Regrettably, DET has misled the Committee, and rather than provide a "balanced perspective" as claimed on page 1 of their letter, it has ensured that the Committee has no proper understanding of the litigation that DET has been involved in, **such that this is in any way relevant to the Inquiry**.

I raise its relevance, as the Inquiry, as I understand it, is on the subject of violence, abuse, neglect and exploitation, rather than the effectiveness of discrimination legislation. However if this topic is of any interest to the Committee, I attach my submission to the review of the *Disability Standards for Education 2005, Disability Discrimination Act 1992* **(Attachment A)**. The Committee may also, if it is interested, wish to look at other submissions made regarding the Standards both from this year's review and the review five years prior.

On page 2 of the DET response, it is claimed that I have been the "Applicant's representative" in four matters before the Federal Court of Australia. This is untrue and a dangerous allegation to make. Applicants running cases at the Federal Court require legal representation. The applicants listed were represented by a law firm. The allegations imply I have acted outside the law. Those allegations are now in the public domain.

DET has presented the Senate with five cases. I attach a list of cases that I have assisted parents to lodge at state and federal human rights commissions, and then on to the relevant tribunals and courts **(Attachment B).** As the list was compiled in haste, there may be more I have missed. It should be assumed that many more cases have been lodged by parents themselves and by other representatives.

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These matters, are of course, known to DET. In comparison with the 5 unsuccessful cases that DET has decided to present to the Committee to provide it with the "balanced perspective", there is a list of 31 applicants, representing 34 complaints lodged since the year 2000. Of those 34 complaints, in fact 6 were unsuccessful, 2 were successful (including one appeal to the Supreme Court), 2 were withdrawn, 4 are current, but of more relevance - **20 were settled**.

Points of interest for the Committee

1. Of the four Federal Court cases presented to you by DET, three of them were heard by Justice Tracey, and one by Justice Marshall who referred extensively to Justice Tracey's decisions.
2. DET is able to choose which judges it wishes to run cases in front of, simply by settling those where the allocated Judge is not their preferred Judge. The Federal Court cases in the attached list which were settled, were all allocated to judges other than Tracey,J and Marshall,J, bar one.
3. You will see on my list, that cases listed as Nos 2 & 3 appearing on the short list provided by DET, had appeals lodged. The appeals would have been heard by judges other than those DET choose to run cases before. DET settled those appeals.
4. You will see on my list, that the case listed as No. 24, also appearing on the shortlist provided by DET, involved a further complaint being lodged. This case was allocated to a judge which was neither Tracey,J nor Marshall, J. DET chose to settle that complaint, despite it being similar to the first complaint.

It certainly is regrettable that DET have quoted on p3 of their letter to you a VCAT decision supporting the use of a wrist strap even only once or twice, citing concern for a child's safety when the child was inside a school building. The Committee will be pleased to know that:

- Only one week after the date DET wrote to the Committee, mechanical restraint such as this was banned by DET (Restraint Policy 2015 *"Mechanical restraints should never be used in schools to restrict a student's freedom of movement, unless the restraint is for a therapeutic purpose with written evidence of the prescription / recommendation, or if required to travel safely in a vehicle.")* Therefore it seems that both Ms Callister and VCAT may be out of step with what actions constitute unacceptable or inhumane and degrading treatment.
- The child in question, now attending a mainstream school, plays in the school yard without an aide by his side, and without secure fencing. He certainly has not been subjected to any types of physical mechanical restraint since leaving Marnebek School.

It is also regrettable, that DET have quoted on p3 Justice Tracey giving his view that restraint causing injuries to a child with Autism Spectrum Disorder was "*often necessary to avoid harm*". The Committee will be pleased to know that:

- The child in question, who Justice Tracey believed in his view it was appropriate to restrain whether he sustained injuries or not, when taken

out of the country and enrolled in a school that was supervised by Board Certified Behaviour Analysts, had no challenging behaviours after 3 months. He is now an independent young man with many skills, able to be included in the community successfully as we would all wish him to be.

The decisions that DET have provided the Committee may not, in fact, help the Committee at all have a better understanding of the evidence. For example the Decision in the case referred to immediately above did not reflect the evidence of the same child being locked in a bathroom on approximately 10 occasions in response to challenging behaviours, despite these admissions being made in open court.

The decision in *Abela,* in fact, will mislead the Committee in relation to fact. Justice Tracey, in his enthusiastic support of DET, refers to evidence from DET witnesses/experts **who did not even appear at the hearing.** These references are made in the Decision at paragraphs 68, 73-74, 76 and 87. It is not difficult to understand why the appeal was settled.

If the Committee does indeed wish for a balanced perspective on disability discrimination litigation in Victoria, it is open to it to request from DET how much they have spent on settlements with parents of children with disabilities who have made discrimination claims against them. Such information could be provided and identified without breaching confidentiality. It is entirely up to the Committee whether they believe such information is relevant to the matter at hand.

**Summary**

I note that DET have not challenged one specific allegation in my 70 page submission to the Committee. In fact, their letter of response is simply a further attack on me. I respectfully request that the letter itself is taken into consideration by the Committee in regard to the section of my submission which refers to victimisation of advocates at page 36.

Yours sincerely

Julie Phillips