

Responses from legislation proponents — Report 2 of 2020¹

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MC19-037483

Senator the Hon Sarah Henderson
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Dear Senator

Thank you for your email of 6 December 2019 requesting information on certain human rights matters in relation to the *Disability Discrimination Regulations 2019* (the Regulations). I appreciate the time you have taken to bring this matter to my attention.

You have informed me that the Parliamentary Joint Committee on Human Rights *Report 6 of 2019* includes a request for more information on the Regulations to facilitate the Committee's consideration of the Regulations. In particular, the Committee has, at paragraphs 1.117 and 1.119 of the report, sought further information on the following matters:

- a. whether providing a blanket exemption is the least rights restrictive way of achieving the stated objectives
- b. what safeguards are in place to ensure the exemptions are not disproportionate, including any rights of review or monitoring
- c. whether a child's right to inclusive education will be considered by the relevant Director-General in relation to those exemptions, and
- d. whether there are other mechanisms available by which a person whose rights to equality and non-discrimination are violated may obtain a remedy.

I have addressed each of these matters in turn.

- a. Blanket exemption

I note the Committee's comments that other states and territories appear not to have equivalent exemptions. The approach taken by the Commonwealth in this case is to rely on the states and territories to identify any laws that need to be prescribed, and to provide justification, including an assurance that it has consulted with the community and other relevant stakeholders in its jurisdiction. I consider that each jurisdiction is best placed to determine the risk of their own laws creating a situation where unlawful discrimination may occur under the *Disability Discrimination Act 1992* (Cth) (DDA). However upon receiving a request to prescribe a law, the Commonwealth conducts a separate assessment of the request and consults with the Australian Human Rights Commission.

I consider prescription to be an appropriate means for determining when the DDA should give way to other laws, noting in particular that the process for prescribing laws provides for scrutiny through parliamentary disallowance as well as through consultation with relevant governments.

The prescription of the particular laws provides reasonable certainty to decision-makers that they can appropriately make decisions in the interests of public safety and be protected from an unlawful discrimination complaint based on that decision. In forming my view, I considered that the requirements a person must meet under each of the prescribed laws in order to ensure public safety were reasonable, necessary and proportionate. I considered that the potential risk to the public may be significant if these laws were not prescribed, particularly in relation to those laws that deal with motor vehicles and firearms.

b. Safeguards and monitoring available

The Regulations are subject to the review and consultation provisions of the *Legislative Instruments Act 2003* (Legislative Instruments Act). A review of the Regulations was undertaken in accordance with these provisions to determine whether they were still current and fit-for-purpose. In forming my views on these Regulations I was provided with advice by a panel which conducted a public consultation process. This process provided an opportunity for stakeholders, including disability advocates, to make submissions on the existing prescribed laws and to identify any concerns about the operation of the regulations. While no submissions were received from disability advocates, the panel carefully considered all the exempted laws in the regulations and sought further advice from the relevant jurisdictions before making their recommendations to me.

In implementing this review of the Regulations, a number of previously prescribed laws have been removed. This was because I considered that compliance with those prescribed laws may not constitute unlawful conduct under the DDA and therefore they did not need to be prescribed.

In the case of the *Fair Work (General) Regulations 2009* (Fair Work Regulations), I wrote to the relevant jurisdiction seeking further information to support the prescription of regulation 10, including further consultation with affected organisations. I proposed to repeal the prescribed law in 12 months' time pending further information being provided. Upon further consideration, the jurisdiction has advised that the Fair Work Regulations do not need to be prescribed and that there are no individuals employed under the regulation. The exemption will therefore be allowed to lapse as scheduled. As no individuals are currently affected by the exemption and are not expected to be affected within the next 12 months, I do not consider that it is necessary to bring forward the repeal of this exemption.

Where I considered that a law should continue to be prescribed in the Regulations, the general approach was taken to prescribe specific provisions to ensure the exemption was limited in scope and proportionate. However, in the case of the *Mental Health Act 2007* (NSW) (Mental Health Act) and the *Mental Health Regulation 2013* (NSW) (Mental Health Regulation) I agreed with the request from NSW that these laws needed to be prescribed in their entirety given the nature of the laws and the importance of ensuring that they could operate effectively. This is because the definition of 'disability' could arguably include mental illnesses and provisions of the DDA, particularly section 24, could apply to care and treatment provided under the Mental Health Act and the Mental Health Regulation. For the avoidance of doubt and to ensure clinicians can appropriately provide care and treatment to patients with a mental illness, I considered that the Mental Health Act and the Mental Health Regulation should be prescribed in their entirety.

I note the Committee's concern that ongoing monitoring of the exemptions be considered. As you would be aware, the functions of the Australian Human Rights Commission include, pursuant subsections 67(i) and (j) of the DDA, examining and monitoring the operation of other laws and reporting to the Minister on their consistency with the DDA.

The Regulations will be required to be reviewed again in 10 years' time, in accordance with relevant provisions in the Legislative Instruments Act. In addition, states and territories can identify any laws that need to be added, removed or amended at any time.

c. Right to inclusive education

The Committee has asked whether a child's right to inclusive education is considered by the relevant Director-General. While there is no explicit obligation to consider the right to inclusive education, subsection 75(3) of the *Education Act 1972* (South Australia) requires the Director-General to consider the best interests of the child when making a direction that a child should attend a special school. This requirement could arguably be considered a special measure within the meaning of subparagraph 45(1)(b)(i) of the DDA (affording people with disability access to opportunities to meet their special needs in relation to education). However, whether compulsory enrolment at a special school could be a special measure would be dependent on the specific circumstances of each individual case, and would need to be assessed on a case by case basis.

d. Other remedies available

The prescription of these laws under the DDA does not affect any other existing review mechanisms or remedies that a person is entitled to seek in relation to decisions under the prescribed laws. The existing review rights under the prescribed laws are as follows:

- The Mental Health Act and Mental Health Regulation provide that a person can seek a review of, or appeal a decision to, the Mental Health Review Tribunal. If a person remains dissatisfied with the decision, the person can appeal to the Supreme Court against a determination of the Tribunal (or if the Tribunal was unable to reach a determination, against that decision)
- Part 3E of the *Motor Vehicles Act 1959* (SA) provides any person who is aggrieved or dissatisfied with a decision with a right of review by the Registrar and a subsequent right of appeal to the District Court
- Part 7.8 of the *Road Transport Act 2013* (NSW) provides a person with the right to appeal a decision of the Authority made under the *Road Transport (Driver Licensing) Regulation 2017* (NSW)
- Subsection 75(c) of the *Education Act 1972* (SA) provides that parents have the right to appeal a direction or decision through the Administrative and Disciplinary Division of the District Court provided

Thank you for raising this matter with me. I trust this information is of assistance.

Yours sincerely

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 Minister for Industrial Relations
 Leader of the House