



**Australian Government**  
**Attorney-General's Department**  
**Classification, Human Rights and**  
**Copyright Division**

09/1115

11 February 2009

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

Dear Mr Hallahan

**Disability Discrimination and Other Human Rights Legislation Amendment Bill: answers to questions on notice**

During the Committee's hearing in Canberra on 6 February 2009, I took four questions on notice regarding the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. I write to answer those questions.

1. Senator Barnett asked for a list of the Productivity Commission recommendations that proposed legislative change which are not being implemented by the Bill.

I attach a table setting out those legislative recommendations not implemented, or partially implemented, in this Bill, and a brief comment on their status.

2. Senator Barnett asked for information on where to find the Australian Electoral Commission's Disability Action Plan and any further information on what the Australian Electoral Commission has done in relation to accessible voting.

Since 2005, the *Electoral and Referendum Legislation Amendment Act 2007* has provided for two electronic voting trials: the first for overseas Defence personnel, and the second for voters who are blind or vision-impaired.

At the 2007 Federal election, the Australian Electoral Commission trialled electronic assisted voting machines at 29 selected pre-polling centres in Australia to allow vision-impaired electors to vote independently. Approximately 850 electors with vision impairment made use of the electronic assisted voting machines, and the results of the trial were published in March 2008 in a Final Evaluation Report. Amongst the electronic voting machine users, the support for the machines was overwhelmingly positive, with 97% of users stating that they were satisfied overall with them.

The Australian Electoral Commission also recently released its 2008-2011 Disability Action Plan, which details a range of actions to be taken relating to polling place accessibility. The Plan is available on the Australian Human Rights Commission website at:  
< [www.humanrights.gov.au/disability\\_rights/action\\_plans/Register/register.html](http://www.humanrights.gov.au/disability_rights/action_plans/Register/register.html)>

3. Senator Barnett asked about what, if anything, the Government is doing about the Australian Law Reform Commission recommendation to amend the Human Rights and Equal Opportunity Commission Regulations.

In 2003, the Australian Law Reform Commission and Australian Health Ethics Committee issued a joint report entitled *Essentially Yours: The protection of human genetic information in Australia*. The report indicated that public submissions had called for the definition of the disability grounds of discrimination in the Human Rights and Equal Opportunity Commission Regulations 1989 to be aligned with the definition in the *Disability Discrimination Act 1992* (at paragraph 9.82). The report expressed the Inquiry's support for this approach (at paragraph 9.93). In addition, Recommendation 9-4 of that report recommended that the HREOC Regulations include discrimination on the basis of association with a person who has a disability.

While these recommendations have not been implemented in the present Bill (the Bill does not include any amendments to delegated legislation), the Government is considering their implementation.

4. Senator Fisher asked for clarification and advice on the meaning of the phrase 'financial or other assistance' in the proposed section 11.

The proposed amendments in section 11 implement Productivity Commission Recommendation 8.3 by clarifying that the criteria for determining unjustifiable hardship includes: consideration of the costs and benefits to *all* persons; expanding the criteria to include availability of financial and other assistance; and clarifying that any respondent to a complaint can have their action plan considered (not only 'service providers').

Currently, section 11 provides that, in determining whether the defence of unjustifiable hardship is made out, all the relevant circumstances of the particular case must be taken into account, including 'the financial circumstances and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship'.

The 'availability of financial and other assistance' to the person claiming unjustifiable hardship has been added to the criteria to be taken into account under section 11 (paragraph 11(1)(d)). This is intended to allow for a more balanced assessment of the costs of making adjustments. For example, the court would take into account any government or non-government funding that is available to assist employers in responding to particular needs of people with disability in the context of employment. The reference to 'other assistance' allows any assistance provided in non-monetary forms to also be taken into account when determining whether the defence of unjustifiable hardship is made out. The focus is on assistance that the person would be likely to be legally entitled to access.

I trust that this information is of assistance to the Committee.

Yours sincerely



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### Legislative recommendations not implemented in this Bill

Recommendation	Comment
<p>9.2: The Commonwealth <i>Electoral Act 1918</i> should be amended to ensure that federal voting procedures are accessible (physically and in provision of information and independent assistance), and the Australian Government should encourage State and Territory governments to follow suit.</p>	<p>Action has been, and continues to be, taken by the Australian Electoral Commission on accessible voting. This includes amendments to the <i>Electoral Act 1918</i> and trial electronic voting.</p>
<p>13.3: The Australian Government should legislate to ensure that, where it is the clear intent of the parties, conciliation agreements should become legally binding agreements. The legislation should grant Federal Court or Federal Magistrates Court jurisdiction over such agreements. The legislation should also set out the remedies that may be granted by those courts in respect of a breach of such an agreement.</p>	<p>Conciliation agreements are already binding where that is the parties' intention and, like agreements made in other contracts, are enforceable through State courts with the usual remedies being available.</p>
<p>13.4: The <i>Human Rights and Equal Opportunity Commission Act 1986</i> should be amended to require each party to a disability discrimination case to bear his or her own costs in the Federal Court and Federal Magistrates Court, subject to guidelines for cost orders based on the criteria in sections 117(3) and 118 of the <i>Family Law Act 1975</i>.</p>	<p>This raises broader standing implications for other areas of litigation and access to justice more generally. The Government is considering this recommendation in the context of these broader initiatives.</p>
<p>13.5: The <i>Human Rights and Equal Opportunity Commission Act 1986</i> should be amended to allow disability organisations with a demonstrated connection to the subject matter of a complaint to initiate complaints in their own right and proceed to the Federal Court or Federal Magistrates Court if required.</p>	<p>This raises broader standing implications for other areas of litigation and access to justice more generally. The Government is considering this recommendation in the context of these broader initiatives.</p>
<p>14.5: The Australian Government should legislate to allow the Human Rights and Equal Opportunity Commission to certify formal co-regulatory arrangements with organisations to whom the Act applies.</p>	<p>The Government is giving further consideration to this recommendation, including on the resource implications for both government and industry. Co-regulatory arrangements are also likely to be considered in the context of the Transport Standards review.</p>

**Parts of legislative recommendations not being implemented in this Bill**

Part of recommendation	Comment
8.1: The person or persons on whom the duty (to make reasonable adjustments) would fall should be identified.	The person or persons on whom the duty would fall would depend on the circumstances of any particular case.
8.2: The <i>Disability Discrimination Act 1992</i> should be amended to allow an unjustifiable hardship defence in <i>all areas</i> of the Act that make discrimination on the ground of disability unlawful (emphasis added).	The defence is not made available where it is inapplicable, ie in response to claims of harassment or victimisation.
8.4: The defence of inherent requirements should be available to employers in <i>all</i> employment situations (emphasis added).	The defence is not made available for discrimination in opportunities for promotion, training or transfer. This ensures that people with disability retain an entitlement to have the <i>opportunity</i> to seek a promotion or transfer on an equal basis with others. It is also not made available in denying a person with disability access to any other benefits associated with employment or in subjecting the employee to 'any other detriment'. The defence is inapplicable in those instances as the employee is already carrying out the inherent requirements of the job.
11.1: The definition of disability in the <i>Disability Discrimination Act 1992</i> (s.4) should be amended to ensure that it is clear that it includes medically recognised symptoms where the underlying cause is unknown.	The current definition of disability and the proposed amendments provide broad protection and may include medically recognised symptoms with an unknown cause if they constitute a disability.
11.3: The definition of indirect discrimination in the <i>Disability Discrimination Act 1992</i> (s.6) should be amended to include criteria for determining whether a requirement or condition 'is not reasonable having regard to the circumstances'.	The criteria for determining whether a requirement or condition is 'not reasonable having regard to the circumstances' will differ from case to case.

### Legislative recommendations being implemented through non-legislative measures

Recommendation	Government reason for implementing through non-legislative measures
<p>11.2: The definition of direct discrimination in the <i>Disability Discrimination Act 1992</i> (s.5(1)) should be supplemented with examples (either included in the Act or guidelines) to clarify the 'circumstances that are the same or not materially different' for the purposes of making a comparison.</p>	<p>The Government intends to explore the possibility of guidelines being developed to provide more clarity on the operation of this provision.</p>
<p>12.1: The <i>Disability Discrimination Act 1992</i> should be amended to clarify what are 'other relevant factors' for the purpose of the insurance and superannuation exemption (s.46). 'Other relevant factors' should not include:</p> <ul style="list-style-type: none"> <li>▪ stereotypical assumptions about disability that are not supported by reasonable evidence</li> <li>▪ unfounded assumptions about risks related to disability.</li> </ul>	<p>The Government is investigating non-legislative options for implementing this recommendation in principle through dialogue with the industries.</p>
<p>12.2: The <i>Disability Discrimination Act 1992</i> should be amended to limit the application of the insurance and superannuation exemption (s.46). It should only apply if, when requested, insurance and superannuation providers give clear and meaningful reasons for unfavourable underwriting decisions (including an explanation of the information on which they have relied).</p>	<p>The Government is investigating non-legislative options for implementing this recommendation in principle through dialogue with the industries.</p>
<p>14.1: Section 31 of the <i>Disability Discrimination Act 1992</i> should be amended to clarify that disability standards cannot alter in a fundamental way the scope of the Act. The scope should only be altered via amendment of the Act, not via disability standards.</p>	<p>Disability standards are delegated legislation aimed at implementing the objectives of the Act and cannot exceed the scope of the Act.</p>