



**Australian Government**  
**Attorney-General's Department**

**Classification, Human Rights and  
Copyright Division**

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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 a question on notice regarding the requests for information provisions in the Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008. Since the hearing, the Inquiry Secretary of the Committee Secretariat, Mr Tim Watling, has sought further information regarding the reasonable adjustments provisions in the Bill. I write to answer that question on notice and to assist the Inquiry Secretary with his query.

*Request for information*

The Committee asked for some comment on the submission of the Human Rights Legal Resource Centre in relation to requests for information dealt with in new section 30 of the Act (Item 60 of Schedule 2 of the Bill). The Centre considers that an employer should retain the burden of proving the absence of an unlawful purpose to the normal standard of proof. The Australian Human Rights Commission made a similar point stating that the provision does not pose an unduly or unfairly heavy burden on respondents to prove they had a lawful reason for requesting the information and that it was not clear why a respondent is not required to bear the ordinary burden of proving the defence.

New section 30 will provide that if it would be unlawful to discriminate against a person on the ground of that person's disability it will also be unlawful to request or require a person to provide information if

- the request was connected with the unlawful discrimination; and
- either:

- people without the disability would not be required to provide the information in circumstances that are not materially different; or
- the information relates to the disability.

However, the section will not apply if the person requiring the information can produce evidence that the request was not connected with unlawful discrimination and that evidence is not rebutted. The effect of this is that the person who requested the information has an onus to prove that it was not connected with unlawful discrimination.

As it is difficult to prove a negative, proposed subsection 30(3) eases this difficulty by providing that, if the person can produce evidence that the request was not for unlawful discrimination, and this evidence is not rebutted, the section will not apply.

Requiring the person to demonstrate that they had a lawful purpose in requesting the information would allow the request to be made even though there may also be an unlawful purpose in making the request. This approach (put forward by the Centre) would narrow the obligation from that currently in the Bill and would not fully protect the rights of people with a disability from unlawful requests for information and not give full effect to the recommendations in the *Essentially Yours* report.

We note that the Australian Law Reform Commission, the co-author of *Essentially Yours*, also made a submission to the Committee and has expressed strong support for this amendment. It made no comment on the burden of proof provision.

### *Reasonable Adjustments*

Under the approach in the Bill, the duty to make reasonable adjustments is incorporated within the direct discrimination and indirect discrimination provisions:

- Direct discrimination will occur if reasonable adjustments are not made for a person with a disability and the effect of that is that the person with a disability is treated less favourably than a person without a disability. In those instances, the aim of the adjustments is to ensure that the person with a disability is not treated less favourably.
- Indirect discrimination will occur if reasonable adjustments are not made to allow the person with a disability to comply with a requirement that is being imposed on him or her, and that failure to make adjustments has a disadvantaging effect on people with the disability. In those instances, the aim of the adjustments is to enable the person with a disability to comply with the requirement or otherwise eliminate the disadvantaging effect of the requirement.

The Bill introduces a definition of 'reasonable adjustment' that makes it clear that an adjustment will be reasonable unless making it would impose unjustifiable hardship. Proposed new section 11(2) of the Act makes it clear that the burden of proving that something would impose unjustifiable hardship lies on the person claiming the hardship. In the case of reasonable adjustments, this would be the person required to make the adjustments. When determining whether the adjustment would impose unjustifiable hardship, all of the relevant circumstances of the case must be taken into account, including the factors listed in subsection 11(1).

The duty to make reasonable adjustments is not new. The proposed amendments make explicit the original intention of the Act that refusal to make reasonable adjustments may amount to

discrimination. The Productivity Commission notes that this was the original intention of the Act at pages 189-190 and 194 of its report.

The Government has given effect to Recommendation 8.1 by explicitly linking the concept of reasonable adjustments into the definitions of direct and indirect discrimination in sections 5 and 6 of the Act, which already implicitly recognise the obligation to make reasonable adjustments. Subsection 5(2) already provides that the fact that a person with a disability requires accommodation is not a reason to treat that person less favourably. Subsection 6(2) provides that discrimination will occur if a person is required to comply with an unreasonable requirement and that person cannot comply. In this instance, a discriminator can avoid discrimination by imposing a reasonable requirement or by making a reasonable adjustment.

Submissions to the Committee have proposed that Productivity Commission Recommendation 8.1 can be given effect by introducing a separate reasonable adjustments provision (this approach was also considered by the Productivity Commission). However, this would introduce a new ground of unlawful discrimination that is not connected to the existing definitions of discrimination in sections 5 and 6 of the Act. This is likely to generate unnecessary overlap and repetition in the Act.

Submissions have also proposed that the definition of reasonable adjustments be separated from unjustifiable hardship. This would require the person with a disability to demonstrate that an adjustment was reasonable. Under the approach in the Bill, the burden lies on the person required to make adjustments to establish that the required adjustment is not reasonable (by proving that making the adjustment would impose unjustifiable hardship).

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

Yours sincerely



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