

Committee Secretary
 Senate Standing Committee on Legal and Constitutional Affairs
 Australian Parliament House
 Canberra, ACT 2600

Dear Secretariat

Thank you for considering this late submission to the Senate Standing Committee on Legal and Constitutional Affairs (the ‘Committee’). We have been asked to make it on the advice of Ms Melissa Parke, MHR.

Civil Liberties Australia (CLA) has already lodged a submission with the Committee,¹ but the difficulty covered in this present submission has been recently identified during CLA’s work as part of our ongoing campaign to reform Australia’s patent law to prevent the patenting of DNA and genetic information.

Our concern is simple: the proposed Bill omits from its definition of ‘disability’ the existing protection from genetic discrimination. A quick review of submissions to the inquiry suggests this issue may not have been raised in any submissions posted online.

Whether by design or accident the proposed definition of ‘disability’ in section 6 of the Bill no longer includes reference to genetic predisposition. Indeed the whole concept of present, past, imputed and future disability is omitted.

Existing Disability Discrimination Act	Proposed Human Rights and Anti-Discrimination Bill
<p style="text-align: center;">Section 4</p> <p><i>“disability”</i>, in relation to a person, means: (a) total or partial loss of the person’s bodily or mental functions; or (b) total or partial loss of a part of the body; or ... and includes a disability that: (h) presently exists; or (i) previously existed but no longer exists; or <u>(j) may exist in the future (including because of a genetic predisposition to that disability);</u> or (k) is imputed to a person.</p>	<p style="text-align: center;">Section 6</p> <p><i>“Disability”</i> means any of the following: (a) total or partial loss of bodily or mental functions; (b) total or partial loss of a part of the body; I the presence in the body of organisms causing disease or illness; (d) the presence in the body of organisms capable of causing disease or illness; (e) the malfunction, malformation or disfigurement of a part of the body; (f) a disorder or malfunction that results 1 in a person learning differently from a person without the disorder or malfunction; (g) a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgement, or that</p>

¹ Submission 407.

	<p><i>results in disturbed behavior;</i> <i>and includes:</i> <i>(h) behavior that is a symptom or manifestation of a disability referred to in any of the above paragraphs; and</i> <i>(i) having any of the following because of having a disability referred to in any of the above paragraphs:</i> <i>(i) a carer, assistant, interpreter or reader;</i> <i>(ii) an assistance animal or disability aid.</i></p>
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In addition, section 30(2) of the current *Disability Discrimination Act* includes further protection from unlawful requests for certain information.

Section 30(2) Disability Discrimination Act 1992

(2) It is unlawful for the first person to request or require the other person to provide information (whether by completing a form or otherwise) if:

- a) the first person requests or requires the information in connection with, or for the purposes of, doing the act referred to in subsection (1); and
- b) either or both of the following applies:
 - i. persons who do not have the disability would not be requested or required to provide the information in circumstances that are not materially different;
 - ii. the information relates to the disability.

Example: An employer may not require a prospective employee to provide genetic information if the employer intends to use that information to unlawfully discriminate against the employee on the ground of a disability of the employee.

However, the employer may require such information in order to determine if the prospective employee would be able to carry out the inherent requirements of the employment or to determine what reasonable adjustments to make for the employee.

These changes are not explained in the Explanatory Memorandum and we can see no policy justification for the change. A simple search reveals that the words ‘predisposition’ and ‘genetic’ do not appear anywhere in the Bill.

Given the increased uptake of consumer genetic tests surely there is a need for greater clarity and protection around the rights of Australians to non-genetic based discrimination.

Indeed, the new legislation appears to ignore the good work of the Australian Law Reform Commission’s inquiry into genetic information and privacy: *Essentially Yours* (Report 96).

Relevantly, the ALRC recommended:

Recommendation 9-2. The Commonwealth should amend the objects clause of the *Disability Discrimination Act 1992* (Cth) (DDA) to clarify that the Act applies to discrimination in relation to past, present, possible future or imputed disability, including discrimination on the ground of genetic status.

And concluded at [9.92]

The Inquiry considers that there is value in providing greater certainty and raising awareness in relation to the issue of genetic discrimination. There is a possibility that the existing definition in the DDA [Disability Discrimination Act] will be construed narrowly by the courts so as to exclude predictive genetic information.

The Inquiry is of the view that there is no policy justification for excluding discrimination based on possible future genetic conditions from coverage by the DDA. As well as having an educative effect, an appropriate amendment would put the matter beyond doubt and would ensure that the question did not need to be tested in the courts.

The Inquiry recommends, therefore, that the definition of disability in the DDA be amended to specifically include genetic status.²

It may be that genetic discrimination will be dealt with by the proposed Disability Standards. With respect, this is insufficient protection, and is out of step with overseas measures. For example, the United States prohibits genetic discrimination under a stand-alone Act.³

While that measure may not be appropriate in Australia, legislative protection against genetic discrimination should be made explicit.

We recommend the Committee explore the reasons behind this change. and in its report propose amendments to the Bill to protect Australians from discrimination on the basis of their genetic profile and 'potential' to develop a certain disability.

Thank you for considering this submission.

Yours sincerely,

Dr Kristine Klugman OAM
President
Civil Liberties Australia.

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² ALRC, *Essentially Yours*, http://www.austlii.edu.au/au/other/alrc/publications/reports/96/9_Anti-Discrimination_Law.doc.html (accessed 22 January 2013).

³ The *Genetic Information and Non-discrimination Act* ('GINA') Public Law 110-233.