

GOVERNMENT RESPONSE TO RECOMMENDATIONS IN CHAPTER 2 OF REPORT 99 BY THE PARLIAMENTARY JOINT STANDING COMMITTEE ON TREATIES.

Recommendations

In Report 99 the Joint Standing Committee on Treaties (JSCOT) made two recommendations relating to the *Optional Protocol to the Convention on the Rights of Persons with Disabilities* (Optional Protocol).

- (1) **The Committee recommends that the Australian Government makes available via the Attorney-General's Department website and/or other fora as to:**
 - **when all domestic avenues of complaint under Australia's anti-discrimination regime would be considered to be exhausted; and**
 - **the process a complainant would need to undertake in order to lodge a complaint with the United Nations Committee on the Rights of Persons with Disabilities.**
- (2) **The Committee supports the Optional Protocol to the Convention on the Rights of Persons with Disabilities and recommends that binding treaty action be taken.**

Response

Recommendation 1

The Government notes the concern raised before the Committee suggesting that there is a lack of clarity about when all domestic remedies are exhausted, and therefore when a communication can appropriately be made to the United Nations (UN) Committee on the Rights of Persons with Disabilities under the Optional Protocol.¹ Generally, to exhaust domestic remedies an applicant must make use of all judicial and administrative avenues that offer a reasonable prospect of redress for their complaint. Under article 2(d) of the Optional Protocol, an applicant is not required to exhaust all domestic remedies where the remaining remedies are unreasonably prolonged or unlikely to provide effective relief.

The Office of the United Nations High Commissioner for Human Rights' (OHCHR) website provides the following guidance about when domestic remedies are 'exhausted':

A cardinal principle governing the admissibility of a complaint is that you must, in general, have exhausted all remedies in your own State before bringing a claim to a committee. This usually includes pursuing your claim through the local court system, and you should be aware that mere doubts about the effectiveness of such action do not, in the committees' view, dispense with this requirement. There are, however, limited exceptions to this rule. If the exhaustion of remedies would be unreasonably prolonged, or if they would plainly be ineffective (if, for example, the law in your State is quite clear on the point at issue) or if the remedies are otherwise unavailable to you (owing, for

¹ Joint Standing Committee on Treaties, Report 99 at 2.35.

example, to denial of legal aid in a criminal case), you may not be required to exhaust domestic remedies. You should, however, give detailed reasons why the general rule should not apply. On the issue of exhaustion of domestic remedies, you should describe *in your original complaint* the efforts you have made to exhaust local remedies, specifying the claims advanced before the national authorities and the dates and outcome of the proceedings, or alternatively stating why any exception should apply.²

In relation to communications under the Optional Protocol, the United Nations (UN) Committee on the Rights of Persons with Disabilities will decide whether it considers that domestic remedies have been exhausted in each case by taking into account the particular national legal system and the circumstances of the case before it. In consequence, it is not possible for the Government to provide specific advice about when all domestic avenues of complaint would be considered to be exhausted, as compliance with this requirement will differ - based on the circumstances of each case and the rights the individual is claiming have been breached.

As noted, the OHCHR website provides some guidance to individuals about the procedure for complaints under the human rights treaties. The Government has now made a link on the human rights communications page of the Attorney-General's Department website³ to the relevant page of the OHCHR website⁴ to assist individuals in understanding the complaints process. The OHCHR website has not yet been updated to include specific information on the Optional Protocol to the Convention on the Rights of Persons with Disabilities. However, the information provided on the website on admissibility requirements and contact details for lodging a complaint is generally applicable to all the human rights individual complaints mechanisms that Australia has accepted. This includes the complaints mechanism established by the Optional Protocol to the Convention on the Rights of Persons with Disabilities.

In addition, details of admissibility requirements are provided in each treaty that establishes an individual complaints mechanism and the Rules of Procedure of each Committee established to monitor each treaty. A link to the website of each treaty body has also been added on the Attorney-General's Department website.

Complaints under the Optional Protocol are initiated, as with other individual complaints under other human rights treaties, by contacting the OHCHR using one of the following means:

²< <http://www2.ohchr.org/english/bodies/petitions/individual.htm#admissibility>>.

³< http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationCommunications>.

⁴ <http://www2.ohchr.org/english/bodies/petitions/individual.htm#admissibility>>.

Mail:

Petitions Team

Office of the High Commissioner for Human Rights

United Nations Office at Geneva

1211 Geneva 10, Switzerland

Fax: + 41 22 9179022 (particularly for urgent matters)

Email: tb-petitions@ohchr.org

The OHCHR website provides some guidance on what information and documentation an applicant should include when initiating a communication.

The above contact information has also been included on the human rights communications page of the Attorney-General's Department website along with a link to the guidance page⁵ on the OHCHR website.

Recommendation 2

Australia acceded to the Optional Protocol on 21 August 2009. It came into force for Australia on 20 September 2009.

⁵ <<http://www2.ohchr.org/english/bodies/petitions/individual.htm#what>>