20 January 2014

The Executive Director

Australian Law Reform Commission

GPO Box 3708

Sydney 2001

Dear Executive Director,

**Submission: Equality, Capacity and Disability in Commonwealth Laws**

I thank you for the opportunity to comment on the inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.

The role of the South Australian Commissioner for Equal Opportunity is to administer the *Equal Opportunity Act 1984* (SA). I am able to accept complaints of discrimination in areas such as employment, goods and services, housing, and education for grounds such as race, age, sex and disability. The Equal Opportunity Commission (**the Commission**) also has a role in providing equal opportunity training and education to the community.

The most common ground of discrimination complaints received by the Commission is disability and the most common area in which discrimination is reported is employment. In 2012-13, 39% of all complaints received related to disability discrimination (101 in total). The Commission also received 402 disability discrimination enquiries in 2012-13.

The definition of disability in the *Equal Opportunity Act 1984* (SA) (**EO Act**) is similar to that in the *Disability Discrimination Act 1992* *(***DDA***)* and includes physical or [mental illness](http://www.eoc.sa.gov.au/eo-you/what-discrimination/types-discrimination/disability/mental-illness), learning or intellectual disability, genetic predisposition to develop a particular illness and the state of having or carrying an infection, whether or not it is symptomatic. It also includes a disability that a person had in the past or may develop in the future. Where discrimination occurs in South Australia, people are generally able to make a complaint under either the EO Act or the DDA (to the Australian Human Rights Commission).

The Commission is a State based authority, and is only able to accept complaints occurring within South Australia, or that arise as the result of South Australian laws. The Commission does not have the authority to deal with matters affecting the Commonwealth. However, through the Commission’s enquiry line, the Commission regularly comes into contact with persons with disability alleging discrimination as a result of a Commonwealth law or by a Commonwealth authority. Where this occurs the Commission refers the complainant to the Australian Human Rights Commission. The Commission will be drawing on these anecdotal examples throughout its submission.

Further, in the application of certain laws there is consistency between State and Commonwealth laws, resulting in a similar outcomes in experience for those who are affected by these instruments. Therefore, where the Commission believes its learnings from State based experiences would be of use to the Australian Law Reform Commission, these will be provided.

Please find attached the Commission’s submission for your consideration.

If you would like any further information regarding the Submission, please do not hesitate to contact Anastasia Kaldi, Policy and Education Officer (kaldi.anastasia@agd.sa.gov.au).

Yours sincerely,



**ANNE GALE**

**COMMISSIONER FOR EQUAL OPPORTUNITY**

**Submission by the Office of the Commissioner for Equal Opportunity, South Australia to the inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.**

In respect to the questions for consideration, the Equal Opportunity Commission **(the Commission**) provides the following comments.

**Anti-discrimination law:**

**Question 6. What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to the *Disability Discrimination Act 1992* (Cth) to address these issues?**

Despite the differences of detail between each Australian jurisdiction, legislation dealing with discrimination in Australia is designed around a similar framework, that is to identify unlawful discrimination with the purpose of reducing discrimination. However, as highlighted during the consultation process surrounding the proposed Consolidation of the Commonwealth Anti-Discrimination Laws, many gaps in coverage still exist. Although Consolidation of the Federal Anti-Discrimination legislation has not come to fruition, the key insights arising from the process remain relevant and highlight some of the challenges that exist in countering discrimination in this area. These include:

* The nature of the legislation which proscribes certain types of behaviors as discriminatory, and ultimately limits those who fall under the Act.
* Narrow and inconsistent construction of Anti-discrimination laws by the courts, which further limits those who are protected under those laws, and which has resulted in a history of low compensation outcomes.
* A reliance on an individual complaints system, which limits the ability to address systemic discrimination and structural causes and also exposes individual complainants to potential victimisation, particularly in cases involving their employers, where individuals remain reliant on their discriminator for their livelihood.

Some areas of the DDA in particular which, in the Commission’s opinion, could be modified include:

*Test for direct discrimination*

The Commission continues to experience difficulties with the comparator test and considers that the more effective test for direct discrimination is the detriment test.

The EO Act currently applies the comparator test. Although no cases have yet failed before the South Australian Equal Opportunity Tribunal on the basis of the difficulty of applying the comparator test, the uncertain and unpredictable nature of the comparator test means that a decision, such as that in *Purvis[[1]](#footnote-1),* is a possibility.

Applying the detriment test within the DDA will provide greater clarity and certainty for those seeking recourse through the Federal system.

*Test for indirect discrimination*

Both the SA EO Act and the DDA definition of indirect discrimination includes the need to show that the complainant does not or is unable to comply with the condition, requirement or practice in question.

The Commission notes the inconsistency of this requirement with comparative international models for defining indirect discrimination and believes that the test for indirect discrimination should not include a requirement that the ‘complainant does not or cannot comply’ with the condition imposed on the basis that it gives the impression of a test which is more stringent than is actually borne out by the case law.

The ‘reasonableness’ test currently applied in relation to indirect discrimination is ambiguous and provides little guidance of what the standard is. The term ‘reasonableness’ is given varying and sometimes inconsistent interpretations, creating uncertainty. The Commission concurs with the views of the Australian Human Rights Commission[[2]](#footnote-2) that applying the ‘legitimate and proportionate’ test, (a more universally applied standard), would provide further guidance for both complainants and respondents. The Commission supports this approach primarily, but also sees some benefit in the alternative proposition of an indicative list of factors to be considered when determining what is “reasonable”.

*Reasonable adjustments and unjustifiable hardship:*

As recognised in the Issues Paper, the terms ‘reasonable adjustments’ and ‘unjustifiable hardship’ are complicated in application, and are the source of great confusion to many.

The Commission would see some benefit in an indicative list of factors to be considered when determining what is meant by these terms, and how they should be practically applied.

**Social security, financial services and superannuation:**

**Question 26. In what ways do Commonwealth laws and legal frameworks relating to social security diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?**

As mentioned, the Commission is a State based authority and does not have the authority to accept complaints against Federal Government departments such as Centrelink. The Commission does, however, receive enquiries from the public related to Centrelink, which are generally referred on by the Commission to the Australian Human Rights Commission. The Commission has taken up some complaints against employment providers where the situation has impacted upon the complainant’s social security status.

Common themes in the enquiries and complaints received by the Commission from people with disability related to social security are face-to-face meeting requirements, participation requirements, and issues with job network providers.

**Case study:**

*Complainant has a mental health condition - social phobia. She is experiencing issues with Centrelink - they are demanding that she comes in to meet with a Centrelink officer face to face otherwise they will cut her payment. Centrelink are aware of her mental health condition and are still demanding a meeting. Referred to Australian Human Rights Commission and advocacy services.*

**Case study:**

*Enquirer rang about Centrelink. Has been on Newstart but now they are going to cut his payments. He wants to lodge a complaint of disability discrimination as he is illiterate, and refusing him the right to make direct contact was unfair.*

**Case study:**

*Caller with epilepsy states that he was put on a Disability Support Pension because this provides an avenue for subsidy for medication. Feels that the Supported Wage structure is unfair and discriminates against him in trying to find employment. He states that he has received no real assistance from disability employment providers and all they do is update his resume. He is also unhappy about the extra cost of transport to and from meetings and that Centrelink has hardly ever paid him mobility allowance.*

**Case study:**

*Enquirer came to our office to discuss problems with Centrelink. He has PTSD and alcohol abuse problems. He told us that he was in the army, and suffered significant physical injuries that contributed to the PTSD and alcohol abuse.*

*He has had a dispute with Centrelink about his fitness to work. He said that he was considered fit to work 15 hours per week, and that this presumably results in reducing any benefits he might receive. In light of how he presented, it is hard to see how he could obtain work given the problems that he has.*

*He said that he was awaiting a review, and that he had waited for 9 months. He has previously had assistance from the Welfare Rights Centre, but said that they would not assist him again until the review is finalised. Referred to the Australian Human Rights Commission to discuss options.*

**Case study:**

*Complainant has insulin-dependent diabetes. He was enrolled with an employment service provider and did not attend a planned interview. His case manager contacted him and told him that his non-attendance meant that there was a requirement to notify Centrelink of a breach of conditions. The complainant explained that he has diabetes and that he had been in a coma due to a hypoglycaemic attack the night before, and was so unwell that he could not attend the interview. He also struggled to discuss this due to his debilitated state.*

*The next day he contacted the manager of the employment service provider and says that he was told he could avert the breach notification if he could produce a certificate for the day of the planned meeting. The complainant explained that he was too unwell to attend, and that there was no medical reason to attend a doctor as he had now recovered.*

*At the conciliation conference, the manager of the employment service acknowledged that facets of their service needed looking into: he also undertook to review training material. The complainant was satisfied with the explanation of events and undertakings and considered that this resolved his complaint.*

**Case study:**

*Complainant has a disability as a result of a workplace injury and resides in a regional town. Complainant was advised he could not access employment services with the Respondent, an employment service provider as he was not receiving Centrelink benefits and was therefore not eligible for assistance to find work from them.*

*The Respondent provided a response outlining restrictions on funding for their service is limited by Commonwealth contract with them and were unable to provide direct job seeking service to the complainant because they are only funded for Centrelink clients receiving benefits. The Respondent did assist the complainant where they could with help job seeking.*

From an equal opportunity perspective, the Commission supports any moves to change social security laws and regulations to provide more flexible options for people with a disability, particularly involving mental health, in relation to aspects such as reporting requirements. Improvements also need to be made in the area of employment services for persons with disability, although this may fall outside the scope of this inquiry.

**Access to justice, evidence and federal offences**

**Question 23. What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?**

**Question 24. What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?**

**Question 25. What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?**

Jurisdictions across Australia and the rest of the world have recognised that access to justice, giving of evidence, and treatment of offenders are major areas where people with disability are experiencing discrimination, unfair treatment and exclusion.

In 2013, the South Australian Attorney-General’s Department held community consultations on what changes were needed to improve access to justice for people with disability, particularly in regard to State law. This will inform the development of a Disability Justice Plan. More information about this work, including a number of submissions, can be found at <http://www.agd.sa.gov.au/disability-justice-plan-new-hub-page>.

The discussion paper highlighted particular areas for consideration and public comment, including:

* What support people with disability require to take part in the criminal justice system on an equal basis, such as vulnerable witnesses having access to intermediaries to assist them communicate more clearly and easily
* Overcoming barriers people with disability can face in the criminal justice system
* How people with disability can be better protected
* How abuse and exploitation of people with disability can be better prevented
* Proposed changes to legislation, such as recent laws introduced in NSW making it a crime for a carer to have sexual contact with a person of intellectual disability they are caring for.

In the view of the Commission, any legislative improvements must go hand-in-hand with appropriate training on the human rights of people with a disability for all persons working in the field of administration of justice including: police, lawyers, judges, court officers, prison boards and prison staff. This is relevant at all stages of the judicial process. Such training is of particular importance where people are involved in the taking of evidence and where powers over an individual’s sentence, terms or conditions of incarceration, and/or release exist.

As highlighted by the Australian Human Rights Commission, “*Outcomes for individuals can vary depending on the understandings and attitudes of the court personnel and officials towards people with a disability and their willingness to use discretionary processes where available*.”[[3]](#footnote-3)

Regarding offenders, age appropriate adjustments, supports and programs should be provided to allow people with a disability to participate in and benefit from suitable access to appropriate health, housing and rehabilitation programs whilst in prison or other purpose built facilities. The Commission supports the idea of separate facilities for individuals who have either an intellectual disability or an acquired brain injury, as it is recognised that these individuals may have different treatment and care needs than individuals with mental illness.

The Commission is also supportive of Step-up - Step-down’ facilities which would provide individuals with the support necessary to facilitate more a streamlined process of re-entering and participating in the community, but which would also allow for extra support where needed.

**Banking:**

**Question 28. What issues arise in relation to banking for people with disability? What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure people with disability control their own financial affairs and have equal access to bank loans, mortgages and other forms of financial credit?**

The Commission sometimes receives enquiries and complaints from people with disability in relation to bank loans and finance that indicate the existence of barriers that may be unreasonable. In a recent example, an SA Equal Opportunity Tribunal decision (outlined below) found that Homestart Finance had discriminated against an applicant on the basis of disability. The decision is a reminder of the risk that service providers may take in making assumptions about a person based on a disability, without adequately assessing a person’s capacity.

**Tribunal decision: Jackson v Homestart Finance – [2013] SAEOT 13**

*In a decision of the SA Equal Opportunity Tribunal, it was held that a young man and his mother were discriminated against by Homestart Finance on the grounds of the son’s intellectual disability.*

*The complaint was made by Mrs Jackson and her 31 year old son, Dean (who has a mild intellectual disability), following Homestart’s decision to decline their joint home loan application. Mrs Jackson had attended a meeting with a Homestart consultant, together with her son, to discuss a possible home loan. Mrs Jackson did most of the talking at the appointment, as Dean is a shy and reserved person by nature. Following that meeting, the Homestart consultant had concerns about Dean’s ability to understand the subject of the home loan. Shortly after, the Jacksons were advised that their loan application had been declined on the grounds of “unsuitability”. The Jacksons lodged a complaint with the Equal Opportunity Commission which did not resolve, and so the case was referred to the Equal Opportunity Tribunal.*

*The Tribunal held that Homestart had discriminated against both Mrs Jackson and Dean on the basis that the consultant and his manager formed an incorrect assumption, with very little ‘hard’ supporting information, that Dean’s loss of mental function prevented him from being able to understand the nature and impact of the loan. Further, the Tribunal considered that it was unreasonable of Homestart to decline the loan on account of Dean’s disability without undertaking further investigations as to his capacity. Dean was awarded $2,500 in damages and Mrs Jackson $500.*

The Commission has also heard from people with disability who are refused finance because streams of income such as compensation payments may not be taken into consideration.

**Case study:**

*I have an accepted workplace injury and am in receipt of WorkCover SA income maintenance payments. My condition is long-term and has been confirmed by Medical Panels SA and by Workers Compensation Tribunal court orders. I work part-time, which is my maximum working capability.*

*I recently applied for a credit card with one of the Big Four banks. My application was declined because the income from my WorkCover payments ($80,000 + pa) was not considered "guaranteed", but the $33,000 p.a. income from my part-time employment was considered "guaranteed".*

*I acknowledge that each financial institution has its own lending criteria; however; I am querying whether they are discriminating against an injured worker with court-ordered income -- while a part-time job could be terminated at any time.*

While the finance industry needs to manage risk and ensure tight controls exist, Commonwealth laws and legal frameworks should recognise that people with disability should have as much equity and control in their own financial affairs as possible. This is consistent with the principle of supported-decision making that enables people with a disability and/or diminished mental capacity to make decisions for as long as possible, sometimes with support. Similarly laws and the practices of financial institutions should embrace the principle of supported decision-making[[4]](#footnote-4).

**Insurance:**

**Question 29. In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?**

**Question 30. What changes, if any, should be made to the insurance exemption under the *Disability Discrimination Act 1992* (Cth) to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?**

**Question 31. What additional guidance or supporting material relating to the application and operation of the insurance exemption under the *Disability Discrimination Act 1992* (Cth) would assist people with disability?**

The Commission regularly receives complaints and enquiries related to insurance. The majority of these are from people refused various types insurance because they have a disability. Many are related to mental illness or the presumption that an older person is more likely to experience health issues (presumed future disability).

Complaints and enquiries received indicate that refusal of insurance over a certain age in the workplace is a major issue, as well as private and travel insurance restrictions based upon disability.

Both the EO Act and the DDA contain exemptions whereby it is not unlawful to discriminate by refusing to offer or altering terms and conditions of insurance for persons with a disability if those decisions are based on reliable actuarial or statistical data or the discrimination is reasonable having regard to other relevant factors.

Complaints and enquiries, however, indicate a lack of understanding about these exemptions, not only by the public but sometimes also by the insurers themselves. Persons refused insurance also sometimes report insurers are reluctant or unwilling to provide actuarial data.

In one landmark South Australian case, originally lodged with the Human Rights and Equal Opportunity Commission and subsequently taken to the Federal Court, the Court ruled that an insurance company did in fact discriminate on the grounds of disability when they refused travel insurance to a woman suffering from breast cancer[[5]](#footnote-5).

The fact that this complaint was not taken up by the Human Rights and Equal Opportunity Commission based on the existing exemption in the DDA, and the insurance company appealed the original Federal Magistrates Court decision believing that it was flawed, indicates a need for far greater clarity in this area.

**Case studies - Insurance refused:**

* *Enquirer has a genetic bone condition - bones are brittle and can break more easily than those without the condition. She had applied for extra income protection but was told that the insurance company would not cover for her for any condition. Expected an exclusion for bone issues, but not a blanket refusal.*
* *Enquirer is starting business as sole trader. Finding it difficult because he is unable to get income protection insurance because he has type-1 diabetes.*
* *Enquirer has mild cerebral palsy and has been refused income protection insurance by his bank (where he has his mortgage). Advised to contact the bank for the reason they have declined and to request supporting evidence.*
* *Enquirer has lymphatic breast cancer and has been refused travel insurance. Insurance not just related to illness, but also lost luggage, accidental etc. Does not understand why they cannot cover her for that.*

As mentioned, anecdotal evidence suggests that there appear to be particular difficulties obtaining insurance for persons with current or previous mental illness. Beyond Blue[[6]](#footnote-6) reports that people who are experiencing, or have experienced, depression, anxiety and related disorders can have difficulties in obtaining insurance, including health, life and income protection insurance, and also have claims denied on the grounds of non-disclosure of a previous mental illness.

**Case study:**

*The Complainant sought income protection insurance, but had an exclusion included due to previous episodes of mental illness (depression). She believes that the exclusion is too extreme given the nature of her history.*

*At a conciliation conference held at the Commission, the Respondent gave a detailed explanation for the reasons for the exclusion, how her application was assessed, what information was included, and an explanation about how the exclusion might be applied.*

*The Complainant sought confirmation that the exclusion would not apply indefinitely if she had no further episodes of mental illness. This was provided, but it also stated that her medical condition would be considered in its entirety at the time of the new application. This resolved the complaint.*

**Case study:**

*The Complainant was a male in his 30's who has bipolar disorder well controlled by medication. His mother bought tickets to travel o/seas and purchased travel insurance cover for herself and her son. The Complainant was refused cover by 2 x insurance companies because he had a pre-existing illness that was not covered by their policies. The Complainant believed this as unfair as other pre-existing conditions were covered albeit by paying a higher premium. He had been told that he could not get cover even if he was prepared to pay a higher premium.*

*The Respondent’s response indicated that they believed that the information they hold relating to bi-polar disorder placed it in the category of an exemption under Section 85 of the Act.*

*The Complainant requested that Respondent review its decision. The Respondent referred the matter to their underwriters to conduct a review. The underwriter confirmed their decision to deny cover to the Complainant for his bi-polar disorder. The Complainant elected to withdraw his complaint as the Respondent was not prepared to offer cover and his overseas trip was pending.*

The Commission has also received enquiries and complaints from the public reporting that some insurers have included mental health exclusions for persons with back injuries because they believe that people who experienced back injuries frequently suffered from depression and related mental illnesses.

**Case study:**

*The Complainant alleged that he applied for permanent and disablement insurance with a company and had been provided with cover with a total mental health exclusion based on a previous back injury. The complainant felt this was unfair as he had never experienced any mental illness. The company had indicated to him that it was their view that people who experienced back injuries frequently suffered from depression and related mental illnesses.*

*The Complainant thought it unfair that a total mental health exclusion was in place and lodged a complaint with the EOC. A conciliation conference was held and it was agreed by the parties that the Respondent would remove the mental health exclusion and pay the policy fee for 12 months from the date it was activated. The matter was resolved.*

*Other implications:*

Studies such as an Australian study of families with genetic risk of bowel cancer in 2009[[7]](#footnote-7) also indicate that ongoing decisions of insurance companies in relation to disability and potential disability can adversely affect people’s health decisions. In the study, 50 percent of participants with increased risk of bowel cancer declined genetic testing when informed of insurance implications. It seems likely that, due to insurance implications, people with other potential health issues may also be reluctant to seek diagnoses or testing.

*Presumed disability due to age:*

As mentioned, the Commission also sees many examples of where an older person is assessed as more likely to experience health issues and therefore denied insurance. Access to insurance, in all its forms, poses difficulties for many older people. Age barriers to insurance are in place from as early as 50 years old, affecting mature age workers’ capacity to participate in the workforce, volunteer, travel and drive. Often these barriers arise as a result of presumed disabilities of older people, rather than being based on actual existing disabilities.

Insurance companies rely upon exemptions from anti-discrimination legislation, such as s37 *Age Discrimination Act 2004* (Cth) which enable companies to discriminate on the basis of age where the discrimination is based on actuarial or statistical data from a source upon which it is reasonable to rely.

However, current insurance schemes tend to be based on the historical retirement age of 65 years and the assumption that the risk of disability and ill health increases for all older people over 65 years at the same rate. Hence insurance products tend to treat all people over 65 years as homogenous. Whilst this may have been appropriate at some point in the past, people over the age of 65 years are living longer and healthier lives and the risk assessment framework for insurance should be updated to reflect more current scenarios, for example, greater breakdown of age cohorts over the age of 65 years, such as 65-75, 75-85, and 85 plus.

One area in which the Commission has received a number of enquiries and complaints from older people is income protection insurance. Although only around 30% of Australians take out income protection insurance, the effect of not being about to protect their income is a significant detriment to mature workers who are sole traders or who are self-employed.

**Case studies:**

* *Enquirer has been refused income protection insurance because they are over 65.*
* *Caller is 59 and once he is 60 will no longer be able to access salary insurance through his superannuation scheme.*
* *Caller is self-employed and has own work related personal insurance cover. When caller turns 65 next year, he will no longer be able to be covered. This will force him out of the workforce.*

**Case Study:**

*I am a self-employed primary producer, now aged 69 years, and cannot access accident or illness insurance to cover me at work. I was told I was too old for illness insurance, but could get some cover for accident insurance at greatly reduced benefits up to the age of 70. I have therefore been working full time without any illness cover for 5 years, and soon will have no accident cover either when I turn 70. I have a clean bill of health each year from my GP which I submit to the insurance company. The government encourages us to work after retirement age, but does not care that insurance companies say we are uninsurable.*

With the pension age increasing to 67 years for those born after June 1952, the 65 age limit imposed by insurers is no longer relevant. It prevents capable people from participating fully as a member of society. The Commission suggests that the age limits imposed by superannuation and insurance schemes need to be revised to allow for more flexibility in an older person’s employment and volunteering arrangements and not as barriers to participation.

In May 2013, the Tasmanian Anti-Discrimination Commissioner (the Tasmanian Commissioner) released an investigative report into the provision of personal injury and accident insurance cover for volunteers entitled *Volunteers, Age and Insurance*.[[8]](#footnote-8)

The focus of the report was the issue of exclusion from volunteer insurance cover on the basis of age and whether, under the *Anti-Discrimination Act 1998* (Tas), this behaviour was discriminatory in nature. The report proposed a number of broader recommendations for changes to the insurance industry. The Commission considers the following recommendations to be of relevance to this Submission:

* **Recommendation 2:** That the Insurance Reform Advisory Group (IRAG) be requested to oversee the development of an Insurance Industry Anti-discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exemptions in anti-discrimination law are to apply.
* **Recommendation 4:** That the Insurance Industry Anti-discrimination Compliance code be the subject of consolation with stakeholders
* **Recommendation 5:** That IRAG work with the Australian Council of Human Rights Agencies (ACHRA) to identify mechanisms to implement the Insurance Industry Compliance Code
* **Recommendation 7:** That insurers that are unwilling to provide coverage for volunteers in particular age groups, or that provide (or propose to provide) differential benefits on the basis of age or coverage at a different premium, be required as a matter of course to provide reasons and to refer those seeking insurance to another insurer able to provide coverage to the Insurance Council of Australia or the National Insurance Brokers Association as provided for under Standard 2.1.5(b) of the General Insurance Code of Practice
* **Recommendation 8:** That insurers be required to submit for open publication, a list of products where age is a factor used to exclude coverage or determine premiums and benefits and the data on which these decisions rely.

The Commission recognises the IRAG no longer exists but supports the intentions of the above recommendations.

In conclusion, the Commission’s experiences indicate that in some cases insurers are prepared to change their practices when individual cases are examined more closely, often as a result of a complaint being made. There is, however, a strong argument for systemic changes to current approaches, such as:

* Insurers providing clearer information about reasons for refusal;
* Possible changes to the insurance exemption under the DDA or additional guidance or supporting material in relation to its application and operation;
* Age-based assessments should reflect the risk factors associated with age cohorts post 65 years, rather than a cut-off at 65 years, and be more reflective of the current health and wellbeing of Australia’s population; and
* Reverse the current burden of proof - adverse decisions based upon a ground protected by anti-discrimination legislation, such as age or disability, should be assumed to be discrimination unless the insurance company provides evidence to rebut that presumption.

**Health Care and Aged Care**

**Question 35. What issues arise in relation to aged care that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and frameworks relating to aged care to address these issues?**

*Young People with Disability Living in Aged Care:*

As noted by the issues paper there around 7,500 people under the age of 65 live in aged care facilities in Australia.

Younger people with disability generally reside in aged care residential facilities where no other options are available. Aged care facilities are designed to cater for the needs of older people. Some key issues include:

* costs of care can be high and are not always appropriately catered to the needs of the younger person, particularly in cases where younger people are in need of rehabilitation support given that aged care facilities are geared towards end of life support;
* lack of proper training by staff about particular disabilities as well as on the needs of younger persons;
* lack of peer interaction or age appropriate activities available, including activities to partake in community life leading to social isolation; and
* depression and distress experienced by younger person, and their family from prolonged exposure to end of life experiences (i.e., death and illness).

Young people with disability prematurely entering into, and remaining in aged care residential facilities, has been recognised as a serious issue in Australia.

On 10 February 2006, the Council of Australian Governments (COAG) agreed, and implemented a joint Commonwealth, State and Territory initiative to reduce the numbers of younger people with disability living in nursing homes throughout Australia - the *Younger People with Disability in Residential Aged Care* (YPIRAC). [[9]](#footnote-9)

In 2009, the YPIRAC program was incorporated into the National Disability Agreement.

In 2011 the Young People in Nursing Homes National Alliance, released a report, *YPIRAC2: the Next Steps[[10]](#footnote-10)* outlining the achievements and limitations of the project, and put forth recommendations for advancing and improving YPIRAC. Many of these recommendations deal with issues of funding, the need for improved service co-ordination, and the need for increased leadership in the area - which are beyond the scope of this inquiry. However, the issues raised may be important in developing any reformed frameworks and agreements in dealing with the issue. Any future development of Commonwealth Government legislation and legal frameworks in dealing with disability care should ensure its explicit inclusion.

**Restrictive practices**

**Question 37. What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?**

Since July 2010, the Commission has received 23 enquiries and 3 complaints (all assessed to be outside the Commission’s jurisdiction) from the public related to mental health. Issues raised by complainants/enquirers include:

* being unhappy with medical treatment being administered as part of a mental health order (including involuntary admission);
* unfair treatment by police (e.g., restraint, arrest, alleged assault) that they attribute to a mental health issue;
* unfair treatment in a mental health facility (including hospital);
* lack of communication in respect to a Community Treatment Order; and
* being denied access to cultural events/expression due to mental health treatment.

It is critical that any legislation, policies and/or frameworks related to mental health continue to adhere to principles such as taking into account cultural needs, including the traditional beliefs and practices of Aboriginal and Torres Strait Islander persons, and the needs of young and aged persons. Patients must also continue to have access to interpreters, if required, and to appropriate and accessible information about their treatment and their legal rights.

Appropriate training on anti-discrimination and human rights of people with a disability is critical for all persons working in mental health services, including treatment centre staff and police officers.

In addition to State and Federal anti-discrimination legislation, the *Convention on the Rights of Persons with Disabilities* (CRPD) sets out the human rights of people with a disability. Australia ratified the convention in 2008. In doing so Australia undertook to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with a disability without discrimination of any kind on the basis of disability, including taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with a disability.

Rights under the CRPD relevant to the Mental Health include the rights:

* to equal protection and equal recognition before the law.
* to have the same legal rights and obligations as people without a disability.
* not to be deprived of their liberty unlawfully or arbitrarily, and not simply because they have a disability.
* to be provided with the support and adjustments necessary to allow people with disabilities to enjoy their other human rights where their freedom is restricted or taken away (for example by incarceration).

In the recent *Concluding observations on the initial report of Australia* (distributed October 2013), concerns and recommendations made by the Committee on the Rights of Persons with Disabilities included:

* that laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, are reviewed and provisions that authorize involuntary internment linked to an apparent or diagnosed disability are repealed. (32c)
* that Australia should repeal all legislation that authorises medical interventions without free and informed consent of the persons with disabilities concerned, and legal provisions that authorize commitment of individuals to detention in mental health services, or the imposition of compulsory treatment either in institutions or in the community via Community Treatment Orders (CTOs). (34)
* that immediate steps are taken to end unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion, in environments including schools, mental health facilities and hospitals, by establishing an independent national preventative mechanism to monitor places of detention including mental health facilities, special schools, hospitals, disability justice centres and prisons, to ensure that persons with disabilities including those with psychosocial disabilities are not subjected to intrusive medical interventions. (36)

In the view of the Commission, it is important to protect both the human rights of the individual as well as ensure the continued safety of the broader community. Any Commonwealth laws and frameworks surrounding mental health should continue to adhere to the guiding principles of providing mental health service provision on a voluntary basis where possible and any involuntary detention and treatment should have appropriate and timely review and appeal processes available. Patients should also continue to have timely access to community visitors on request.

**Marriage, intimate relationships, parenthood and family law:**

**Question 40. What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?**

*Sterilisation of minors with a decision-making disability, particularly girl children:*

The non-therapeutic sterilisation of minors with a decision-making disability is a complex and controversial matter.

It is an area in which a sophisticated balance needs to be struck between the human rights of the child and the concerns of parents and carers.

Australia’s regulation of this area is influenced by a number of international treaties that aim to protect the rights of, and promote the ‘highest attainable standards of health for, persons with disabilities.’[[11]](#footnote-11) These include:

* The International Covenant on Civil and Political Rights[[12]](#footnote-12)
* The International Covenant on Economic, Social and Cultural Rights[[13]](#footnote-13)
* The Convention on the Elimination of All Forms of Discrimination against Women[[14]](#footnote-14)
* The Convention on the Rights of the Child[[15]](#footnote-15)
* The Convention on the Rights of Persons with Disabilities[[16]](#footnote-16)
* The International Convention on the Elimination of All Forms of Racial Discrimination and
* The Convention against Torture and other Cruel, Inhuman and Degrading punishment and Treatment[[17]](#footnote-17).

Australia has signed and ratified each of the above conventions.

Under Commonwealth law, jurisdiction for making orders for sterilisation of a child are granted to the Family Court of Australia under s67ZC - orders relating to welfare of children - of the *Family Law Act 1975* (Cth). Sterilisation orders will be made where two conditions are met:

1. the sterilisation is on the facts of the matter seen to be in the best interest of a child.[[18]](#footnote-18) (set out in sections 60CB to 60CG of the *Family Law Act 1975* (Cth), case law and the *Family Law Rules 2004* (Cth))
2. alternative less invasive procedures have failed or it is certain no other procedure will work.[[19]](#footnote-19)

The Family Court can appoint an independent children’s lawyer ( ICL) , however the role of the ICL is not as a representative for the child but rather as an independent advisor.[[20]](#footnote-20)

In South Australia, the *Guardian and Administration Act 1993* (SA) operates concurrently with the *Family Law Act 1975* (Cth), authorising the Guardianship Board to make sterilisation orders.

It is the Commission’s view that there is a need in this area of law to move away from a substitute decision-making model to a supported decision making model, as outlined in this issues paper. There is a strong presumptive weight in favour of the protection of human rights for people with a disability in these circumstances which should only be overridden in exceptional situations.

This view also supports the recommendations of the United Nations Human Rights Committee in its 2012 *Thematic Study on the Issue of Violence against Women and Girls and Disability*, in which it stated that ‘consent to treatment is one of the most important human rights issues relating to mental disability,’[[21]](#footnote-21) and that, as a result, States were under an obligation to ensure ‘procedural safeguards protecting the right to informed consent are water tight.’[[22]](#footnote-22)

This is especially so in cases where the State holds the important responsibility of making decisions on behalf of minors who are not only intellectually disabled, but often female.

There exists the potential for girls with intellectual disabilities to be the subject of social and medical interference at times without proper justification.

Any national legislative scheme around this issue should contain sufficient protection to guard against this.

With these concerns in mind, there is value in the introduction of a nationally consistent approach to entrench procedures which:

* provide for the impartial assessment of applications for the sterilisation of minors;
* remove the decision-making power from parents and surgeons;
* appoint a child representative to advocate on their behalf, or in extreme cases where this is not possible in their best interests;
* respect fundamental human rights; and
* are based on supported decision making.

The definitions of ‘child’, ‘decision-making disability’, and ‘non-therapeutic sterilisation’ need to be carefully considered. Too wide, and the procedure is potentially available in unwarranted cases. Too narrow, and it might be thought that the procedure could be carried out privately.

For this reason, the Commission suggests that sanctions should be available to guard against unauthorised procedures. Consideration should also be given to regulating or prohibiting international forum-shopping that could circumvent national standards.

With regard to any changes made to Commonwealth laws in this area, the Commission would recommend that the Australian Law Reform Commission refer to recommendations made by the Community Affairs Reference Committee’s *Involuntary or coerced sterilisation of people with disability in Australia* 2013 Senate enquiry, as this document thoroughly sets out the issues surrounding non-therapeutic sterilisation.

**Particular Communities**

**Question 41. How do Commonwealth laws and legal frameworks relating to equal recognition before the law and capacity affect people with disability who are:**

1. **children;**
2. **women;**
3. **Aboriginal and Torres Strait Islander;**
4. **from culturally and linguistically diverse backgrounds;**
5. **older;**
6. **lesbian, gay, bisexual, transgender or intersex; or**
7. **living in rural, remote and regional areas?**

*Intersecting discrimination:*

In terms of possible disability discrimination complaints, the first six of the listed communities may, depending on the circumstances, be able to argue that they have been discriminated against on more than one personal characteristic. They may also have a complaint of age, sex, sexuality or race discrimination.

Under Commonwealth law, when a complaint is made alleging discrimination on the basis of more than one attribute or on the basis of a combination of attributes, the complaint is routinely accepted by the Australian Human Rights Commission and handled as a single complaint rather than as a series of complaints on separate grounds.

The Australian Human Rights Commission has previously recommended that a consolidated Commonwealth equality law apply to discrimination based on one or more protected attributes or a combination of protected attributes[[23]](#footnote-23). This is the case under the SA EO Act and this allows for a complaint to be looked at in a holistic manner. The Commission therefore supports the AHRC recommendation.

In regard to the communities listed, the Commission receives disability related complaints and enquiries from all of these groups. Additional comment is provided below for children with disability.

***a) Children:***

*Children and disability – access to education and support services*

There continues to exist a relatively low level of educational attainment for children with disability.

The Commission has received a number of complaints regarding children who suffer from physical or intellectual disabilities who may not receive the support and stability they need from education services and support services.

**Case Study:**

*Caller's child has Down’s Syndrome and has been looked after by a childcare centre in school holidays since birth. The Caller was always told that it was unnecessary to book far in advance as there was plenty of room. The childcare centre now has a new director. The Caller went to book her daughter in for the most recent school holidays and was told that before they would accept her child she would first need to seek approval for her special needs. This was refused. There have never been any incidents or problems with the daughter before at childcare. Upon further enquiries to the centre, the Caller was told that the centre was full. The Caller doesn't believe this given the previous response from the centre, and they didn't mention it being full earlier. The Caller has had to resign from her job to care for her daughter. It is not easy to find alternative care as facilities need to have appropriate security etc. so that her daughter can't escape. Discussed potential disability discrimination complaint.*

**Case Study:**

*Complainant's son was in junior primary school in a special options class for children with a disability. She complained that she was given an undertaking that he could continue in this class in 2011, but that the school later told her that he would have to move as there was no place for him at the school.*

*She lodged a complaint and after conciliation the school arranged a place for her son at the same school in a year 3-7 class.*

Although the above complaint was able to be conciliated, it is indicative of an ongoing problem. The Commission considers more needs to be done to ensure children with disabilities are afforded the support they require at school to enable them to access the same opportunities as their peers.

Many of the matters regarding children with disability are also related to funding issues in areas of education, child care and support services. The Commission understands that although education and child care is generally a State matter, a considerable amount of support funding is allocated by the Commonwealth and that often eligibility is determined by Commonwealth agencies.

The following are some examples of enquiries received by the Commission:

***Case Study:***

*Enquirer rang on behalf of a school that is running an after-hours program that is in danger of closing down. The school is running a special education pilot program and has a high number of children with special needs attending the program but only 1 carer is funded. Until now, the school has been paying for additional carers but they can't afford to keep doing so and the program is in danger of being shut down. They have exhausted additional funding options. Enquirer wanted to know if it would be discriminatory to have a policy that they could only take a limited number of special needs children. Discussed reasonableness and that it would be taken into consideration if a complaint was made. Also referred to Disability Information and Resource Centre to see if there are any other options for assistance.*

***Case Study:***

*Enquirer’s daughter's support was cut at school after a psychiatric assessment placed her at 4th percentile. She also suffers from bowel and bladder incontinence. Was advised that a school excursion is coming up and that she would need to be picked up half way through the excursion as they do not have the facilities to change her. Enquirer has been fighting with Education Dept for the last 4 months regarding her funding cuts. She was diagnosed with Global Developmental Delay but because she has turned 8 that diagnosis no longer applies and according to the Education Dept she does not have a disability even though she has been diagnosed with Tethered Spinal Cord and low physiological assessment and bowel and bladder incontinence.*

***Case Study:***

*Enquirer is from Family Day Care industry. Queried why, under DEEWR guidelines, the Inclusive Support Subsidy cannot be granted for respite purposes (any care provided where a parent is not working is classified as ‘respite’). Situations where one parent is working and one not, are covered but a single parent not working is not. Many of these parents are unable to work due to their children’s needs. Because of this, some children who have been attending Family Day Care for 10 years now no longer receive ISS and have had to move to other services or miss out altogether. Referred to Australian Human Rights Commission as related to Commonwealth funding.*

It is essential that Commonwealth legislation recognises the significant impact that access to education and support services has on quality of life, participation, employment prospects and future financial security for children with disability in both policy and practical terms. Implementation of laws require regular review to ensure that practice matches legal intention.

1. *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92. [↑](#footnote-ref-1)
2. Australian Human Rights Commission, 2011, *Consolidation of Commonwealth Discrimination Law: Australian Human Rights Commission Submission to the Attorney General’s Department*, Australian Human Rights Commission [↑](#footnote-ref-2)
3. Australian Human Rights Commission, *Access to Justice in the Criminal Justice System for People with Disability*, point 20 (page 11) [↑](#footnote-ref-3)
4. United Nations. “Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, Chapter 6: Legal Capacity and Supported Decision- Making”. Retrieved January 17, 2013. <http://www.un.org/disabilities/default.asp?id=242> [↑](#footnote-ref-4)
5. *QBE Travel Insurance v Bassanelli* [2004] FCA 396 (7 April 2004) [↑](#footnote-ref-5)
6. Beyond Blue. “Discrimination in Insurance.” Retrieved January 10, 2013. <http://www.beyondblue.org.au/about-us/programs/system-reform-and-access/discrimination-in-insurance> [↑](#footnote-ref-6)
7. [Is uptake of genetic testing for colorectal cancer influenced by knowledge of insurance implications?](http://www.findanexpert.unimelb.edu.au/individual/publication130578). Medical Journal of Australia. 191:255-258. 2009 [↑](#footnote-ref-7)
8. Anti-Discrimination Commissioner Tasmania, *Volunteers, Age and Insurance: Investigative Report* (Hobart:2013) [↑](#footnote-ref-8)
9. Commonwealth Government Department of Social Services, ‘Younger People with Disability in Residential Aged Care Initiative’, *Commonwealth Government Department of Social Services* (last updated September 2013) <http://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/younger-people-with-disability-in-residential-aged-care-initiative> [↑](#footnote-ref-9)
10. The Young People in Nursing Homes National Alliance 2001, YPIRAC2: The Next Steps, Commonwealth of Australia, Canberra. [↑](#footnote-ref-10)
11. Office of the United Nations High Commissioner for Special Procedures of the Human Rights Committee, AL Health (2002-7) G/SO 214 (89-15), 18 July 2011 as cited in Community Affairs Reference Committee, *Involuntary or coerced sterilisation of people with disability in Australia*, July 2013, 52 [↑](#footnote-ref-11)
12. See articles 7, 17, 23 and 24. [↑](#footnote-ref-12)
13. See articles 10 and 12. [↑](#footnote-ref-13)
14. See articles 12, and 24. [↑](#footnote-ref-14)
15. See articles 2, 3, 5, 19, and 37 [↑](#footnote-ref-15)
16. See articles 1, 4, 5, 6, 7, 12, 16, 17, 23, and 25. [↑](#footnote-ref-16)
17. See articles 1 and 2. [↑](#footnote-ref-17)
18. Mason C.J., Dawson, Toohey and Gaudron JJ, *Secretary, Department of Health and Community Services (NT) v JWB and SMB* (1992) 66 ALJR 300 (Re Marion) at 73; and Family Law Act 1975, ss. 67ZC(2) [↑](#footnote-ref-18)
19. Re Marion at 74 [↑](#footnote-ref-19)
20. Family Law At 1975 (Cth) s68L [↑](#footnote-ref-20)
21. Office of the United Nations High Commissioner for Human Rights, *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United Nations High commissioner for Human Rights*, A/HRC/20/5, 30 March 2012, pp 10 -11 [↑](#footnote-ref-21)
22. Office of the United Nations High Commissioner for Human Rights, *Thematic study on the issue of violence against women and girls and disability: Report of the Office of the United Nations High commissioner for Human Rights*, A/HRC/20/5, 30 March 2012, p 11 [↑](#footnote-ref-22)
23. *Consolidation of Commonwealth Discrimination law. Australian Human Rights Commission Submission to the Attorney-General’s Department.* 06 December 2011 [↑](#footnote-ref-23)