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Australian Law Reform Commission

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**SUBMISSION TO DISABILITY INQUIRY:**

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

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# Recommendations

# Introduction

## Background to the Cairns Community Legal Centre Inc (CCLC)

The CCLC is a non-profit, community based organisation run by volunteers and paid workers with Commonwealth and State Government funding to assist socially and financially disadvantaged persons in Far North Qld with various legal problems and issues they face. It offers free legal services in the areas of criminal law, traffic matters, family law, civil law (including motor vehicle accidents and debt recovery matters), consumer complaints, employment law, discrimination work (other than disability discrimination), neighbourhood disputes, bankruptcy matters and other miscellaneous matters.

The CCLC offers other free legal services in addition to the cores service above: the Disability Discrimination Legal Service (DDLS), the Seniors Legal and Support Service, the Family Law Service and the Consumer Law Service.

The DDLS provides legal advice and case work which relates to disability discrimination complaints under the Federal Disability Discrimination Act 1992 (DDA) and the Queensland Anti-Discrimination Act 1991 (Queensland Act).

Community education and awareness-raising activities as well as law reform work are important aspect of all the services.

## Our interest in the consultation

We welcome the opportunity to take part in consultations on equality, capacity and disability in Commonwealth laws.

Our client base is amongst the most vulnerable in society and we put forward this submission to protect their human rights.

Our service is one of many that have already provided input to various relevant consultations:

* the National Disability Strategy in 2008
* the National Human Rights consultation in 2009
* the Inquiry into Disability Care and Support in 2010
* the National Human Rights Action Plan in 2012
* the Consolidation of Commonwealth Anti-discrimination Laws in 2012
* the Draft Human Rights and Anti-Discrimination Bill in 2012
* the National Disability Insurance Scheme (NDIS) legislation in 2013

We do not address all Questions in the Terms of Reference for this Inquiry, and limit our submission to areas of significant importance to our client base as identified in our case work.

### Observation

It is heartening to see that some of the recurrent issues raised in those many consultations are being addressed with the trial and proposed implementation of the NDIS.

However, it is disappointing that even greater progress which would have been achieved with a national Human Rights Act and consolidation of existing Commonwealth anti-discrimination legislation was surrendered in the face of strident vocal opposition to a relatively small part of proposed legislation. The Victorian experience with its Charter of Human Rights and Responsibilities clearly demonstrates the effectiveness of codified rights and obligations in protecting human rights of persons with disability.

Since many of the issues being canvassed in this inquiry are under State control, it is our firm view that the surest way of protecting rights of persons with disability is to incorporate the commitment to human rights, ratified in the signing of the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and the Protocol, into domestic Commonwealth law which is also binding on the States and Territories.

This is especially so given the narrow focus of this inquiry which is mostly restricted to one Article of the CRPD, Article 12.

#### Holistic approach

We note that the Report by the Access to Justice Taskforce Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) is only referenced once in the Issues Paper, simply to define what ‘access to justice’ means.

In our view the 177 page report (and not just the 12 page Guide currently available as a download) is relevant to the current inquiry. It identified that over 45 per cent of the civil legal events experienced by people related to matters which, in whole or part, were within an area of Commonwealth responsibility. Four of the seven most common civil legal issues reported are issues with an aspect falling within Commonwealth responsibility or arising under Commonwealth law. These were: consumer (22 per cent of all participants), government (19.5 per cent), employment (12.1 per cent) and credit/debt (12.0 per cent)[[1]](#footnote-1).

That report also referenced a 2006 study by the Law and Justice Foundation of New South Wales, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas*, which found that disability was a significant predictor of reporting legal events, and that people with a chronic illness or disability have increased vulnerability for experiencing nine out of the 10 most frequently occurring legal issues.[[2]](#footnote-2)

A more recent report from the Law and Justice Foundation of New South Wales: *Access to Justice and Legal Needs Volume 7 – Legal Australia-Wide Survey* (LAW Survey) published in August 2012, confirmed that people with a disability stood out as the disadvantaged group with the greatest number of significant

associations with increased prevalence of legal problems. In Australia as a whole, people with a disability had high prevalence of legal problems overall, substantial legal problems, multiple legal problems and problems from all of the problem groups.[[3]](#footnote-3)

In addition, people with disabilities were also the only disadvantaged group that had low levels of finalisation

in most jurisdictions. Several factors were identified which contributed to their reduced capacity to achieve legal resolution:

* lower legal capability due to poor knowledge about legal rights and remedies
* lower legal capability due to poorer literacy levels and communication skills
* high rates of a broad range of often substantial legal problems, often of a severe nature, which concurrently or proximately, may strain their personal resources for solving each problem
* the health and other non-legal needs of people with a disability may also complicate the legal resolution process[[4]](#footnote-4)

The LAW Survey confirmed that access to justice in Australia is fundamental to community wellbeing and that access to justice for disadvantaged people must remain a priority. In addition, the LAW Survey indicated that integrated service delivery across legal and broader human services is critical, given that legal needs are often interconnected with non-legal needs.[[5]](#footnote-5)

Therefore we are of the view that a broader, holistic approach is needed to improve access to justice for people with disabilities, not just to focus on current laws. However, given the narrow focus of this Inquiry, we address below the specific Questions relevant to the case work of our client base.

# Question 2: National Disability Strategy 2010 – 2020 (NDS)

We note that the NDS published in 2010 included in the ‘Looking to the long term’ section, the Government’s request to the Productivity Commission to conduct an inquiry into a national disability long-term care and support scheme, including consideration of a national disability insurance scheme. Exploring alternative approaches to the funding and delivery of disability services with a focus on early intervention and long-term care was to be an important contribution to the Strategy.[[6]](#footnote-6)

Since the Productivity Commission Inquiry Report on Disability Care and Support was published in July 2011, and the legislation for the NDIS resulting from that Inquiry was passed in 2013, the NDS clearly needs to be updated to reflect the measures proposed and already commenced in the major social reform of the NDIS.

More generally, the NDS includes ‘Policy Directions’ which appear to be aspirational, rather than concrete ways of delivering on protection of human rights.

For example, the section on Rights protection, justice and legislation contains just 5 brief Policy Directions. Policy Direction 3 People with disability have access to justice, states: ‘Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues’. This Policy focuses on the court process, whereas the Government seeks to reduce cost and improve effectiveness through early intervention and use of alternate dispute resolution remedies.

The NDS is not a document to address stakeholder concerns identified in the Issues Paper for this Inquiry. In our view, a Human Rights Act or Charter of Human Rights is the most effective way of addressing those and many other concerns.

**Recommendation: That the NDS be updated to reflect the measures proposed and already commenced in the major social reform of the NDIS.**

# Question 6: Anti-discrimination law

We addressed many of the issues raised here in our submission on the Consolidation of Commonwealth Anti-discrimination Laws

## Intersectional discrimination

The proposed Human Rights Act which consolidated Commonwealth Anti-Discrimination Laws would have addressed this issue.

In our view, the DDA in isolation cannot address this issue.

## Individualised nature of the complaint system

The Courts require litigation guardians or ‘next friends’ where applicants lack legal capacity, and allow parties to be joined where a defined commercial relationship exists (such as insured/insurer and tenant/landlord).

Currently, the *Australian Human Rights Commission Act 1986* (AHRCA) only allows for aggrieved persons to lodge formal written complaints. This includes parents/guardians on behalf of aggrieved minors. The only other allowance is for a trade union on behalf of aggrieved persons. However, we expect that such representation would be limited to employment situations and would not extend to the others areas of public life.

Only the complainant (including the minor) can apply to the Court alleging the same unlawful discrimination by one or more of the respondents to the terminated complaint.

In our view, it would be right and proper for a vulnerable aggrieved person to authorise a representative body, such as an advocacy organisation, to ‘stand with’ them in civil action where their complaint to the Commission has not been resolved, and they are supported to pursue it in the court system.

**Recommendation: That the AHRCA be amended to specifically grant a representative body standing in civil proceedings in pursuit of the discrimination complaint, where an aggrieved person has authorised that representation.**

## Coverage

Currently the definition of employment in the DDA does not cover volunteers, which many organisations rely on to provide the much needed services to customers/clients. Community organisations are essential to social inclusion of vulnerable people, especially those with disabilities.

We note that the definition of ‘work’ as currently found in the Schedule of the Queensland *Anti-Discrimination Act* *1991* (ADA), includes: ‘work on a voluntary or unpaid basis’.

This covers all workers, regardless of their particular circumstances. It also supports the intention under the Human Rights Framework to strengthen human rights protections.

**Recommendation: That the definition of ‘employment’ in section 4 DDA be amended to include ‘work on a voluntary or unpaid basis.’**

## Burden of proof

We note that under section 361 FWA the reason for action is to be presumed unless proved otherwise.

Bearing in mind that many complainants alleging discrimination are unrepresented, and in order to promote consistency in the application of various Commonwealth Acts, we propose that once a ‘prima facie’ case has been made out, a rebuttable presumption exists that the alleged action was taken for the stated prohibited reason.

The respondents have greater facility to prove any non-discriminatory reason for their actions, or that the conditions imposed were reasonable in the circumstances, than the complainants have to prove otherwise.

This would also encourage the respondents to provide an early response in the complaints process and not catch the complainant with unfair surprise at a conciliation conference, often with no time to assess statements made or to seek out contrary evidence or witnesses to challenge the assertions made. If a genuine, non-discriminatory reason exists, the complainant may well withdraw the complaint before a scheduled conference. This would result in cost savings for all concerned.

**Recommendation: That the AHRCA be amended to specify that once a prima facie case has been made out by the complainant, a rebuttable presumption exists that the alleged action was taken for the stated prohibited reason.**

## Reasonable adjustments

In our view, the current definition of ‘reasonable adjustment’ in section 4 DDA provides appropriate protection and should not be weakened.

## Unjustifiable hardship

In our view the definition of ‘unjustified hardship’ in section 11 DDA is appropriate (including the burden of proof requirement) and should not be changed

## Special Measures

In our view, section 45 DDA does not adequately provide clarity in this issue.

We prefer to see the following provision set out in the DDA:

**Special Measures**

The measure must confer a *benefit* on some or all persons with a protected attribute (disability);

The *primary purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;

The protection given to the beneficiaries by the measure must be *necessary* for them to enjoy and exercise their human rights equally with others;

The measure must be *reasonable and proportionate* to the disadvantage it is designed to address; and

The objectives for which the measure is to be introduced must not have already been achieved.

We also recommend that where Government agencies or other providers intend to implement special measures, they should undergo a process similar to that where temporary exemptions are currently sought from the Commission. This will ensure that adequate public consultation is undertaken, and the Commission can determine (with qualifications and limitations if necessary) whether the measures do indeed comply with the legislative provisions. The Commission can also set a timetable for reviewing when the objectives of the special measure have been met, and the measures are no longer required (and therefore removed from the register).

Once a measure has been determined to be a special measure, it should be registered by the Commission. Any complaints, by persons who are not beneficiaries of the special measure, of discrimination related to the special measure, can be rejected on the grounds of lacking in substance, and not proceeded with. This would result in cost savings for all concerned.

**Recommendation: That the Special Measures provision in section 45 DDA be amended to provide:**

1. **The measure must confer a *benefit* on some or all persons with a disability;**
2. **The *primary purpose* of the measure must be to secure adequate advancement of the beneficiaries so they may equally enjoy and exercise their human rights and fundamental freedoms;**
3. **The protection given to the beneficiaries by the measure must be *necessary* for them to enjoy and exercise their human rights equally with others;**
4. **The measure must be *reasonable and proportionate* to the disadvantage it is designed to address; and**
5. **The objectives for which the measure is to be introduced must not have already been achieved.**

**Recommendation: That the DDA provisions for Special Services require parties intending to implement Special Measures follow an application process similar to applications to the Commission for temporary exemptions. Registration of the Special Measure is to provide an exemption to an allegation of discrimination.**

## Cost of proceedings past conciliation

We support a proposal that generally each party should bear their own costs for the proceeding, subject to the interests of justice.

We note that the Queensland Civil and Administrative Tribunal Act 2009 (QCAT Act) does not allow costs to be awarded against a child, and otherwise sets out what the tribunal will consider in awarding costs against a party or their representative, in the interests of justice. Generally, parties are expected to bear their own costs in the proceeding.

**Recommendation: That the AHRCA be amended so that each party bear their own costs for civil proceedings, subject to the interests of justice.**

## Voluntary arbitration

We note that now the *Fair Work Act 2009* (FWA) allows for voluntary arbitration if a general protections dismissal dispute is not resolved during the conference (instead of having an only option of pursuing the matter in the Federal Circuit Court of Australia).

Properly conducted arbitration can be a quicker and cheaper alternative to the courts. The most important decision affecting the efficiency of (commercial and industrial) arbitration is the choice of arbitrator – which professional to choose and who is available (lawyer, engineer, builder or architect).

In our view, it would greatly assist to finalise some disability discrimination complaints if complainants had access to appropriately qualified arbitrators (such as retired Judges or Tribunal Members with experience in discrimination matters), sourced by the AHRC. This would be especially useful in circumstances where self-represented litigants cannot be appropriately advised by the AHRC on the lack of merits of their complaint. The process would have to be funded by the Government. Requiring parties to pay would be a disincentive to using such a process.

**Recommendation: That the AHRCA be amended to provide for a free voluntary arbitration process.**

## Expanded role for the Commission

In our view it would be consistent with the objects of the Human Rights Framework (protect and respect) for the Commission to have an internal Division which has powers to undertake its own investigations into systemic discrimination matters brought to its attention by individuals or advocacy organisations. It could then report to the relevant duty holder on the alleged breaches of the legislation.

If that duty holder does not make changes to overcome the identified breaches, the Commission should have power to commence civil action for the continuing breaches.

**Recommendation: That the AHRCA be amended to expand the Commission to include an Investigative Division with power to:**

1. **undertake independent investigations;**
2. **report to the duty holder on the alleged breaches of the legislation; and**
3. **if no remedial action is taken by the duty holder, to commence civil action for the breach.**

# Question 7: General protections provisions

## Representation

Trade union membership has generally declined since 1992. From August 1992 to August 2011, the proportion of those who were trade union members in their main job has fallen from 43% to 18% for employees who were males and 35% to 18% for females.[[7]](#footnote-7)

People with disabilities, particularly related to intellectual impairment or mental health are especially vulnerable when they have been subjected to discriminatory conduct by their employers, and seek redress through the Fair Work Commission. They are far less able to access justice on an equal basis as other workers who do not have a disability.

We propose, in addition to ‘industrial associations’ entitled to represent persons filing applications to the Fair Work Commission (FWC), that advocacy organisations authorised by the worker with disability also be entitled to represent them in FWC proceedings.

**Recommendation: That the *Fair Work Act 2009* be amended to entitle advocacy organisations which are authorised by employees with disability, to represent them in proceedings before the Fair Work Commission.**

## Temporary absence – illness or injury

Currently, if an employee’s absence because of illness or injury lasts for more than three months, or if their total absences for illness or injury in a 12 month period amount to more than three months, the protection will not apply to them if any part of the temporary absence is not on paid sick leave.

The Court has found that parts of the period of leave of absence taken as annual leave and leave without pay should be included in the calculation of the period of absence for the purposes of the regulations.[[8]](#footnote-8)

In our view this subjects employees with a disability to less favourable treatment than other employees who do not have to explain why leave is to be taken, and are not penalised for their reasons for taking annual leave or long service leave.

It should not matter whether it is needed for one period of absence (for example for knee reconstruction or back surgery, resulting in infection which takes more surgery to address and longer to heal) or is episodic (due to mental health reasons where identifying and stabilising effective medication may take some time).

The use of approved paid leave other than personal leave is negotiated between employees and their employer and should not be counted for the purposes of the protective provisions in the FWA relating to illness or injury. Only unpaid leave supported by medical certificates should be counted

Furthermore, it is totally unrealistic to expect an employee to accumulate more than three months sick/personal leave to ensure the protection afforded by the FWA provisions. It would require them to work continuously for more than six years without taking any personal leave in all that time to qualify.

**Recommendation: That the *Fair Work Regulations 2009* (Regulation 3.01) is amended to specify that only paid and unpaid personal leave supported by medical certificates is counted in the period of time which determines whether an illness or injury is not a prescribed kind of illness or injury.**

# Question 12: The National Disability Insurance Scheme

We made a lengthy submission on the NDIS Bill in January 2013. Some of the issues raised are relevant to this Inquiry.

## Independent advice

Many civil interactions and transactions recommend or require participants to obtain independent legal advice before committing to an agreed course of action (for example in mortgages, leases, family law proceedings, major consumer purchases etc.)

We note that the NDIS Act only refers briefly to independent ‘lifestyles’ (not advice) and only once to ‘advocacy’ (in section 4,General principles guiding actions under this Act). The support to be provided under the NDIS has a major impact on the life of any participants. In our view, they should be afforded the opportunity to obtain advice independent from the NDIA to consider in making important decisions.

**Recommendation: That the NDIS Act be amended to include provisions for independent advice (including legal advice) where the participant and/or their nominee requests it, to be funded by the NDIA as part of the administration of the scheme.**

## Appointment of nominees

We note that currently under the NDIS (Nominees) Rules 2013, appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves.

We expect that this will be impacted by recommendations resulting from consultation on Question 4 A uniform approach to legal capacity.

## Privacy, dignity and confidentiality

We note that various State and Federal Disability Service Standards recognise and respect the person’s right to privacy, dignity and confidentiality in all aspects of their life. They require compliance with Information Privacy Principles of the Privacy Act 1988 in order to protect and respect those rights. As a government agency, those Principles apply to the NDIA.

The NDIS Act does address privacy and disclosure of information to some extent (Part 2 of Chapter 4). In addition, the NDIS (Protection and Disclosure of Information) Rules 2013 apply. However neither document refer to the Privacy Principles.

In our view, the Privacy Principles should be incorporated into the Act and the relevant Rules, as well as compliance with the Principles being required in both.

**Recommendation: That the NDIS Act and the NDIS (Protection and Disclosure of Information) Rules be amended to include a requirement of compliance with Information Privacy Principles, and include those Principles in a Schedule.**

## Access request

We note that currently, if a person wishes to make a discrimination complaint to the AHRC and that person requires assistance to formulate the complaint or to reduce it to writing, it is the duty of the Commission to take reasonable steps to provide appropriate assistance to that person.

In our view, the NDIA should have at least the same obligation to assist applicants to access the scheme.

The NDIS Act states that a person may make a request (an access request) to the Agency to

become a participant and that the access request must be in the form (if any) approved by the CEO.

It is only once a person becomes a participant, that the CEO must commence to facilitate the preparation of his or her plan.

**Recommendation: That the NDIS Act be amended to impose a duty on the CEO to take reasonable steps to provide assistance to persons requesting access to comply with lodgement provisions.**

Neither the NDIS Act nor the (Becoming a Participant) Rules set out clearly who can make a request to become a participant.

If the applicant cannot complete the request for access themselves, their informal substitute decision-maker should be authorised to complete and lodge the request on their behalf.

Another situation where prospective participants may need assistance is where they come to the attention of Courts. Their offending behaviour often arises from mental health conditions and resulting homelessness. Their condition certainly meets the ‘disability requirements’ in the NDIS. In our view, non-government organisations assisting such clients with diversionary programs should also be able to assist them to access the NDIS.

**Recommendation: That the NDIS Act and Rules be amended to authorise the following to make requests for access to the NDIS:**

1. **a prospective participant, on their own behalf**
2. **a person with parental responsibility, on behalf of the child**
3. **a formal or informal substitute decision-maker on behalf of the person lacking sufficient capacity**
4. **an advocacy/support organisation on behalf of a client who is a prospective participant in need of such assistance**

# Question 15: Employment

We note that Schedule 1 in the *Disability Services Standards (FaCSIA)* *2007* contains the 12 Disability Employment Standards, Rehabilitation Program Standards and Key Performance Indicators, including Standard 9: Employment conditions.

One Key Performance Indicator (KPI) for Standard 9 requires service providers to ensure that people with a disability in open or supported employment such as with Australian Disability Enterprises (ADEs) receive pro-rata wages where they are unable to work at full productive capacity due to disability, with those wages determined through a transparent assessment tool or process, such as the SWS or tools that comply with criteria referred to in the Guide to Good Practice Wage Determination (the GP Guide).

The GP Guide was published in May 2001 before the consultation process which led to the development of Business Services Wage Assessment Tool (BSWAT) and acknowledges that Supported Wage System tool (SWS) is a valid, reliable and accepted form of wage assessment and is deemed to comply with relevant legislation and Standards. However, the GP Guide also allows for the use of competency and hybrid assessment tools.

The recent decision in *Nojin v Commonwealth of Australia* [2012] FCAFC 192 (*Nojin*) held that the use of the competency based assessment component of BSWAT discriminated against the Applicant (due to his intellectual impairment). In refusing leave to appeal the matter, the High Court focused on unchallenged expert evidence that BSWAT produced a differential effect for intellectually disabled persons and reduced their score (and income). The High Court saw no reason to doubt the conclusion of the Full Federal Court that competency assessments in BSWAT disadvantaged intellectually disabled persons financially.

In our view the Disability Employment Standards and the GP Guide must be updated to reflect the decisions in *Nojin*.

**Recommendation: That Standard 9 in the *Disability Services Standards (FaCSIA) 2007* and the Guide to Good Practice Wage Determination be amended to require that only tools which assess a worker’s productivity (and not competency) are to be used in determining pro-rata wages for workers with disability who are unable to work at full productive capacity due to disability.**

# Question 22: Identity documents

All States and Territories (except for New South Wales and Tasmania) provide for ‘Proof of Age’ cards for those over 18 years of age who do not have a driver licence or other form of photo identification. Since the age of most adults is not in dispute (and therefore does not require proof), such cards serve as general identification cards.

NSW provides for a ‘Photo Card’ and Tasmania a ‘Personal Identification Card’.

We note that a controversial proposal for an ‘Australia Card’ in 1985 was defeated in 1987 following increasing public concern. A proposal to re-examine the idea of a national identity card in 2006 was also defeated

People with disability who do not have driver licences or passports often have other forms of identification which can be used to satisfy security requirements. However, they can be disadvantaged when those alternate forms of identification are deemed inadequate.

One elderly client with vision impairment had the unfortunate experience of being refused membership of a rewards scheme offered to other patrons at a casino because he could not produce a driver licence, passport or proof of age card, even though the legislation they quoted as authorising the refusal clearly allowed for alternatives. His contact with the relevant government agency to complain about the situation failed to address the matter.

**Recommendation: That the Commonwealth Government, in consultation with the States, develops Principles and Guidelines relating to personal identification, setting out the forms of identification (for example, primary and secondary forms, photographic and no-photographic), where they can be required to be produced, and what alternatives can be used for identification purposes.**

# Question 23: Criminal law

The Universal Declaration of Human Rights and the various Covenants and Conventions all recognise that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

There can be no doubt that certain groups, people with intellectual disabilities and mental health problems, indigenous people, the homeless and others, are particularly vulnerable when they come to the notice of the criminal justice system, and that there is an over-representation of such people in the prison system.

Furthermore, early identification of the vulnerable person and early intervention in the legal process, together with appropriate support leads to a better outcome for the individual and the community at large.

Appropriate intervention can interrupt the escalating cycle that currently leads inevitably to incarceration of people with mental disabilities. Such intervention is cost effective in delivery of justice and improves the quality of life of affected people.

It was a major step back when the Queensland Government disbanded the Special Circumstances Court Diversion Program which had proved so successful and should have been rolled out across the State. The remaining diversionary programs assist those with minor drug related problems, not the those experiencing mental health problems or intellectual impairment which brought them to the attention of the Courts.

Though acknowledging that the administration of justice is a State responsibility, we consider that this is a national human rights issue and should be approached as such.

**Recommendation: That the Commonwealth Government work with the States and Territories to develop and implement diversionary programs, based on consistent principles and guidelines, to assist people with mental and intellectual impairment coming before the Courts.**

# Question 30: Insurance

People with diagnoses of mental health condition too often are refused insurance policies with little recourse to appeal the decisions, which are often quite expensive to pursue.

It has been our client’s experience to be denied trauma insurance and income protection insurance together with loading on life insurance, based on a mild disability, the effects of which would have been excluded under policies offered to other people without the disability. A complaint to AHRC failed to resolve the matter and it was only when an application was filed with the Federal Circuit Court of Australia that the insurer treated the complaint seriously and took steps to settle. Even then, no actuarial or statistical data was provided.

It is an extremely wearing and expensive process to pursue discrimination in insurance through to a final court hearing in order to set precedents.

It would assist if the AHRC could investigate such alleged systemic discrimination (as proposed above in Question 6).

Our proposal regarding reversing burden of proof in the AHRC (also in Question 6 above) would make insurers more accountable for decisions they make, and provide greater equality of access to their products.

In addition, an Insurance Ombudsman with power to receive and investigate Complaints would improve equal access to insurance for people with disability.

**Recommendation: That a national office of Insurance Ombudsman be established to receive and investigate complaints.**

In the meantime, section 46 DDA can be improved so that where actuarial or statistical data is relied on to refuse an application for insurance, the insurer is required to provide a copy of that data/information to the applicant at the time of the refusal so that it can be examined and challenged if considered invalid, insufficient or not up to date.

Other types of insurance (such as car, home, contents) can be easily compared based on specifics.

In current circumstance where massive amounts of up to date information are freely and widely available globally, it would not cause prejudice to insurers to make their actuarial and statistical data available for inspection.

We expect that Guidelines, if developed by AHRC (similar to those for employers regarding discrimination in employment), would not be effective as they would not be binding, and insurance companies and their re-insurers are global.

**Recommendation: That section 46 DDA be amended to require insurers to provide actuarial or statistical data relied on where applications for coverage are refused.**

# Question 41: Particular disability communities

Various government reports and strategies over the many years recognised that women with disability are especially vulnerable to violence and that specific and targeted measures are required to protect their human rights.

Australia’s National Human Rights Action Plan 2012 failed to deliver any specific measures to protect women with disabilities from violence and exploitation.

We rely on submissions from peak bodies more closely involved with supporting this vulnerable group (such as Women With Disabilities Australia).

# In conclusion

We thank the Commission for this opportunity to make a submission on this important matter.

If you have any queries regarding this submission, please direct your enquiries to Sue Tomasich at our office.

1. Attorney-General’s Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009), p 12 [↑](#footnote-ref-1)
2. People with disability were: 2.1 times more likely than people without a disability to experience a consumer related legal event, 1.7 times more likely to experience a credit/debt legal issue, and 1.5 times more likely to experience an employment related legal event than a person without a disability respectively. [↑](#footnote-ref-2)
3. Law and Justice Foundation of New South Wales: *Access to Justice and Legal Needs Volume 7 – Legal Australia-Wide Survey* (2012), p 174 [↑](#footnote-ref-3)
4. ibid p233 [↑](#footnote-ref-4)
5. ibid p 243 [↑](#footnote-ref-5)
6. National Disability Strategy 2010-2020, p 20 [↑](#footnote-ref-6)
7. Australian Bureau of Statistics, 6310.0 - *Employee Earnings, Benefits and Trade Union Membership, Australia*, August 2011 [↑](#footnote-ref-7)
8. *Nikolich v Goldman Sachs J B Were Services Pty Ltd* [2006] FCA 784. [↑](#footnote-ref-8)