



Submission to the Australian Law Reform Commission

Review of equal recognition before the law and legal capacity for people with disability

January 2014

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Introduction

The Central Australian Aboriginal Legal Aid Service (CAALAS) is grateful for the opportunity to respond to the recent Issues Paper, *Equality, Capacity and Disability in Commonwealth Laws*, released by the Australian Law Reform Commission in its review of equal recognition before the law and legal capacity for people with disability (**the Review**). CAALAS commends the Commonwealth Government for carrying out the review, and supports the objective of the Review which is to 'ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights'.

CAALAS anticipates that it will make a further submission in response to the Discussion Paper due to be released by the Australian Law Reform Commission in April 2014. Accordingly, the scope of this submission is limited; it outlines general issues arising in the Central Australian context for Aboriginal and Torres Strait Islander people¹ with disabilities, and identifies general legal issues of concern arising under Commonwealth areas of law discussed in the Issues Paper.

About CAALAS

CAALAS is the largest legal service in Central Australia, employing over 45 full-time staff and servicing a vast area of approximately 900,000 square kilometres across the Southern Region of the Northern Territory. Our service area covers sixteen autonomous Aboriginal language groups and a large number of very remote Aboriginal communities.

Our largest practice area is our criminal law practice, which dealt with over 11,000 matters last financial year. We also have a strong and busy family law and child protection practice and civil law and welfare rights practice. Our civil law and welfare rights practice provides assistance in relation to a diverse range of matters, including tenancy, compensation, employment and social security law. Additionally, CAALAS provides community legal education to town and remote communities, support for youth interacting with the justice system and assistance to prisoners, detainees and their families to support reintegration into the community.

Disability in Central Australia

Disability affects a large proportion of our client base, directly and indirectly. Available data indicates that Aboriginal people are more likely to have a disability than non-Aboriginal people, and there is some evidence to suggest that the rate of disability, particularly the rate of cognitive impairment, is under-diagnosed in Central Australia and in the Northern Territory more generally.² This may be because of a range of factors including higher rates of non-response to health surveys used to assess the rate and prevalence of disability, the failure to conduct surveys in remote areas, different concepts of disability in some Aboriginal communities, language barriers and culturally inappropriate survey or assessment design.³

¹ In this submission, a reference to "Aboriginal people" is a reference to "Aboriginal and Torres Strait Islander people".

² See Productivity Commission, *Disability Care and Support*, (2011), 531-533.

³ Ibid, 532-533; Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 'Mental illness and cognitive disability in Aboriginal and Torres Strait Islander prisoners – a human rights approach' (Paper presented at 22nd Annual TheMHS Conference – National Mental Health Services Conference 2012: Recovering Citizenship, Cairns, 23 August 2012), <http://www.humanrights.gov.au/news/speeches/mental-illness-and-cognitive-disability-aboriginal-and-torres-strait-islander>; see also Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, "'People like numbers': a descriptive study of cognitive assessment methods in clinical practice for Aboriginal Australians in the Northern Territory' (2013) 13 *BMC Psychiatry* 42; see further Madeleine Rowley, 'The Invisible Client: People with cognitive impairments in the Northern Territory's Court of Summary Jurisdiction' (paper delivered at the 14th CLANT Conference, Bali, 25 June 2013), 2-4.

Nationally, the rate of reported disability within the Aboriginal population is over two times the rate reported in the non-Aboriginal population.⁴ In the Northern Territory context, the picture is particularly concerning. A 2006 review of disability services in the Northern Territory carried out by KPMG found that:⁵

- Of the 39,500 people in the Northern Territory with a disability, 40% were Aboriginal or Torres Strait Islander, despite making up only 29% of the Northern Territory's population;
- 15,800 of the approximately 59,000 Aboriginal or Torres Strait Islander people in the Northern Territory had a disability,⁶ which equates to a rate of 26.8% across the Aboriginal and Torres Strait Islander population;⁷
- Of the 15,800 Aboriginal and Torres Strait Islander people with a disability, 5000 people had a profound disability;⁸
- A large number of people with a disability live in remote areas. Of the 14,900 people with a disability living remotely, 4,500 had a profound/severe disability;⁹
- KPMG projections indicate that the number of people with a disability will increase significantly over the next 20 years in the Northern Territory.¹⁰

We note that the community is becoming increasingly concerned about 'hidden disabilities' such as foetal alcohol spectrum disorder, acquired brain injury and other forms of cognitive impairment.¹¹ Reliable and comprehensive data on the prevalence of cognitive impairment, including foetal alcohol spectrum disorders, is not yet available in the Central Australian context, but research carried out in other jurisdictions suggests that the rates are likely to be high.¹²

In our experience, the disadvantaged experienced by Aboriginal people with a disability living in Central Australia is often compounded by multiple other forms of disadvantage, including poverty, lack of appropriate housing, language and communication barriers (many Aboriginal people in Central Australia speak English as a second, third or fourth language), and other health issues.¹³ Both a client's disability, and the other forms of disadvantage that clients with disabilities often experience, can have a significant impact on a client's ability to access the justice system and effectively and fully exercise his or her legal rights within the system.

Equality, capacity and disability: systemic issues in Central Australia

The ALRC has adopted a broad definition of the term 'disability' and the expression 'equal recognition before the law' for the purposes of this Inquiry. The Terms of Reference states that the words 'equal recognition

⁴ Productivity Commission, *Disability Care and Support*, (2011), 531.

⁵ This data was also discussed in our submission to the Australian Human Rights Commission's recent Consultation on access to justice in the criminal justice system for people with disability.

⁶ KPMG, *Review of Disability Services in the Northern Territory: Final Report*, (2006) 4.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, 6-7.

¹⁰ *Ibid.*, 5.

¹¹ See Aboriginal Peak Organisations of the Northern Territory, *Grog in the Territory: Central Australian summit on alcohol policy and its impact on Aboriginal people and communities*, 30-31 July 2013, 19,

<http://apont.org.au/attachments/article/71/Central%20Australian%20Grog%20Summit%20Report%20FINAL%207%20November%202013.pdf>.

¹² See, for example, Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *FASD: The Hidden Harm - Inquiry into the prevention, diagnosis and management of Fetal Alcohol Spectrum Disorders* (2012) 137.

¹³ See also Productivity Commission, *Disability Care and Support*, (2011), 537-8.

before the law and legal capacity' are to be understood as they are used in the [United Nations Convention on the Rights of Persons with Disabilities] including to refer to the rights of people with disability to make decisions and act on their own behalf. The Issues Paper further clarifies that 'the concept of equality therefore emphasises independent decision-making by people with disability'.¹⁴

The issues of most pertinent concern to CAALAS relating to capacity and equality before the law for people with disabilities relate to systemic problems in accessing justice. Access to justice is often significantly limited because of the lack of access to culturally appropriate and responsive disability assessment and support services for Aboriginal people in this region, particularly for Aboriginal living in remote communities.¹⁵ While we appreciate that the focus of this Inquiry is not on general issues relating to service-delivery or systemic barriers for people with disability exercising legal capacity, we submit that specific questions raised in the Inquiry cannot be considered in isolation: systemic barriers and service-delivery greatly affects the capacity of our clients with a disability to access the justice system and exercise legal rights, and detrimentally impacts on their ability to enjoy equality before the law. This is particularly problematic for our many clients who do not speak English as a first language and live in remote communities in Central Australia.

In its 2011 *Report on Disability Care and Support*, the Productivity Commission identified the extremely limited disability services for many Aboriginal people living in remote communities as a significant issue. It noted that around 80% of Aboriginal people in the Northern Territory live in remote or very remote areas, usually in discrete Aboriginal communities, and that "in remote communities, disability support services are practically non-existent".¹⁶ The Productivity Commission further commented that:

"In some communities, only basic HACC [Health and Community Care] and visiting services are available (for example, for respite or specialists). This approach cannot provide adequate support for people with a high level of complex needs on an ongoing basis..."¹⁷

Certainly, in our experience, Aboriginal people in Central Australia and particularly those living in remote communities with cognitive impairments and/or mental illness, have little access to suitable disability assessment and support services. This presents a number of issues in the delivery of justice. First and foremost, unless a disability is identified and diagnosed, a lawyer and other stakeholders in the legal system may not identify the need to make adjustments to the manner in which a legal matter is dealt with to enhance the client's capacity to make decisions and enjoy equality before the law, including by drawing on support services and family and carers to enhance the client's capacity to engage in the process. Secondly, avenues for legal redress, such as a disability discrimination complaints and claims may not be identified or readily available. Finally, where a disability has been identified or diagnosed, it can be difficult to obtain services able to support a client to effectively exercise their legal rights.

Specific legal issues in the Central Australian context: response to questions

We note that the principal focus of the ALRC's Inquiry is on Commonwealth laws and legal frameworks, with territory and state law and frameworks of relevance only to the extent to which they impact on the

¹⁴ Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws', *Issues Paper 44*, November 2013.

¹⁵ Some of these issues were discussed in detail in our submission to the Australian Human Rights Commission's recent *Consultation on access to justice in the criminal justice system for people with disability* and were also raised in our submission to the Productivity Commission's *Inquiry into Access to Justice Arrangements*

¹⁶ Productivity Commission, *Disability Care and Support* (2011), 531.

¹⁷ *Ibid*, 543-544.

operation of Commonwealth law and legal frameworks. CAALAS does have a welfare rights practice, a developing family law practice, and a civil practice which deals with employment law and consumer law issues from time to time. However, most of CAALAS' work primarily concerns the application of Territory legislation, including in the areas of criminal justice, mental health and adult guardianship, child protection, housing and tenancies, and victims of crime and motor vehicle compensation. Issues arising under Territory legislation, such as mandatory sentencing, mandatory alcohol treatment and public housing tenancy management, greatly affect people with disabilities in Central Australia. There is significant need for law reform in these areas to improve equality before the law, but we acknowledge that such issues are outside the scope of this inquiry.

We have outlined below some of the more general issues arising under Commonwealth areas of law in our practices, and we would welcome the opportunity to respond in more detail to some of the more technical issues raised in the Inquiry following the release of the ALRC's Discussion Paper.

Question 4 - Definition and assessment of capacity

The varying and inconsistent definitions and mechanisms for assessing capacity under different legislative schemes are problematic, particularly where a client has multiple legal problems. CAALAS generally supports a movement towards a nationally consistent approach. At this stage, CAALAS does not hold a particular view on the most appropriate mechanism, and would need to consider proposals in some detail. Any proposed mechanism would need to cater for cultural and language differences to ensure that communication barriers do not affect the accuracy of cognitive assessments. This is a significant issue in Central Australia where a lack of culturally appropriate assessment tools makes it difficult to obtain accurate cognitive assessments.¹⁸

Question 6- Disability Discrimination Act

Problems with the *Disability Discrimination Act* have been discussed in detail in a number of reports and publications, including the review of Commonwealth discrimination legislation by the Attorney General's Department and the Report on the Inquiry into the *Disability Discrimination Act* carried out by the Productivity Commission in 2004. We endorse the comments made by the National Aboriginal and Torres Strait Islander Legal Services in its submission to the review of Commonwealth discrimination legislation, and we affirm concerns raised in the Inquiry into the *Disability Discrimination Act* in relation to the absence of an explicit provision enabling a people to use the *Disability Discrimination Act* to challenge legislation that is discriminatory (as distinct from challenging discriminatory actions or conduct).¹⁹

Question 10 - Consumer law

CAALAS has assisted a number of non-English speaking Aboriginal clients with little familiarity with the legal system and consumer law who have been taken advantage of by unscrupulous businesses operating in Central Australia. Usually, language and cultural barriers are the most significant factors we identify in this area of law; however, we are concerned that some businesses seem to target or take advantage of vulnerable clients, and we would generally support recommendations which would strengthen the protection provided to people who have limited legal capacity to ensure their equal and fair treatment under consumer law.

¹⁸ See Kylie M Dingwall, Jennifer Pinkerton, Melissa A Lindeman, "'People like numbers': a descriptive study of cognitive assessment methods in clinical practice for Aboriginal Australians in the Northern Territory' (2013) 13 *BMC Psychiatry* 42

¹⁹ See Productivity Commission, Report on the Inquiry into the Disability Discrimination Act, (2004), 259-266.

Questions 26-27 - Social security law

Similarly, language and cultural barriers often result in unfair outcomes for our clients in their transactions with Centrelink. Disability can compound this disadvantage. As is observed in the Issues Paper,²⁰ the social security system is extremely complex, yet clients with special needs are often not supported to engage effectively in the administrative and legal process. Accordingly, we would be pleased to make submissions in relation to any proposals presented in the Discussion Paper aimed at improving equality for people with disability within the social security system.

Questions 36-37 - Restrictive practices

CAALAS considers that the response to challenging behaviour by prisoners with cognitive impairment and/or mental health problems, involuntary mental health patients and people with disabilities in secure care facilities should be the least-restrictive response in accordance with the client's therapeutic needs. Unfortunately, in some institutions and environments, such as the prison and mental health institutions, challenging behaviour relating to a client's cognitive impairment and/or mental health issues is far too often responded to inappropriately through restrictive practices because of a lack of appropriate facilities and resources and inadequately trained staff. To reduce the use of these practices, there is a need for greater scrutiny of these practices, and greater accountability. Accordingly, CAALAS supports the progress that has been made in Australia towards the ratification of the United Nations Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) and urges governments to move towards the implementation of a National Preventative Mechanism to facilitate preventative visits to places of detention, including mental health facilities. We are also generally supportive of movement towards the development of a national or nationally consistent regulatory or principles-based framework with respect to the regulation and reduction of restrictive practices. While we reserve comment on the proposed draft framework at this stage, we would be pleased to respond further to any proposals and recommendations outlined in the Discussion Paper concerning the draft framework or restrictive practices regulation more generally.

Question 41 – impact on particular groups

In relation to the particular barriers faced by Aboriginal and Torres Strait Islander people, people from culturally and linguistically and diverse backgrounds, and people living in rural and remote communities, see discussion under the headings “Disability in Central Australia” and “Equality, capacity and disability: systemic issues in Central Australia”.

²⁰ Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’, *Issues Paper 44*, November 2013, 66.

Conclusion

CAALAS strives to provide high quality, culturally appropriate legal advice and representation to Aboriginal people across Central Australia. However, whilst services such as ours greatly assist in improving access to the justice system and equality before the law for Aboriginal people with disabilities in Central Australia, a large number of barriers remain. The lack of services for people with disabilities in remote communities, and the lack of culturally appropriate services for Aboriginal people in Central Australia more generally, hinder the ability of people to engage fully and effectively in legal processes. Legislative barriers also exist. Whilst most of the problems we encounter arise under Territory legislation (because the majority of our work concerns the application of Territory legislation and legal frameworks), we have outlined some of the general areas of concern under Commonwealth legislation and legal frameworks above.