

LAQ welcomes the opportunity to make a submission in response to the Australian Law Reform Commission's issues paper on equality, capacity and disability in Commonwealth Laws. LAQ's clients include people with a disability requiring legal assistance in the following areas of Commonwealth law — anti-discrimination; consumer law; criminal law; employment; family law; and social security. This submission is made on the basis of the knowledge and experience of LAQ's specialist lawyers in those areas of law who have acted for clients with a disability.

Legal Aid Queensland (LAQ) provides input to State and Commonwealth policy development and law reform processes to advance its organisational objectives.

Under the *Legal Aid Queensland Act 1997*, LAQ is established for the purpose of "giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way" and "giving legal assistance at a reasonable cost to the community and on an equitable basis throughout the State". In pursuance of these statutory objects, LAQ contributes to government policy processes about any proposals that will impact on the cost-effectiveness of LAQ's services, either directly, or consequentially through impacts on the efficient functioning of the justice system.

Under *LAQ's Strategic Plan 2011-16*, which has been endorsed by the Queensland and Commonwealth governments, LAQ's purpose is to "provide quality legal services to financially disadvantaged people", and our vision is to "be a leader in a fair justice system where people are able to understand and protect their legal rights". In pursuit of our purpose, LAQ offers policy feedback on proposals that will impact on the quality of services that LAQ is able to provide to our client groups. In pursuit of our vision, LAQ also provides feedback on proposals that may impact on our clients' ability to understand or protect their legal rights.

We look to international human rights instruments to which Australia is a signatory, relevant domestic legislation, and established common law principles, for guidance on rights accorded to Queenslanders at law.

LAQ always seeks to offer policy input that is constructive, and is based upon the extensive experience of LAQ's lawyers in the day to day application of laws in the justice system's courts and tribunals. We believe that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that may not be available to policy officers within government. LAQ also endeavours to offer alternative options that may enable government to pursue policy objectives in the most effective and efficient way.

We have responded only to those questions in the discussion paper that are relevant to our areas of practice.

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?

Legal Aid Queensland's Civil Justice Service provide advice and representation to clients about anti-discrimination complaints under the *Anti-Discrimination Act 1991 (Qld)* (ADA) and the *Disability Discrimination Act 1992 (Cth)* (DDA).

LAQ does not generally make complaints on behalf of clients to the Australian Human Rights Commission. We provide assistance to clients to help them prepare their complaint for self-lodgment. However, there is a grant of aid for complaint preparation available where the person would have difficulty lodging a complaint without the assistance of a lawyer by reason of their special circumstances, which include circumstances relating to disability, literacy or language.

Clients who access our advice and representation services are those who have the knowledge, capacity and/or support to access our services. We encourage referrals from the Anti-Discrimination Commission Queensland, the Australian Human Rights Commission and disability services groups, and conduct community legal education sessions to inform people of the law and their rights. However, we have concerns that there may be a significant number of people who are not aware of their rights under anti-discrimination law. In addition, people may have a discrimination complaint that could be made in either the State or Commonwealth jurisdiction. If they lodge a complaint without first obtaining legal advice, they are making a decision about the jurisdiction in which they will litigate their complaint without a full understanding of the consequences of that choice.

LAQ's anti-discrimination clients generally have limited income and assets and limited access to information and technology. Many also have limited support networks. The effect of these limitations is often aggravated when the client also has a disability.

We agree with the range of systemic issues identified by the ALRC which may limit the ability of people with disability to access the anti-discrimination system, namely:

- the individualised nature of the complaint system;
- failure to cover intersectional discrimination;
- costs associated with proceeding past conciliation;
- reliance on, and the operation of, exceptions;
- coverage; and
- the role and powers of the AHRC.

We make the following comments and suggested changes to the DDA which we believe, if implemented, will improve the accessibility and appropriateness of legal remedies for discrimination for people with a disability.

Jurisdiction/Coverage

The first challenge our clients face is choosing the best jurisdiction for their claim. Clients must choose whether they bring a complaint under the Queensland ADA or the Commonwealth DDA. Where the complaint is in the work/employment area, there is a third option of bringing a complaint under the *Fair Work Act 2009* (Cth).

Every situation must be examined on its own facts. The information available to advice lawyers is generally limited (usually the client's instructions, and in the employment area, possibly a separation certificate or letter from the employer).

While the protection in relation to 'impairment'¹ under the ADA and 'disability'² under the DDA is similar, there are some areas where the DDA arguably has better coverage. For example, future disabilities are covered³, indirect discrimination may be easier to prove⁴,

¹ *Anti-Discrimination Act* (Qld) s7(h) and s4.

² DDA s4.

³ As above at n 2.

disability need only be one reason for the treatment rather than a substantial one⁵ and the requirement for reasonable adjustments to be made is explicit⁶.

Conversely, there are some areas where the ADA arguably has better coverage. Therefore, consideration could be given to amending the DDA to bring it in line with the ADA in relation to:

- intersectional discrimination (see below);
- definition of ‘impairment’⁷ (in the ADA the phrase ‘whether or not arising from an illness, disease or injury or from a condition subsisting at birth’ is used; and
- protection of voluntary workers⁸.

Despite potential ‘legal’ advantages in the DDA, many of our clients choose to proceed under the State anti-discrimination system due to the more accessible and less formal processes at the Queensland Civil and Administrative Tribunal⁹. This includes a more simple referral process whereby the Anti-Discrimination Commission Queensland provides the complaint and relevant documents to the Tribunal. Also, costs are only awarded where the Tribunal considers the interests of justice require it¹⁰.

The individualised nature of the complaint system

The reliance on individual complaints does little to address systemic discrimination and effect change on a societal level. The current system relies on people who are often marginalised and vulnerable successfully making complaints and enforcing their rights in a complex and potentially expensive legal system. It is likely that many people who have legitimate complaints do not proceed with them and the wrong goes unaddressed.

An extension to the current system might be to introduce agency-initiated investigations and prosecutions. This could involve a designated agency — such as the Australian Human Rights Commission, but it might be better undertaken by an Ombudsman, with similar functions as the Fair Work Ombudsman¹¹. The role could monitor systemic discrimination issues and/or complaints in certain workplaces, sectors or industries and initiate investigations as necessary. It could have the power to issue compliance notices with civil penalties and damages for a breach, consistent with other regulatory regimes such as occupational health and safety and the Fair Work Commission. The role could also include monitoring respondents’ compliance with conciliated agreements and court outcomes, and facilitating and enforcing compliance where necessary.

Failure to cover intersectional discrimination

People with a disability may face discrimination, not only on the basis of their disability but on the basis of other attributes, some of which are covered by other Commonwealth anti-discrimination legislation. Where complaints are made on the basis of more than one attribute, procedural difficulties can arise in prosecuting their claims.

⁴ As there is no ‘proportionality test’ such as that in the ADA s11(1)(b).

⁵ DDA s10 vs ADA s10(4).

⁶ DDA s5(2) and 6(2).

⁷ ADA s4.

⁸ ADA s4 (definition of ‘work’) vs DDA s4 (definition of ‘employment’)

⁹ *Queensland Civil and Administrative Tribunal Act 2009* (Qld), for example s3, s4, s28 and s29.

¹⁰ As above a n9, s102.

¹¹ *Fair Work Act 2009* s 682.

Protection against intersectional discrimination should be expressly stated in the DDA. Our clients are disadvantaged both socially and financially, and they often face disadvantage on more than one level. A snapshot of our client base would show that more than half are women, some suffer from a disability, some are homeless, some have criminal records and about 10% come from culturally and linguistically diverse backgrounds.

While the Australian Human Rights Commission 'routinely accept[s]'¹² complaints where more than one attribute is identified, once a matter proceeds to court, it becomes very difficult for complainants to particularise their complaints under separate Acts, each with unique definitions, exemptions and liability provisions. This difficulty adds further barriers to our most marginalised and disadvantaged communities obtaining redress.

The ADA covers intersectional discrimination – complainants can easily identify more than one attribute listed in section 7.

A possible solution to this problem would be the consolidation of Commonwealth discrimination legislation into one Act that has consistent definitions, exemptions, liability provisions and procedures.

The role and powers of the Australian Human Rights Commission

See comments under *The individualised nature of the complaint system* above.

Costs associated with proceeding past conciliation

Complainants in actions brought under the DDA currently face costs orders in the event of a negative finding. LAQ's clients are financially disadvantaged and often elect to pursue their complaints through the Queensland State system rather than under Commonwealth law because they fear of a costs order in the Federal courts.

LAQ supports the Commonwealth legislation being amended to provide that each party to a discrimination case should bear their own costs. Consideration should be given to inclusion of a power to award costs in exceptional cases (such as that in the FWA¹³), for example, where a party had acted unreasonably.

Disclosure

Complainant's must disclose their case in a written complaint in order to commence proceedings, however respondents are not required to, and rarely, make a written response to a discrimination complaint. The complainant is therefore in a weaker position in the conciliation conference setting, where they hear the respondent's position for the first time. In any event, such a process does not support early resolution of matters because the most effective dispute resolution should involve both parties' cases being on the table before they meet. Some complainants, including people with some disabilities, have difficulty processing and responding to new information in a high pressure environment, limiting the effectiveness of the conciliation process.

LAQ supports the introduction of a statutory 'questionnaire procedure' such as that used in the United Kingdom and Ireland. In the United Kingdom a statutory 'questionnaire procedure' is used under the *Race Relations Act 1976* (UK). It was introduced to address the difficulties complainants face in obtaining sufficient evidence to support their complaints. The process

¹² Australian Human Rights Commission, *Consolidation of Commonwealth Discrimination law: Submission to the Attorney-General's Department* (6 December 2011), [96].

¹³ s 611.

gives them access to information and helps them to identify material relevant to their complaint to decide whether to commence proceedings and how to present their cases.

In Ireland, the complainant has a statutory right to ask for relevant information to assist them with deciding whether or not to lodge a complaint at the Equality Tribunal.¹⁴ The respondent is not legally obliged to respond to the complainant's questions, but if they fail to do so, the tribunal can draw an adverse inference if a complaint is brought. The questionnaire procedure in the United Kingdom and Ireland are substantially the same. The complainant can ask the respondent any question relevant to the alleged discrimination and questions and responses are admissible as evidence.¹⁵

Enforcement

Some respondents do not fulfill their obligations under conciliated agreements. Consideration could be given to registration of de-identified conciliation agreements in a court of federal jurisdiction, together with a simple and low cost court enforcement process.

General protections provisions

Question 7: In what ways, if any, should the general protections provisions under the *Fair Work Act 2009 (Cth)* be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

LAQ's Civil Justice Services will provide employment and workplace relations advice and representation for eligible clients.

It is noted that Part 3-1, Division 5 of the *Fair Work Act (Cth)* (the Fair Work Act) provides protection for people with a disability against discrimination on the basis of their disability in relation to employment. In particular, section 351 of the Fair Work Act provides that:

"(1) an employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin. This provision appear to provide adequate protection for employees against discrimination, including discrimination on the basis of disability, in relation to employment"

The Fair Work Act appears to provide adequate protection for people with a disability from discrimination in relation to employment. However LAQ has not been providing legal assistance services for matters under the Fair Work Act for sufficient time to be able to comment on the effectiveness of the above provision.

Question 8: There is substantial overlap between the general protections provisions under the *Fair Work Act 2009 (Cth)* and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

¹⁴ *Equal Status Act 2000–2004* (Ireland) para 21(2)(b); *Employment Equality Act 1998–2004* (Ireland) s76

¹⁵ See article by Dominique Allen, 'Reducing the burden of proving discrimination in Australia' (2009) 31(4) *Sydney Law Review* 579.

Persons seeking redress for discrimination on the basis of disability and other protected attributes are able to take action under either the *Disability Discrimination Act 1992* (Cth) (DDA) or the *Fair Work Act 2009* (Cth) (FWA).

Under section 351(1) of the FWA, an employer must not take adverse action against an employee or prospective employee because of various specified attributes, which include physical or mental disability. However, section 351(2) provides that section 351(1) does not apply if the action is:

- not unlawful under other specified legislation, which includes other specified Commonwealth and State anti-discrimination legislation;
- taken because of the inherent requirements of the particular position; or
- taken against a staff member of an institution conducted in accordance with the beliefs of a particular religion to avoid injury to the religious susceptibilities of members of the religion.

Consolidating the legislative provisions against discrimination, including disability discrimination, in employment would provide greater clarity for business and the public and may reduce costs for government.

While the two pieces of legislation provide similar protection for current and potential employees against discrimination in employment, each has its own separate adjudicative body, that is, the Fair Work Commission and the Australian Human Rights Commission, with their own procedures. One significant procedural difference between the bodies is that under the Fair Work Act, a compulsory conference is required before the matter can proceed further. If the matter does not settle at the conference, the applicant will have the choice to take the matter to the Federal Court, the Federal Circuit Court or if the respondent agrees, the Fair Work Commission. Under the DDA, while an applicant must initially apply for a conciliation conference, the respondent is not legally required to participate. If the matter does not settle at the conciliation conference, the applicant can only continue their claim by lodging an application in the Federal Court or Federal Circuit Court.

Also, because of the evolving and frequently changing nature of Australia's employment law framework, there is already a high level of duplication and overlap between Commonwealth and Commonwealth/State legislation. This overlap can create uncertainty and a tendency towards 'forum shopping' by parties.

Administrative law

Question 9. What issues arise in relation to review of government decisions that may affect the equal recognition before the law of people with disability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws & legal frameworks relating to administrative laws to address these issues?

LAQ conducts a weekly legal advice clinic at the Administrative Appeals Tribunal (AAT) office in Brisbane. At the clinic our lawyers provide legal advice to clients who have lodged appeals with the AAT against decisions concerning them made by government agencies under Commonwealth laws. Mostly we advise clients who are appealing to the AAT against refusal by Centrelink of applications for Disability Support Pension. (The following discussion is limited to our experience of clients presenting with these issues.)

In the course of this advice work at the AAT we often come upon people with disability who are confronted with systemic barriers which hinder their capacity to access social security entitlement and review of adverse decisions made by Centrelink. Following are some illustrations of these systemic barriers.

The framework established under Commonwealth law for eligibility for the DSP require an applicant to meet three essential criteria:

1. Applicant must show they have a *permanent impairment – a physical, intellectual or psychiatric condition that is fully diagnosed treated and stabilised*; and
2. Applicant must score 20 or more points for their impairments when rated on *Impairment Tables* prescribed under Commonwealth law; and
3. Applicant must show that their impairment stops them from working at least 15 hours per week and prevents them from completing 18 months of a work retraining program of support.

Many of the clients we assist in our AAT clinic do not have the resources or capacity to obtain the evidence required to meet these criteria. In some cases they do not have the financial resources to obtain the private medical services required to diagnose and treat their conditions or to obtain the medical specialist reports to satisfy the criteria for DSP eligibility. In many cases, they cannot access the required specialist treatment or reports in a timely manner through the public health system.

Case study 1

Our client has severe arthritis that prevents her from working in her profession as a consultant archaeologist. She experiences severe pain and cannot do field work. In addition, she cannot now operate a computer to prepare professional reports. She is on a public health waiting list to consult a medical specialist and undergo tests which will determine whether she has osteoarthritis or rheumatoid arthritis. The treatment for each condition is different and cannot commence until the specific form of arthritis from which the client is suffering, is determined. It is anticipated that the client could be waiting more than 18 months on the public health waiting list before she will see the specialist and undergo the required tests. The client says she is continuously “bumped back” on the public waiting list because other patients with a “higher priority” take precedence and are given appointments with the specialist ahead of her because (she is told) they are in greater need.

The client is unable to demonstrate to Centrelink that she has a permanent impairment which has been fully diagnosed, treated and stabilised – which is the first criterion for eligibility for DSP – because she cannot access the required specialist tests or specialist medical advice/reports, through the public health system in a timely fashion.

Because the client cannot work, she has no income apart from a social security benefit. She cannot show eligibility for DSP (as described above) and must rely on the Newstart allowance, which is a substantially lower level of payment.

As a consequence, the client is under financial stress and she defaulted on payment of her home mortgage. The bank foreclosed and she was evicted from her home. The home was sold off and the client was left with a debt owing to the bank. The client is now homeless, does not have enough savings or income to raise a bond or pay the rent on the private rental market and has had to seek crisis accommodation. The client can see no way out of her

financial situation. Due to her homelessness and the associated stress, the client has developed anxiety and depression.

Comment

There is no option available for this woman to obtain assistance from any government agency to pay for the medical specialist diagnosis, treatment and specialist report she needs to effectively apply for the social security support most suited to her needs at a time when she is most in need. The schemes which have been set up to assist people with the costs of specialist reports concerning their condition (e.g. section *Administrative Appeals Tribunal Act 1975*; Disbursement Support Scheme; and the Commonwealth Public Interest and Test Case Scheme) are only available to people who are parties to legal proceedings in certain commonwealth cases – grants of assistance are not available to cover the cost of any disbursements paid before legal proceedings are commenced.

Case study 2

Our client has suffered epileptic seizures triggered by development of a fistula/lesion of major blood vessels in his brain. This has resulted in the client experiencing brain damage and functional loss of capacity impacting on his ability to manage his own affairs, or to engage in part-time work to support himself. The client needs to establish that he is experiencing “special circumstances” to invoke the discretion of the AAT (under section 1184K of *the Social Security Act 1991*) to set aside a Centrelink decision precluding him from accessing a social security benefit for a period of several years because he had previously received a compensation payout for a lower limb injury sustained at work.

The client applied to the AAT for review of the Centrelink preclusion decision, but because of his current condition, he lacks the intellectual capacity to understand the complex legal issues and principles involved and he does not adequately prepare his case. Similarly he does not have the intellectual capacity to understand the criteria for the DSP and prepare his application for the DSP.

When his matter was called on for hearing at the AAT, he had not obtained any specialist neuro-psychological or psychiatric evidence to show that he has suffered substantial functional loss due to brain damage that has occurred since the preclusion decision was made by Centrelink. He did not understand that he must present evidence to show that he has substantial functional impairment that would amount to “special circumstances” in his life and argue that this entitled him to exercise of the tribunal’s discretion to set aside or change the preclusion decision of Centrelink.

At the hearing, the tribunal expressed its sympathy for the man’s situation, but explained that he had not adduced evidence to satisfy the Tribunal that he had “special circumstances” as required under section 1184K to set aside or alter the decision by Centrelink about the preclusion period. The Tribunal dismissed the appeal.

Comment

The client’s legal outcome may have been different if the law was drafted in a way that is more supportive of people with limited capacity and other vulnerabilities. For example, the law could provide that in cases where an appellant raises prima facie issues which could trigger the exercise of discretion by a reviewing officer or tribunal, the onus is shifted to the Commonwealth to show why the discretion should not be exercised. If the discretion under

section 1181K were drafted in those terms, this intellectually disabled man might have been afforded equal recognition before the law.

Following is a list of barriers to justice for clients with disability that have been identified by LAQ lawyers working in this jurisdiction:

- Many applicants for the DSP are not fully aware of the criteria that must be met to successfully apply for the DSP. Many appear not to have had the eligibility criteria for the DSP fully explained to them by Centrelink. This particularly applies to:
 - The requirement to establish that the condition is fully treated, diagnosed and stabilised as at the date of the application or within the 13 week period;
 - The relevance of the Impairment Tables in assessing impairment ratings;
 - if 20 points are assessed across multiple impairments the need to undertake a program of support;
 - the circumstances in which an exemption from the program of support can be obtained.
- A person's capacity to understand the criteria for the DSP and to take appropriation action can be adversely affected by the medical conditions they are experiencing i.e. chronic pain, depression, anxiety, acquired brain injuries.
- Most applicants for the DSP are reliant on the public health system. Waiting periods within the public health system create barriers for applicants having their conditions fully investigated, treated, diagnosed and stabilised. Some waiting periods for initial consultation within the public health system, let alone treatment, are up to two years.
- Most applicants for the DSP are placed on Newstart allowance until such time as they are able to meet the criteria for the DSP. Most are experiencing financial hardship and are not able to work because of their conditions. They cannot afford to access the private health system. They cannot afford to pay for treatment and medical reports to support their DSP claims.
- In some circumstances health practitioners and specialists refuse to provide a report. The reasons for this vary, but can include that the doctor is concerned that providing a report may impact on the patient/doctor relationship or refusing to provide a report free of charge. The person must then attempt to access an alternate health practitioner/specialist for assistance in providing supporting medical evidence.
- There is no uniform, easily accessible system for covering the medical report writer's costs so that the applicant can obtain the medical evidence necessary to support their claim for the DSP.
- Often medical reports provided by applicants do not meet the DSP eligibility criteria. Reasons why this can occur include that the report:
 - was out of date;
 - was originally commissioned for a different purpose i.e. personal injuries claim and does not specifically address the criteria for the DSP;
 - does not provide sufficient information;
 - the health practitioner/specialist does not understand the criteria for the DSP and do not address these criteria in the report;

- the health practitioner/specialist has not been provided with the Impairment Tables and/or Guidelines for applying the tables;
 - the health practitioner/specialist providing the report does not have the requisite qualifications i.e. a psychologist providing a report was not clinical psychologist or a general practitioner's report was not accepted because the condition required a report from a medical specialist.
- The standard Medical Report Form provided by Centrelink is inadequate because it does not outline the specific information required for Centrelink to make an assessment of a person's eligibility for DSP. In particular, the form does not direct the health practitioner/specialist to the Impairment Tables and Guidelines. Further, it does not explain that the condition must be fully investigated, diagnosed, treated and stabilised. It does not ask for relevant information e.g. under the heading "Condition 1" the questions are "a. current treatment, b. past treatment, c. future treatment, d. patient's compliance". It does not ask if the condition has been fully treated, whether the condition stabilised, and whether future treatment is likely to bring significant improvement/poses a risk etc — all of which is required for Centrelink to assess the applicant's eligibility.

Competition and Consumer Law

Question 4: Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?

We have addressed this question from a consumer law perspective only.

In the context of consumer law, a standard definition of capacity risks consumers with a disability being unable to enter contracts which they may have capacity to enter, thus restricting their capacity to participate in society to the fullest extent possible.

There is also the risk that a standard definition may encourage industry to adopt a superficial checklist approach to dealing with consumers with a disability to allow it to easily show that it has complied with consumer protection laws. The *National Consumer Credit Protection Act 2009* (Cth), which establishes the *National Consumer Credit Code*, contains processes that discourage a checklist approach. For example, Chapter 3, Parts 3.1 and 3.2 concerning responsible lending conduct places the onus on lenders for assessing whether a proposed loan is suitable for the consumer. Sections 117 (1) and 130(1) require credit assistance providers and credit providers to:

"(a) make reasonable inquiries about the consumer's requirements and objectives in relation to the credit contract; and
(b) make reasonable inquiries about the consumer's financial situation; and
(c) take reasonable steps to verify the consumer's financial situation; and
(d) make any inquiries prescribed by the regulations about any matter prescribed by the regulations; and
(e) take any steps prescribed by the regulations to verify any matter prescribed by the regulations."

The inquiries required under the current legal regime require a credit provider to engage with all consumers, including people with disabilities, to gain an understanding of the consumer's circumstances, their reasons for obtaining the loan and the consumer's understanding of the product that they are entering into. This process essentially requires credit providers to assess the capacity of all consumers, not only consumers with disabilities, and assist them to understand the often complex consumer and financial products being offered. In our submission, the current requirements of the *National Consumer Credit Code* and the protections they offer provide adequate protections for people with disabilities without the need to adopt an overarching definition of capacity or disability in the legislation. The approach of the *National Consumer Credit Code* may serve as a useful model for other legislation in the Commonwealth jurisdiction.

Question 10 – What issues arise in relation to competition and consumer 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 competition and consumer law to address these issues?

It is LAQ's view that the current Australian Consumer Law framework provide appropriate and sufficient protection for consumers with a disability across Australia . The existing consumer law framework effectively encourages people with a disability to participate in society to the fullest extent possible without being denied goods or services because it might be more difficult to ensure they are aware of their legal obligations. It reflects the *United Nations Convention on the Rights of Persons with Disabilities* which states that a person's capacity with or without a disability is a fluid, ever developing and ever changing concept. Specifically applying this to consumer law, a person may have the ability and understanding to engage with simple consumer products or transactions but may not have the capacity to understand or engage with more complex consumer products.

One of the advantages of the Australian Consumer Law is that the *National Consumer Credit Protection Act 2009* (Cth) requires that consumer credit providers must be licensed. One of the requirements for obtaining and holding a license is that the provider must be a member of an approved external dispute resolution scheme. There are two approved external dispute resolutions schemes, the Financial Ombudsman Service and the Credit Ombudsman Service Limited. Both services are accessible by people with a disability in that they are free and allow consumers to make a complaint personally or with the assistance of a lawyer, support worker or friend.

However, the satisfactory operation of the external dispute resolution schemes is dependent on consumers taking matters to dispute resolution having timely access to documentation to support their claims of impaired capacity held by third parties, for example, disability service providers and Centrelink.

The following case studies demonstrate that the Australian Consumer Law provides adequate protection for consumers with a disability.

Case Study 3

Mr. X, suffers from a mild intellectual disability. He went to Company A seeking to purchase a computer, making it clear that he wanted to buy the computer. He could not purchase the computer outright but understood that he was entering into a contract where he would be

repaying the cost of the computer over a three year period under which he would be paying more than the computer was worth over that period.

Instead of entering Mr X into a simple contract that he understood, the company entered him into a consumer lease under which he would never own the computer. Further, if he did not inform the company that he wanted to end the lease within three months of the end of the three year period, the lease would automatically renew every three months. At the time Mr X sought the assistance of LAQ, he had been making lease payments for over five years and could not understand why he did not own the computer yet.

LAQ assisted Mr X to exercise his rights under the unfair contract terms provisions of the Australian Consumer Law, resulting in him receiving a refund of the payments he had made and being able to keep the computer in line with the contract that he had understood he was entering into. This case study demonstrates that the Australian Consumer Law allows people with varying levels of capacity to enter into contracts but provides protections from unfair, misleading, and unconscionable conduct for more vulnerable consumers such as Mr X.

Case Study 4

Ms K was suffering from a severe mental illness that meant she was house bound. During the period of 3 weeks, Ms K was visited by 4 different door to door sellers of energy. The nature of her illness was such that she did not feel comfortable telling them to leave the premises and before the sellers left the property she had signed up for another electricity contract. At the end of the 3 week period she had 4 separate electricity providers.

The door to door selling provisions in the Australian Consumer Law allowed LAQ to assist Ms K to cancel all but 1 of her electricity contracts.

Case Study 5

Mr. T suffered from a terminal illness and was on a disability pension. He was approached when with his grandchildren in the local shopping centre and offered a photo package by Company G. He signed the contract but having considered his position, attempted to withdraw from the contract. Company G told him that he could not withdraw from the contract.

Using the provisions of the Australian Consumer Law concerning unsolicited consumer agreements, which provides a ten day cooling off period to withdraw from an unsolicited contract, LAQ was able to assist Mr T to cancel the contract and have nothing further to pay.

Employment

Question 15: In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

An applicant to the Fair Work Commission does not have an automatic right to representation by a lawyer. Under section 596 of the Fair Work Act, the Fair Work Commission can only grant permission for representation if:

- (a) it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter; or

- (b) it would be unfair not to allow the person to be represented because the person is unable to represent himself, herself or itself effectively; or
- (c) it would be unfair not to allow the person to be represented taking into account fairness between the person and other persons in the same matter.

There is no express provision in relation to a person with a disability. In order to protect their legal rights, it is important that people with a disability are able to access legal representation when necessary. While the above provision may be able to be relied on by the Fair Work Commission to allow a person with a disability to be legally represented, it is LAQ's submission that the legislation would more readily facilitate the equal treatment of people with a disability if there was specific provision for people with a disability where that disability is likely to impact on their ability to represent themselves in the commission, to be given permission to be legally represented.

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?

Most issues for people with a disability in the criminal justice system apply similarly across the state and Commonwealth jurisdictions. They have been comprehensively identified in the report *Disabled justice: the barriers to justice for people with disability in Queensland*, by Phillip French for Queensland Advocacy Incorporated (May 2007). However, there are some specific issues in relation to Commonwealth criminal law, which are outlined below.

In Queensland there is inconsistency between the way in which defendants charged with indictable offences under state law and persons charged with indictable offences under Commonwealth law, who may be either unfit to plead or unfit for trial, or have a defence of insanity are dealt with. Under Queensland law, the issues of fitness to plead or fitness for trial and the defence of insanity are dealt with by the Mental Health Court under the provisions of the *Mental Health Act 2000* (MHA). The MHA also provides for the review by the Mental Health Tribunal of persons detained in mental health or forensic disability facilities following a finding by the Mental Health Court. Under Commonwealth law, the issues are determined by a jury and review by the Mental Health Review Tribunal does not apply.

Consideration could be given to the adoption of state procedures for dealing with defendants charged with indictable Commonwealth offences, so that consistency within the jurisdictions is achieved.

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?

The *Evidence Act 1995* (Cwth) does not have provisions for the treatment of vulnerable witnesses, including people with a disability, similar to section 21A of the *Evidence Act 1977* (Qld). While the incidence of vulnerable witnesses may not be as common in Commonwealth criminal matters as it is for state criminal matters, there will be vulnerable witnesses in Commonwealth criminal matters from time to time.

Social security, financial services and superannuation

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?

One of the major issues for people with a disability in relation to banking is the cost of banking services, given their generally low incomes. LAQ supports the initiative of the Australian Bankers Association to provide disadvantaged consumers with access to information about low cost banking.

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 a disability before the law and their ability to exercise legal capacity?

Legal Aid Queensland's (LAQ) family law clients include people who have a disability or who are in dispute with a former partner who has a disability.

The main concern of LAQ in relation to people with a disability in the family law system is the availability of case guardians.

Under rule 6.08 of the *Family Law Rules 2004* a person with a disability may start, continue, respond to, or seek to intervene in a case only by a case guardian. If a case is started by a person with a disability without a case guardian, the court may appoint a case guardian to continue the case.

The dictionary of the Family Law Rules defines a person with a disability as a person who, because of physical or mental disability:

- a) does not understand the nature or possible consequences of the case; or
- b) is not capable of adequately conducting, or giving adequate instructions for the conduct of, the case.

Rule 11.08 (1) of the *Federal Circuit Court Rules 2001* is similarly worded but does not refer to physical or mental disability, stating that a person needs a litigation guardian in relation to a proceedings if the person "does not understand the nature or possible consequences of the proceedings or is not capable of adequately conducting, or giving adequate instruction for the conduct of the proceedings."

Before a court orders the appointment of a case guardian the court needs to be satisfied that the person for whom the guardian will be appointed has a disability within the meaning of the rules. The person may have a disability within the meaning of the rules by reason of intellectual or cognitive disability or mental illness.

A lawyer who forms the view that his/her client has a disability within the meaning of the rules is ethically obliged to bring this to the attention of the court and cannot continue to act for the client other than through a case guardian.

An application for the appointment of a case guardian may be made by a party to the proceedings (including the Independent Children's Lawyer); a person seeking to be made a

case guardian; or a person authorised to be a case guardian (Rule 6.10 Family Law Rules). There is no specific power in the Family Law Rules for the court to appoint a case guardian of its own motion. However, Rule 1.10 (1) provides that unless a legislative provision states otherwise, the court may make an order, on application or on its own initiative, in relation to any matter mentioned in these Rules. The costs of case guardians, can be paid out of the property of the party for whom the guardian is appointed or by order for costs against the other party (see rule 6.14 of the Family Court Rules).

Rule 11.11(1) of the Federal Circuit Court Rules expressly provides that the court can appoint or remove a litigation guardian of its own motion.

Under rule 6.11 of the Family Law Rules if in the opinion of the court a suitable person is not available for appointment as a case guardian of a person with a disability, the court may request that the Attorney-General nominate, in writing, a person to be a case guardian. However, rule 6.11 is generally ineffective due to the unavailability of case guardians.

The ineffectiveness of rule 6.11 is demonstrated by the case of Connor and Hulett [2010] FamCA 103 (5 February 2010). In that matter the father of a child brought an application for parenting orders. A LAQ solicitor was the appointed Independent Children's Lawyer and sought the appointment of a case guardian for the father, who was self-represented. The Family Court found that the father was a person with a disability within the meaning of the Family Law Rules and ordered that a case guardian be appointed for the father. As a suitable person was not available, the court requested that the Attorney-General nominate a person.

A case guardian was not appointed by the Attorney-General and some nine months later the matter came back before the Court after the father applied to revoke the appointment of the case guardian (Connor and Hulett (No. 2) [2010] FamCA 1013_(1 November 2010)).

In discharging the order for appointment of a case guardian, Murphy J referred to a letter from the Registrar of the Family Court to the Attorney-General's Department. The letter stated that from the Court's perspective the matter cannot progress any further until such time as a case guardian is in place and that in effect the father will not be able to spend time with his child. His Honour also referred to the reply from the department which stated that the department was not in a position to provide a nominee case guardian for the Attorney-General at that time as new arrangements for the nomination process for case guardians in the Family Court of Australia were being put in place.

The matter proceeded without a case guardian, delayed by more than 9 months. A complex parenting order, including requirements that the father continue with psychiatric treatment, was made. The order was ultimately breached and subsequent proceedings resulted in suspension of contact between the father and the child.

Enquiries made with the Attorney-General's Department have led to information being provided to LAQ to confirm that the Attorney-General's Department do not currently have any processes in place to appoint a case guardian. If such requests are made to the department by the court, the department attempts to appoint on an ad hoc basis and often there is simply no person or organisation willing or available to take the appointment.

In LAQ's submission, there remains a need for a clear framework and funded mechanism for the appointment of case guardians in family law matters.