

Submission to the Australian Law Reform Commission

Equality, Capacity and Disability in Commonwealth Laws

2014



COMMUNITY
LEGAL CENTRES
TASMANIA

Northern Territory
Association of
Community Legal
Centres



ACT
Association of
Community
Legal Centres



Community
Legal Centres
NSW

 *South Australian*
Community Legal Centres

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1. About this Submission

This submission has been prepared by National Association of Community Legal Centres (NACLC) in cooperation with the Queensland Association of Independent Legal Services (QAILS), Community Legal Centres NSW, the Federation of Community Legal Centres (Vic), the Community Legal Centres Association (WA), the ACT Association of Community Legal Centres, the South Australian Council of Community Legal Centres, Community Legal Centres Tasmania and the Northern Territory Association of Community Legal Centres. Case studies were sought from community legal centres (CLCs) across Australia and their responses have been collected in this submission. The issues raised and recommendations put forward here are based on the considerable experience CLCs have in assisting clients with disability.

NACLC is the peak national organisation representing CLCs in Australia. Its members are the state and territory associations of CLCs that represent over 200 centres in various metropolitan, regional, rural and remote locations across Australia.

CLCs are not-for-profit, community-based organisations that provide legal advice, casework, information and a range of community development services to their local or special interest communities. CLCs' work is targeted at disadvantaged members of society and those with special needs, and in undertaking matters in the public interest. CLCs have been advocating for a rights based approach to equitable access to the justice system for over 30 years. CLCs are often the first point of contact for people seeking assistance and/or the contact of last resort when all other attempts to seek legal assistance have failed.

NACLC supports individual submissions made to the Australian Law Reform Commission by CLCs, including:

- **Disability Discrimination Legal Service Inc**
- **Human Rights Law Centre**
- **Public Interest Advocacy Centre (PIAC)**
- **Queensland Advocacy Incorporated**
- **Redfern Legal Centre**
- **Women's Legal Services Australia (WLSA)**
- **Women's Legal Services NSW**

The following CLCs have contributed case studies and content for this submission:

- 1) **Arts Law Centre of Australia** is a not-for-profit company established to provide specialised legal and business advice and referral services, professional development resources and advocacy for artists and arts organisations.

- 2) **Disability Discrimination Legal Service** works actively towards the eradication of disability discrimination and facilitates and promotes justice for people with disabilities through community legal education sessions to professional and community groups to raise disability awareness and provide information on the *Disability Discrimination Act 1992* (Cth) and the *Equal Opportunity Act 1995* (Vic).
- 3) **Hawkesbury Nepean Community Legal Centre** The Hawkesbury Nepean Community Legal Centre provides legal advice and assistance to the Hawkesbury, Nepean and Hills communities. It offers a legal advice service a Domestic Violence Court Advocacy Service and an Aboriginal Legal Access Program.
- 4) **Hunter Community Legal Centre** provides free legal advice and assistance services to disadvantaged people who live, work or study in the Newcastle, Lake Macquarie, Port Stephens, Great Lakes and Hunter Valley regions of New South Wales.
- 5) **Logan Youth Legal Service** offers a legal service for young people (under 18 years) in the Logan City area. The service provides legal information and advice for young people and represent them in legal process or in court if required.
- 6) **Loddon Campaspe Community Legal Centre** lawyers give free legal advice to Central Victorians on matters such as credit, court, children, and employment.
- 7) **Mental Health Legal Centre** is an independent, community-based legal centre that offers free, specialised legal advice, advocacy, education and law reform programs for people living with mental illness in Victoria.
- 8) **Northern Rivers Community Legal Centre** is a NSW community legal service, based in Lismore that assists people in the Northern Rivers region from Tweed Heads in the north to Grafton in the south and Tabulam in the west.
- 9) **Prisoners' Legal Service Inc** is a community legal centre providing free legal advice to incarcerated persons and their families on matters relating to imprisonment. The service is based in South Brisbane, Queensland and services the entire state.
- 10) **Queensland Advocacy Incorporated** is an independent, community-based legal, systems and individual advocacy organisation for people with disability in Queensland. QAI provides legal advice and representation to vulnerable adults with disability in matters that include guardianship, administration, restrictive practices and mental health. QAI also provides non-legal forms of assistance to people with disability who encounter the criminal justice system.
- 11) **Queensland Public Interest Law Clearing House Incorporated (QPILCH)** are a not-for-profit, community-based legal organisation that coordinates the provision of pro bono legal services for individuals and community groups.
- 12) **Redfern Community Legal Centre** is an independent, non-profit community centre dedicated to promoting social justice and human rights. They offer free legal

advice, referral and casework to disadvantaged people living in the City of Sydney, Botany Bay and Leichhardt local government areas.

- 13) **Refugee and Immigration Legal Service QLD** specialises in refugee and immigration law. It provides legal help to disadvantaged people who have cases before the Department of Immigration, Migration Review Tribunal, Refugee Review Tribunal and sometimes take cases of public interest to the courts.
- 14) **Riverland Community Legal Service** provides legal advice, representation and community legal education throughout the Riverland region in South Australia.
- 15) **Suncoast Community Legal Service Inc** provides free legal advice to people within the Sunshine Coast community through its population centres.
- 16) **TASC** provides a range of collaborative social, legal, educational, and disability advocacy services to help people in Toowoomba, Ipswich and the whole south-west region of Queensland.
- 17) **Tenants Union of NSW** is the state's peak non-government organisation for tenants. It aims to represent the interests of all tenants in New South Wales, including tenants of private rental housing, social housing tenants, boarders and lodgers, and residential park residents.
- 18) **Villamanta Disability Rights Legal Service Inc** is a Victorian community legal centre that works exclusively on disability-related legal and justice issues for people who have a disability and a disability-related legal issue.
- 19) **Women's Legal Centre ACT** is a community legal centre for women in Canberra and the surrounding area. The Centre is run by women and aims to improve women's access to justice.
- 20) **Women's Legal Services NSW** is an independent non-profit organisation which provides a voice for women in NSW, and promotes access to justice, particularly for women who are disadvantaged by their social and economic circumstances.

2. Response to the Issues Paper

NACLC welcomes the opportunity to make a submission to the Australian Law Reform Commission's Inquiry into legal barriers for people with disability. This submission responds to a number of the questions raised in the *Equality, Capacity and Disability in Commonwealth Laws Issues Paper*, and provides real examples of laws and legal frameworks that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity.

While this review will predominantly examine commonwealth laws, laws of all states and territories should be reviewed to ensure that laws and policies that criminalise or otherwise penalise disability and disadvantage should be revoked.

2.1 Capacity and decision-making

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?

CLCs support the adoption of a nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity. This definition should begin with the presumption that a person has capacity and that lack of capacity cannot be determined simply because a person has a diagnosed disability or impairment, explicitly rejecting the 'status' approach to assessing capacity. Capacity should be assessed on the basis of each question/situation, rather than a blanket assessment that a person is unable to make decisions relating to their lifestyle decisions or their financial and legal affairs.

CLCs recommend adopting the model in the NSW Capacity Toolkit (http://www.diversityservices.lawlink.nsw.gov.au/agdbasev7wr/divserv/documents/pdf/capacity_toolkit0609.pdf) capacity assessment principles (at pp27-47)

There is a presumption that certain people with disability are incapable of making their own choices. People with disability are often viewed as people without rights, and little respect is shown for their inherent dignity.

Matters of guardianship and administration are extremely important to many people with disability as Administration orders and Guardianship orders can severely restrict an individual's freedom to make their own choices. In some instances, less restrictive alternatives may be available to certain people. It is important that a person with disability has access to legal advice and representation when these orders are being considered so these alternatives can be put forward. In addition, people with disability may require assistance to communicate with their administrator and have their views and wishes heard.

An application was made to appoint a guardian and an administrator over "Susan's" affairs. The main objective of the application was to force Susan to live in accommodation chosen by her relatives without Susan's wishes being taken into account. Without proper

advice or legal representation, the less restrictive option may not have been chosen which, in the end, allowed Susan's wishes as to where she wanted to live to be the deciding factor.¹

Similarly, people facing proceedings in immigration jurisdictions can have difficulties providing instructions to their lawyers. Often, the result is that a statutory office holder will be appointed to instruct lawyers.

"Tuhi", a person from a Pacific Island, unsuccessfully applied for refugee status 15 years ago. Due to ongoing fear he remained in Australia without a visa and then in 2012 suffered a stroke which caused significant cognitive disability and seriously affected his ability to communicate. He required daily assistance with management of medications and basic functional tasks.

The Queensland Civil and Administrative Tribunal (QCAT) appointed the Adult Guardian. Queensland's Refugee and Immigration Legal Services (RAILS) was contacted by the Immigration Department and then worked closely with the Adult Guardian, and Tuhi, to obtain instructions and lodge a complex application for Ministerial intervention. The application was decided quickly and successfully which allowed Tuhi to access Centrelink and a Residential Care facility. This freed up a hospital bed which Tuhi has been occupying for considerable time, saved the hospital significant funds and helped relieve the burden on the public hospital system. Tuhi would have been unable to get adequate medical support in his home country and is now able to live permanently in Australia. His condition has begun to slowly improve.²

"Raphael" arrived on a visitor's visa. He had previously lost his permanent resident status after living overseas for some years and now wanted to return. On the flight in he became confused and tried to open an exit door on the plane and was hospitalised on arrival.

Raphael was assessed as having significant cognitive deficits, progressive dementia and impaired capacity, The Office of the Adult Guardian was appointed by the Queensland Civil and Administration Tribunal and the case was referred to RAILS. RAILS worked with the Adult Guardian to obtain instructions and lodge a successful application for a permanent visa based on Raphael's continuing substantial ties to Australia. He had no ties overseas.³

Sometimes there is a less restrictive way of dealing with the issues affecting our clients. Because of this it is important that the person has access to legal advice and representation when administration orders are being considered. In some instances the orders can be of benefit as they can provide authority that helps family members, or other support people, to get things done for our clients. Sometimes clients need help to communicate with their administrator and have their views and wishes heard.

¹ Case study from Villamanta Disability Rights Legal Service.

² Case study from Refugee and Immigration Legal Service QLD.

³ Case study from Refugee and Immigration Legal Service QLD.

2.2 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?

Changes to the *Disability Discrimination Act 1992* (Cth) are required to fully achieve its objectives. CLCs support the consolidation and modernisation of the *Disability Discrimination Act 1992* (Cth) together with Australia's other anti-discrimination laws. These changes would simplify legislation schemes, address previous shortcomings and make anti-discrimination laws more effective, accessible and clear. The exposure draft of the *Human Rights and Anti-Discrimination Bill 2012* and recommendations made by the Senate Standing Committee on Legal and Constitutional Affairs, included a number of changes which would have strengthened protection for people with disability in Australia.

CLCs welcomed the new unified definition of discrimination and the shared burden of proof in the Exposure Draft Legislation. CLCs also welcomed the general rule that each party bear their own costs; however, concern was expressed that the threat of litigation costs if unsuccessful, and the financial burden of paying a lawyer if pro bono assistance cannot be found, is a significant barrier for complainants with disability. CLCs believe that complainants who are generally more disadvantaged should only have costs awarded against them for frivolous, vexatious or lacking in substance complaints.

It is important if consolidation goes ahead that carer responsibilities are expressly protected under legislation. Although there is implicit protection for carers in the *Disability Discrimination Act 1992* (Cth) and the exposure draft of the *Human Rights and Anti-Discrimination Bill 2012*, CLCs believe that clear coverage of caring responsibilities is important given the wide variety of caring relationships and cultural understandings of family, for instance in Aboriginal and Torres Strait Islander communities.

CLCs see many clients who experience discrimination because they are victims or survivors of domestic or family violence. Many people experience mental health issues as a result of domestic or family violence. Domestic or family violence can also compound the vulnerabilities of people with existing mental health issues. While some progress has been made towards combatting domestic violence discrimination in workplaces, through leave provisions in enterprise agreements and awards, these measures do not address the negative attitudes that lead to discrimination or help those who are not permanent workers or those who experience discrimination in other areas of their lives like in their studies or while looking for a place to live. This lack of access to redress compounds the harm to victims and survivors.

CLCs are also concerned about the exception to discrimination on the ground of disability in relation to the Australia Defence Force and Australian Federal Police. We suggest that there are potentially a number of areas of employment within the Defence Force and Federal Police that could be undertaken by persons with, for example, a physical disability or hearing impairment.

2.3 Competition and consumer law

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?

As a result of his intellectual disability, “Simon” had difficulty understanding things but was embarrassed by this so would not admit when things were unclear. Simon entered into a contract to lease a TV and fridge. The contract document was not easy for Simon to understand. He thought he would own the goods at the end of the contract but this was not the case. After he had made a few thousand dollars of repayments he defaulted on the contracts and the company sought repossession. The fridge was repossessed, but Simon no longer had the TV. It was difficult to negotiate with the company for leniency in enforcement of their contract as Simon’s disability was not obvious to the sales attendant when the contract was signed.⁴

Unfortunately Simon’s situation is not unusual. In the experience of CLCs, people with cognitive disability can experience difficulties understanding the terms of contracts or the details of a special sale offer. These difficulties are often compounded by a greater vulnerability to persuasive sales people, an inadequate understanding of consumer rights and a reduced ability to enforce these rights.

Both “Karl” and his partner had an intellectual disability. Karl had entered into a number of mobile phone contracts after receiving unsolicited marketing phone calls. He had been offered free gifts and holidays if he signed up another person, so he signed up his partner.

He had no assets and his sole income was the disability support pension. By the time Karl contacted Loddon Campaspe CLC, he had five mobile phone contracts, all with significant debts attached. He had never received the free holiday he had been promised and the “free gift” laptop he received only worked for one day.

Loddon Campaspe CLC helped Karl to lodge complaints with the Telecommunications Industry Ombudsman (TIO) about encouraging a person who had an evident intellectual disability to enter into a contract. Ultimately, all five telecommunications providers agreed to waive or not pursue the debts, but not without some persistence on the part of Loddon Campaspe CLC.

One company, who had agreed in the TIO conciliation to waive the debt, was taken over by another company shortly after the agreement was reached. The new company continued to send Karl bills after the agreement was reached and insisted upon payment of the debt. A further complaint to the TIO saw the matter finally resolved.

⁴ Case study from Northern Rivers Community Legal Centre.

Karl expressed his concern that other people with disabilities would be targeted by mobile phone companies who would sign them up to contracts without their understanding what the contract meant and that the gifts may not be what they seem.⁵

“Jane” has a complex mental illness. She was regularly getting phone bills of more than \$500 per month. This was mostly due to frequent telephone contact with an interstate hospital after an operation relating to her illness. Jane needed to be in frequent contact with the hospital as part of monitoring the impact of the operation and adjusting her treatment. The large bills ended with her phone being disconnected. This caused Jane a large amount of anxiety. Mid North Coast Community Legal Centre negotiated with the telephone provider so that Jane could go onto a plan where she was able to receive phone calls but not make outgoing calls.⁶

“James” has a chronic mental illness. He accrued a \$4000 debt with his telephone provider while he was unwell. Afterwards was admitted into hospital for a long period. James came to us for help after he had completed rehabilitation and was released from hospital. He was living with his parents and it appeared that they were taking advantage of him. His parents had encouraged James to sign up for a business account with the telephone provider that included multiple connections. At the time his sole income was Disability Support Pension. Mid North Coast Community Legal Centre assisted James to write a letter of complaint to the telephone provider alleging irresponsible lending practices. The telephone provider did not respond to the complaint. Mid North Coast Community Legal Centre is currently assisting James with a complaint to the Telephone Industry Ombudsman.⁷

Although there has been some improvement in simplifying consumer contracts, CLCs suggest that companies and retailers require clear regulations for sales staff to ensure that people entering into contracts have the capacity to understand and fulfil them. For instance, a mandatory list of questions to ensure that a consumer has understood the contract would provide greater protection for people with disabilities.⁸

⁵ Case study from Loddon Campaspe Community Legal Centre.

⁶ Case study from Mid North Coast Community Legal Centre.

⁷ Case study from Mid North Coast Community Legal Centre

⁸ Chris Atmore, Derek Wilding and Elizabeth Beal, *Not So Special: Telecommunications Contracts, Disability and Unfair Practices*, Melbourne, Communications Law Centre, 2006.

2.4 Access to justice, evidence and federal offences

2.4.1 Access to justice

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?

People with disability are over-represented in the civil, criminal justice and prison systems as complainants, litigants, defendants and victims. It is common for persons with disability to encounter disadvantages and barriers when interacting with the justice system as a result of inherent prejudice, discrimination and inadequate support and recognition of the complex and multiple support needs often associated with disability.

In the experience of CLCs people with disability may experience barriers to justice due to a number of factors, including an inability to properly comprehend complex legal and technical language and inflexible legal processes which fail to recognise and effectively address the needs of people with disability.

The following case study shows how infringements can have a disproportionate effect on a person with mental illness, and the potential for incidents to escalate the distress of a person with mental illness and result in the (inappropriate) criminalisation of their behaviour when unwell. It therefore highlights the need for specialist training of officers and police in responding to a person in crisis, as well as the need for specialist legal services to assist a person in responding to charges laid against them.

“Jane” has a diagnosis of paranoid schizophrenia and receives a Disability Support Pension which was managed by State Trustees under an Administration Order. She was living in a rooming house at the time and her wallet had been stolen so she had to travel by public transport to attend, in person, State Trustees offices in order to get her weekly allowance. On one occasion when she attended State Trustees, she was not given any money. On her way back home, ticket inspectors requested Jane produce a valid ticket, but she said she didn’t have one. Jane tried to walk away but was arrested and police were called when she became agitated. An officer took hold of Jane and a scuffle broke out. In addition to failing to produce a valid ticket, six other charges were laid against Jane, including using offensive language, assaulting an officer and resisting arrest. Shortly after the incident Jane was admitted to a psychiatric inpatient unit for treatment. Mental Health Legal Centre (MHLC) assisted Jane in defending the criminal charges, for which she was facing potential imprisonment. The Centre highlighted Jane’s mitigating circumstances and presented psychiatric evidence that supported the fact that she was acutely unwell at the time of the incident and that, because of her mental illness she misinterpreted the actions of the officers and was attempting to evade what she perceived as a threat to her safety. Jane was given a 12-month undertaking, without conviction, and ordered to comply with psychiatric treatment.⁹

⁹ Case study from Mental Health Legal Centre.

Adequate funding for appropriate services and support reduces the barriers for people with disabilities in navigating the legal system.

“Thomas” came to Hawkesbury Nepean Community Legal Centre with his support worker. Thomas was refused legal aid for a property matter. He was on a disability support pension and no other liquid assets. His disposable income was \$267.00 a fortnight and his mortgage repayments were \$250.00 dollars a fortnight.¹⁰ Like many people with disability, Thomas had significant physical, intellectual and psychiatric disabilities, which were not apparent from the way he looked. Thomas did not like to volunteer information about his disability and it was through his support worker that his solicitor learnt what his disabilities were. Thomas’ support worker also played an important role in building trust between Thomas and his solicitor. He had seen a number of solicitors before he came to Hawkesbury Nepean and was very suspicious of lawyers. His disabilities meant that he had substantial difficulties understanding the legal system.

In situations where adequate supports are available, these barriers can be removed. CLCs and other services can show examples where assertive outreach and support, targeted services and ongoing assistance can remove barriers for people with disability, and reduce contact with the criminal justice system.

“Murray” has struggled with schizophrenia and drug addiction, which have contributed to complex problems in his life. He was homeless and in and out of prison for many years. He contacted Prisoners' Legal Service Inc for assistance with his debts, which totalled over \$70,000 including tax debt, housing debt, consumer debts, Centrelink debt and on-the-spot fines debt.

Murray’s lawyers helped him to declare bankruptcy, meaning that he could come out of prison to a fresh start. Prisoners' Legal Service is assisting him to have his driver’s license disqualification lifted to help him with employment opportunities.

The CLC runs a ‘Safe Way Home’ project which assists Murray and others to prepare a parole application that outline relapse prevention plans and reintegration plans to ensure that they was ready for release. After his release, Murray continues to see the CLC’s financial counsellor post release and remains off drugs, in housing and employment and crime free. Most importantly, his 12 year old daughter appreciates the stability and coping skills that he is developing as he works to rebuild his family as the sole parent involved in her life.¹¹

CLCs reported that many clients suffer from the effects of trauma, post traumatic stress, intergenerational trauma – however most have not been formally diagnosed with mental health conditions. Clients are also impacted by forms of disadvantage that lead to disability - such as lack of education resulting in poor literacy, or childhood trauma which

¹⁰ Case Study from Hawkesbury Nepean Community Legal Centre.

¹¹ Case study from Prisoner’s Legal Services.

can impact upon intellectual development. Many of these clients do not view themselves as having a disability and the lack of a formal diagnosis hinders the ability of courts to manage them appropriately. In addition, they often experience difficulty accessing support services, as many support services are incapable of accommodating clients with disability, due to lack of awareness of the needs of these clients.

“Amy” has a number of medical and emotional issues including deafness caused by a genetic condition called Pendred Syndrome, a borderline to lower average IQ of 80 and a verbal IQ of 40. She has temporal lobe epilepsy, cervical dysplasia and hyperthyroidism, which has been suggested as a possible contributor to her intellectual deficit.

It is the consensus amongst professionals that Amy demonstrates signs of an undiagnosed intellectual disability and severe undiagnosed mental health issues. Numerous medical interviews have been conducted over the past 6 years, but Amy has never been formally diagnosed with either a mental health issue or intellectual impairment.

Amy lives with her parents in a small country town. For a period of 4 years, she was relocated to experience independent living however this was ultimately unsuccessful due to another severe bullying incident with a neighbour within the complex. Her service plan was not upheld by various government and non-government providers. Amy was forced to return to her parent’s home and relies upon her aged mother primarily to drive her daily to Doctor appointments and other activities.

Ten years ago Amy was sexually assaulted by three men. Police did not pursue the incident because there was insufficient evidence to press charges against the offenders. A few years later Amy was assaulted by tenants in her independent living arrangement. She received medical attention with photographic evidence, but the police investigation of the matter was protracted and ultimately no charges were laid against the offenders.

Amy has a long history of ‘family violence’ and has been previously referred to Adult Mental Health Unit for violence resulting in a series of court matters, Domestic Violence Orders and associated breaches with family members being named parties and applicants.

Amy has been interviewed by police and other professionals throughout her life without the assistance of an interpreter and a heavy reliance on Amy’s aged mother for this purpose. Evidence of her lack of comprehension throughout processes has gone unchecked. She has difficulty understanding the consequences of not only her actions in committing offences but further the consequences of giving statements to police and the impact of making admissions.

Amy has difficulty in understanding the charges and the terms of orders made. She lacks the intellectual capacity to describe the role of a judge or a lawyer, has a marked difficulty understanding the concepts of guilty vs innocent and has a poor understanding of general knowledge and simple arithmetic.

Medical evidence has suggested that Amy should be considered to be unfit to plea as a result of her communication difficulties. It is considered that she would certainly

experience marked difficulties instructing Counsel appropriately. It has been indicated that her unfitness to plea is of a permanent nature.

Amy was initially managed by way of an informal Family Guardianship arrangement but because of her aging parents the Office of the Adult Guardian (OAG) was appointed for all personal matters. An application to revoke Guardianship was made after it became clear that the Adult Guardian was failing to assist her. The Adult Guardian has again been applied for to assist with the legal matters only as it is clear that Amy cannot instruct counsel on recent criminal charges.

Because Amy has not been officially diagnosed with either a mental health issue or intellectual impairment, she has been unable to secure appropriate and consistent support from Disability Services Qld and other support services. The lack of a formal diagnosis also impedes the court's ability to identify the most appropriate legal process for her.¹²

Obtaining a psychiatrist's report can be expensive for people with disability who are unable to access legal aid and lack the resources to pay for their own assessment. The following case study involves an allegation of assault whereby both the alleged victim and the accused have disabilities. The victim in this instance is completely non-verbal.

"Kim" is on a disability support pension and lives at a facility that provides self-contained accommodation, respite and employment to people with disabilities. There are several people with various disabilities living at this facility. Kim has been living at this facility for the past 17 years, is currently 38 years of age and is subject to a guardianship order. The people living at this facility are monitored by staff members, who help them with day-to-day activities.

Kim suffers from an intellectual disability, namely cognitive dysfunction. He is completely non-verbal. The effect of this disability is that it takes Kim a significant amount of time to process basic instructions. If requested to complete a task which is outside of his routine, Kim can get easily frustrated.

Kim's routine is to get up, go to breakfast and then have a shower. On the day when the assault was alleged to have taken place, Kim had entered the servery, when a staff member asked him to have a shower before breakfast.

Kim then allegedly became confused, frustrated and aggressive. The victim saw Kim become agitated and stepped in between him and the staff member. Kim then allegedly pushed the victim several times in the chest.

The injuries sustained by the alleged victim were a sore chest and a small cut on the right thumb.

Kim came to see the Riverland Community Legal Service ('the Service') at one of their outreach locations, accompanied by his case worker. Riverland CLS believed

¹² Case study from The Advocacy and Support Centre Inc.

that it was appropriate for Kim to apply for mental incompetence provisions under section 269C of the *Criminal Law Consolidation Act 1935* (SA), given his disability. In order to qualify for these provisions, Kim would have to get an initial psychiatrist's report.

Kim and his case worker have been working together over the past five years to save some money. As of the date Kim initially engaged us, he had a total life savings of a little over \$5,000.00. To pay for a psychiatrist's report would cut significantly into his life savings.

Given these circumstances, in order to pursue s269C provisions, the Service assisted Kim to apply for Legal Aid and accompanied him and his case worker to a meeting with the Solicitor who was, subject to funding, going to take over the file.

Kim was then denied Legal Aid funding. The private solicitor appealed to the Legal Services Commission to review the decision. Whilst the review was taking place, the Service prepared Kim for his first Court appearance by organising a walk-through during a non-Court week. the Service then acted for Kim to adjourn the matter subject to Legal Aid funding.

By the time Kim was denied Legal Aid funding a second time, it was two months since he initially saw the Service, and over three months since the alleged incident. Kim's recollection of the incident had by this stage dissipated to the stage that when asked, he could not clearly remember the incident or why he was 'in trouble'.

The Service had no psychiatrist's report, and would have to apply elsewhere for funding. On receipt of the psychiatrist's report, the Court would then likely order another psychiatrist's report.

The Service spoke to both Kim, and his case worker who informed us that given the cost of a psychiatrist's report coupled with the amount of time that the matter had taken it was unfeasible for Kim to pursue s269C.

The Service received instructions to plead guilty at the next hearing. The Service was asked by his residential facility that Kim not be given a fine, as it would be too burdensome. The Service were also asked to apply for community service as Kim would not understand a simple bond as punishment or that he had done anything wrong. Kim received the following punishment:

- No conviction;
- \$100.00 12-month Good Behaviour Bond; and
- 40 hours of community service work within the next 12 months.

Despite being in residential housing for people with a disability, having a guardianship order and receiving the Disability Support Pension, Kim would still have needed 2 psychiatrist's reports, one paid for out of his own life savings, to show mental incompetence or unfitness to stand trial. But for Legal Aid rejection, Kim may not have pleaded guilty.¹³

¹³ Case Study from Riverland Community Legal Service.

Studies have found that people with disability are more likely to be victims of crime.¹⁴ However, while people with disability are the highest risk group for abuse and violence, there is a low awareness of this problem in society.¹⁵ As a result, there has been a failure to address the issue through education and training of police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice. CLCs report that there has been a failure amongst police to provide adequate levels of assistance and protection to clients with disability.¹⁶ Another common problem that the clients of CLCs face is a reluctance on the part of staff in residential settings and police officers to appropriately handle the experiences and testimonies of people with disability who are victims of crime.¹⁷

In the following case study people seeking the protection of Apprehended Violence Orders or similar orders are provided with limited assistance in preparing their applications, including details about the evidentiary requirements of a successful application.

“Kate” and her friend “Mark” have cerebral palsy. Throughout October 2012, Kate and Mark had three incidents of being verbally abused by “Jenny”. In the first instance Jenny called Kate a “spastic slut” and Mark a “spastic c*nt”. In the second instance Jenny physically threatened Kate and Mark with a large stick. In the third instance Jenny followed Kate for about 20 minutes while Kate was walked home and then stood outside her house for one hour.

After the third incident, Kate attended the local police station with her mother/carer. On the advice of a police officer, Kate’s mother assisted her mother to apply for an Apprehended Violence Order (**AVO**). The Local Court granted Kate an interim AVO, however stated the grounds for the order were insufficient and better particulars were required. The initial hearing was adjourned as the defendant had not received the AVO application. Kate (and her mother) then sought assistance from a CLC, who advised on the process of the AVO application, how to complete the application with statutory declaration detailing better particulars and how to serve Jenny.

The CLC represented Kate at the Local Court and assisted in filing the completed statutory declaration. The matter was adjourned again, and at the next hearing the parties consented to referring the matter to the Community Justice Centre (**CJC**) for mediation. By mediation in the CJC, both parties entered into an agreement to “leave each other

¹⁴ Hoong Sin, C., Hedges, A., Cook, C., Mguni, N. And Comber, N. (2009) Disabled People’s Experiences of Targeted Violence and Hostility. Research Report 21, Manchester: Equality and Human Rights Commission; Lewin, B. (2007) ‘Who cares about disabled victims of crime? Barriers and facilitators for redress’, *Journal of Policy and Practice in Intellectual Disabilities*, 4 (3): 170-176; Sobsey, M. (1994) *Violence and Abuse in the Lives of People with Disabilities: the End of Silent Acceptance?* Baltimore M.D: Paul H. Brookes; Williams, C. (1995) *Invisible Victims: Crime and Abuse Against people with Learning Difficulties*. London and New York: Jessica Kingsley Publishers.

¹⁵ Wolbring, G. (1994) “Violence and Abuse in the Lives of People With Disabilities” 1.

¹⁶ Goodfellow, J, & Camilleri, M. (2003). *Beyond belief beyond justice: The difficulties for victim/survivors with disabilities when reporting sexual assault and seeking justice*, Melbourne, Disability Discrimination Legal Service; Camilleri, M. (2010). *[Dis]abled Justice: Why reports of sexual assault made by adults with a cognitive impairment fail to proceed through the justice system*, PhD, University of Ballarat.

¹⁷ Ibid.

alone” and “to walk away” should they see each other on the street.¹⁸

CLCs have also reported instances where police did not investigate criminal allegations made by a person with a disability who lives in a residential setting. There is a tendency amongst service providers to see incidences of violence or abuse as policy issues rather than criminal offences.

“Joe”, who is 20 years of age and has severe autism and intellectual disability, was the victim of a violent attack by another resident in a group home. Joe’s parents contacted the police to request an intervention order to provide a measure of protection for their son. The police referred the matter back to the state government authority that operated the group home. After refusing to offer a physical separation of the living areas in the group home and a long saga of mismanagement of the issue, pressure was placed on Joe to move to another group home.¹⁹

Some CLCs and other support organisations assist victims to ensure perpetrators are brought to justice. Villamanta Disability Rights Legal Service reports that several clients had been sexually abused by a worker while living in residential care. Villamanta supported the clients and ensured that their matters were pursued, the perpetrator brought to justice and crimes victims compensation sought.

“Alex” was experiencing abuse while living in supported accommodation, Villamanta supported Alex to have the matter dealt with and to make a Victim of Crime compensation application.²⁰

Similar issues are raised in a case provided by the Mental Health Legal Centre which illustrates the difficulties that people with psychosocial disability face if their allegations/reports of crime are not believed and/or not acted upon, in particular if they are in psychiatric or other facilities and dependent upon staff for support and referral to police for investigation. It ultimately affects the extent to which they can seek redress through the criminal justice system or otherwise.

“Samuel”, a patient in a psychiatric facility, complained to nursing staff that he had been sexually assaulted earlier that morning. He requested the member of staff to contact police and his consultant psychiatrist. Samuel’s requests were not acted upon. It was only six days after the incident, when an independent consumer consultant raised Samuel’s complaint of sexual assault with the psychiatric facility that an investigation was then

¹⁸ Case study from Northern Rivers Community Legal Centre.

¹⁹ Disability Rights Now, Civil Society Report to the United Nations Committee on the rights of people with disabilities, compiled by Disability Representative, Advocacy, Legal and Human Rights Organisations, August 2012, p.108.

²⁰ Case study from Villamanta Disability Rights Legal Service Inc. See also Making Rights Reality – A Pilot Project for Sexual Assault Survivors with a Cognitive Impairment <http://www.secasa.com.au/assets/Documents/making-rights-reality-paper.pdf>

commenced. It was only then that the consultant psychiatrist was notified. No report was made to police and Samuel and his consumer consultant were not made aware of the outcome of the investigation. The handling of the patient's complaint was in direct contravention of the Office of the Chief Psychiatrist guidelines regarding managing of allegations of sexual assault in acute in-patient units. Mental Health Legal Centre assisted Samuel to make a complaint to the Health Services Commissioner about the matter. He received a written apology and was given a copy of amended guidelines regarding procedures for staff when handling allegations of sexual abuse, which included notification to staff that breach of the guidelines would result in disciplinary action.²¹

2.4.2 Evidence

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?

CLCs are concerned that there is a presumption that people with disability are not able to participate in legal proceedings.

“John”, who has an intellectual disability, was badly assaulted in his home town. During the attack symbols were carved into John's head and he was hospitalised for five days to recover from his injuries. Both John's parents and his support worker spent a lot of time convincing John to give a statement to the police. He knew who had assaulted him and was able to provide a statement to the police but nothing has happened since as the police have said John is not a credible witness.²²

The case studies in this section illustrate the systematic barriers that people with disability face when they are the victims of crime.²³

The Victorian Human Rights and Equal Opportunity Commission have recognised this, and is currently conducting research into the experiences of people with disability in Victoria when they report crime.²⁴ The project aims to:

- identify the nature and extent of crimes against people with disability in Victoria
- understand what barriers people with disability face when reporting crime and gaining redress

²¹ Case study from Mental Health Legal Centre.

²² Queensland Advocacy Incorporated, 'Submission to the Shadow Report', email dated 14 July 2010, 'John's Story'

²³ See also Camilleri, M. (2008). *Enabling Justice*. Paper presented at the National Victims of Crime Conference: New Ways Forward – Pathways to Change, Adelaide; Camilleri, M. (2010). *[Dis]abled Justice: Why reports of sexual assault made by adults with a cognitive impairment fail to proceed through the justice system*, PhD, University of Ballarat.

²⁴ See <http://www.humanrightscommission.vic.gov.au/index.php/training/item/619-experiences-of-people-with-disabilities-reporting-crime>.

- work with Victoria Police and other authorities to break down these barriers and provide better services to people with disability.

Similar projects should be undertaken in each state and territory.

Urgent consideration should be given to ensuring the acceptance of and legitimisation of alternative methods of communication in justice system processes, including the amendment of federal, state and territory evidence legislation where necessary.

2.4.3 Offences

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

A number of Australian laws, policies and practices deny or diminish recognition of persons with disability before the law, or deny or diminish their right to exercise legal capacity. Many people with disability are not being identified as having a disability either when they are dealing with police or in court. As a result, people with disability are not receiving the supports, adjustments or aids they need.

“Andrew” has a number of intellectual and physical disabilities. Due to his physical disability, he is unable to wear a bicycle helmet. Andrew cycles to his workplace because he has no private transport. As the law currently stands in New South Wales, Andrew breaches the road rules every time he rides to work. Last year, Andrew received twenty-six penalty notices and over \$900 in fines for failing to wear a bicycle helmet whilst riding.

In most other Australian jurisdictions, an exemption exists which excuses people from wearing bicycle helmets if they provide a medical certificate as evidence that their disabilities or physical characteristics make it impossible for them to wear a helmet. If a similar exemption was included in New South Wales law, Andrew would be able to maintain his independence and participate fully in his community without being fined due to his disability. In addition, Andrew would not have had to rely on the help of legal assistance providers to, among other things, have the enforcement orders annulled and have the matter dealt with in the Magistrates Court pursuant to the *Mental Health (Forensic Provisions) Act 1990 (NSW)*.²⁵

CLCs are concerned that in some cases clients are put through the stress and anxiety of interacting with the criminal justice system because of behavioural issues related to intellectual disability.

“Pete” is assessed as having an intellectual impairment with severe behavioural disorder and hearing loss. He displays aggression quickly when under stress. Pete was referred to

²⁵ Case study from Hunter Community Legal Centre.

a community legal centre after he was charged with common assault on a youth worker within his placement residence. Pete admitted his behaviour to the police and has no previous convictions. He appeared in court in July 2013 where he was released absolutely and no conviction recorded. This is the lowest form of punishment/order available to a sentencing court. It reflects that the court viewed the offence as extremely minor in the circumstances, and perhaps unnecessary to involve a court.

The process of being arrested, interviewed by police and appearing in court (which was a new and strange process) caused Pete an extreme amount of stress due to his disability.

The policy at Pete's residence requires that when such an incident occurs, a complaint must be made to police to encourage Pete to stop behaving illegally in the future. However, given Pete's disability, police intervention is unlikely to act as a personal deterrent for Pete and his behaviour is likely to continue in the future. Pete is a person who does not have a defence under mental health legislation, due to his lack of self-control due to his disability, he is likely to come before the criminal courts in the future as his anti-social behaviour is seen as a criminal act.²⁶

This type of response is not limited to criminal acts; the penalisation of anti-social behaviour is extending to the provision of services such as housing.

"Ethel" is an elderly woman with mental illness who resides in public housing. The Department is bringing eviction proceedings against Ethel for objectionable behaviour, although the Department's evidence merely demonstrates the symptoms of her various physical disabilities and her ongoing mental illness. In particular the Department is relying on Ethel's loud and forced manner of speech, which is caused by polyps and lesion on her throat, and night-time wakefulness and corresponding cries and rants, which stem from her schizophrenia and post-traumatic stress disorder.

Ethel's lawyers are relying on the tenancy tribunal's duty to make decisions that are 'just and equitable between the parties' to say that the Department needs to make efforts to accommodate her in a way that causes the minimum nuisance to other residents, rather than simply trying to remove her from the equation. The matter is yet to be heard.²⁷

Similarly, people with disability can be unfairly and disproportionately swept up in the child protection jurisdiction. Parents who have a disability are significantly over-represented in this area, as they often have their children removed from their care and their access to them restricted, and are frequently permanently cut off. It is therefore vital that these clients receive appropriate legal advice and representation in regard to this extremely important area of law. Villamanta Disability Rights Legal Service reports of some successful outcomes for some of their clients:

- continued access of parent to child was ensured and DHS varied its application for permanent removal without Permanent Order, with the consent of the client.

²⁶ Case study from Logan Youth Legal Service, Youth and Family Service (Logan City) Inc.

²⁷ Case study from SunCoast Community Legal Service

- continued access of parent to child was ensured, after Villamanta successfully negotiated reduced conditions on the order being sought and their client agreed by way of consent to an extension of the order.

2.5 Insurance

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

The following case study illustrates some of the difficulties people with disability experience in understanding and navigating the process of making an insurance claim.

“Jim's” car was stolen. When the insurance company investigated his claim, Jim was having difficulties negotiating the process. Jim cannot read or write.

Mid North Coast Community Legal Centre assisted Jim through the investigation process by advocating for him and lodging a dispute with the Financial Services Ombudsman. As a result of the complaint, the insurance company paid Jim the total amount of his claim.²⁸

The law should recognise the unequal bargaining power between consumers and insurance companies. Insurance cover often comes down to technicalities that an “everyday” person is unlikely to understand let alone someone with a cognitive disability or mental illness (or person without much formal education for that matter). Some consumer protections that place a positive obligation on the insurer to assist the consumer with their claim including saying at what stage a claim is at and exactly what information is required to process a claim would be helpful. Often insurers seem to obfuscate the process and make it very difficult for consumers to receive their insurance coverage.

2.6 Citizenship Rights and Public Service

The Arts Law Centre of Australia worked together with Accessible Arts NSW and Arts Access Australia on the report *Removing the Obstacles*, which researched the intersection of heritage buildings and laws with disability discrimination laws.

People with a disability are often not provided the means to access heritage buildings and are reliant upon those responsible to ensure access is provided. The report highlights the need for equal opportunity for people with a disability to access venues in buildings with heritage status.

The review of legislation and policy found that the complexity of heritage and access issues requires further assessment of access to heritage buildings, and a mechanism to

²⁸ Case study from Mid North Coast Community Legal Centre

monitor progress. It recommended that more information is needed to assist individuals/organisations regarding the application of the *Disability (Access to Premises – Building) Standards 2010* to existing heritage buildings, and found that ‘heritage significance’ as a consideration in determining an ‘unjustifiable hardship’ defence to providing access requires clarification.

The Removing the Obstacles submission is available at:

www.artsaccessaustralia.org/resources/research-and-reports/135-removing-the-obstacles

2.7 Restrictive Practices

Question 36. In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

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

Restrictive practices in accommodation and services provided to people with disability are of great concern to CLCs. They affect our clients and often relate to the most basic issues of their day-to-day lives, including: where they live, how they are treated there, and what services they can access outside of their accommodation.

CLCs support the proposed National Framework for Reducing the Use of Restrictive Practices. The Framework could be strengthened through addition of a Guiding Principle that sets out a minimum standard approach for the use of restrictive practices:

- restrictive practices should be a last resort, applied only after every other reasonable resource or strategy available to supporters has been tried
- restrictive practices should be the least restrictive alternative
- restrictive practices only used to prevent harm to the adult or others.

CLCs support the recommendations made by Disability Discrimination Legal Service on behalf of the Federation of Community Legal Centres in their submission on the Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector.²⁹ In summary, these recommendations are:

1. That the National Framework needs to also apply to children with disabilities in schools;
2. That the Australian Psychological Society be recognised as the primary expert body in relation to developing the Framework;
3. That the Framework be binding on organisations that receive federal funding, via inclusion in service agreements.

In the following cases Villamanta Disability Rights Legal Service has investigated, advised, liaised and negotiated with relevant parties in relation to service plans and

²⁹ See, Federation of Community Legal Centres *Submission on the Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector* http://www.fclc.org.au/public_resource_details.php?resource_id=2269

accommodation and services issues where service providers were failing to provide appropriate accommodation and/or services. Where required, Villamanta represented clients at meetings, conciliations, mediations or hearings. In some cases Villamanta advised and assisted clients to access the conciliation process of the Disability Services Commissioner, under the Disability Act 2006. Some satisfactory outcomes resulted from the Disability Services Commissioner's conciliation process.

- “Leigh’s” freedom to access the community was being severely restricted. Villamanta was able to successfully negotiate with their accommodation service provider to agree to, and enable, unfettered community access.
- “Chris” was being provided with unsatisfactory and inappropriate accommodation services. Villamanta was able to achieve satisfactory outcomes through a combination of negotiation with the service provider and a complaint to the Disability Services Commissioner.
- “Pat” was an elderly person receiving unsatisfactory services. Villamanta achieved a satisfactory outcome through a combination of negotiating a revised care plan and a complaint to the Aged Care Complaints Board.
- “Lindsay” was experiencing major difficulties in supported accommodation. Villamanta negotiated for appropriate accommodation and services and Lindsay was eventually moved to new and appropriate permanent accommodation.
- A service provider was trying to evict “Sam”. Villamanta negotiated and achieved a satisfactory outcome resolving the issues.
- “Morgan” was being subjected to reduction, suspension and finally expulsion from a day placement service. Villamanta was able to achieve a satisfactory outcome including all issues being addressed, appropriate planning and policies put in place and a new and more suitable service provider being found and accessed.
- In one case Villamanta negotiated to ensure that “Leslie” received the necessary funding to access appropriate disability services and to enable them to continue living in the community.
- Villamanta negotiated to secure the necessary funding and services to enable “Jamie”, a child who had been forced to live in out-of-home care, to return home to live with family with appropriate support services in place.
- Villamanta investigated and then negotiated to have “Kit’s” incorrect personal records corrected by an accommodation service provider.³⁰

³⁰ Case study from Villamanta Disability Rights Legal Service Inc.

2.8 Marriage, intimate relationships, parenthood and family law

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

People with disability often experience difficulty with access to legal assistance and other support services.³¹ This is particularly clear in family law matters where a person's disability can make obtaining the required instructions and initiating the relevant proceedings difficult.

"Grace" is an Aboriginal woman who has a chronic illness, a hearing impairment, a mild intellectual disability, depression and dyslexia. Grace was involved in a financially, emotionally and physically abusive relationship which worsened her mental and physical health. Grace has been trying to regain contact with her children, who are being physically abused by their father. Their father restricts the children's contact with Grace by changing telephone numbers and moving the children. In order to have contact with her children, Grace will need court orders. Due to her multiple disabilities and, among other things, the length of time since she has lived with her children, Grace's prospects of getting the relevant court orders are poor.

Grace's mental and physical health make it difficult for her to access the justice system. She requires a great deal of support in order to obtain access and will likely require extensive legal representation to finalise the matter. A request has been made to transfer Grace's matter to a more experienced solicitor due to the complexity of the situation. While Grace is receiving support from a variety of sources, her disability makes accessing the justice system difficult.³²

There is a pressing need for greater support for women and children who experience domestic and family violence. People with disability are disproportionately affected by domestic and family violence. The effects of trauma caused by domestic and family violence can, exacerbate mental health issues, impeding intellectual development and have severe, ongoing and pervasive repercussions.

³¹ Legal Aid Queensland, *Legal Aid Queensland submission: Developing a national disability strategy* (2008) p 8.

³² Case study from Women's Legal Centre ACT.

3. Recommendations

Adopt a nationally consistent approach to defining capacity

CLCs support the adoption of a nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity. This definition should begin from the assumption that a person has capacity and that lack of capacity cannot be determined simply because a person has a diagnosed disability or impairment.

Modernise anti-discrimination law

The consolidation and modernisation of the *Disability Discrimination Act 1992* (Cth) together with Australia's other anti-discrimination laws, would simplify legislation schemes, address previous shortcomings and make anti-discrimination laws more effective, accessible and clear.

Improve training to police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice

Regular training and adequate resourcing, developed and provided in consultation with people with cognitive disabilities and their advocates, should be provided to the police, the judiciary, court staff, duty lawyers, prosecutors and private solicitors involved in the criminal justice and civil law systems in order to improve their identification and understanding of the needs of clients with any cognitive disability, and to enable those clients to be assisted to engage effectively with all aspects of the legal system. Training and associated resourcing should include information about different forms of cognitive disabilities and provision for the related needs of persons with such disabilities. Urgent consideration should be given to ensuring the acceptance of and legitimisation of alternative methods of communication in justice system processes, including the amendment of federal, state and territory evidence legislation where necessary.

Improve protection for people with disability entering into contracts

Companies and retailers require clear regulations for sales staff to ensure that consumers have the capacity to understand and fulfil the terms of contracts.

Reduce the use of restrictive practices

The National Framework for Reducing the Use of Restrictive Practices could be strengthened through addition of a Guiding Principle that sets out a minimum standard approach for the use of restrictive practices:

- restrictive practices should be a last resort, applied only after every other reasonable resource or strategy available to supporters has been tried
- restrictive practices should be the least restrictive alternative
- restrictive practices only used to prevent harm to the adult or others.

CLCs also recommend:

- That the National Framework needs to also apply to children with disabilities in schools;

- That the Australian Psychological Society be recognised as the primary expert body in relation to developing the Framework;
- That the Framework be binding on organisations that receive federal funding, via inclusion in service agreements.

Improve protection for people who have not been formally diagnosed with disability

Improve access to justice and support services for people who are suffering from the effects of trauma, or who have been impacted by forms of disadvantage that lead to disability - such as lack of education resulting in poor literacy, or childhood trauma which can impact upon intellectual development. Many of these clients do not view themselves as having a disability or may lack the resources to access reports from medical practitioners. The lack of a formal diagnosis hinders the ability of courts to manage them appropriately.

Increase availability and accessibility of legal services

Commonwealth and State Governments should increase funding for specialist legal community centres and Legal Aid lawyers with expertise in disability, in order to enable people with disability to have free/affordable access to legal representation, irrespective of the complexity of their matter. Adequate funding should also be provided to enable people with disability, their families and carers to have access to specialist advocacy services so that they can more easily negotiate the justice system. Access to forensic reports and other medical examinations/reports must be effectively facilitated, as lack of access to evidence is a huge barrier to just outcomes in court proceedings.

Improve data collection

The current failure of justice databases, including police and court systems, to reliably record data about people with disability must be addressed as a priority. Data collection and research must include disaggregation by gender and type of disability, and examine the experience of people with disability as victims, witnesses and offenders.

Implement a Disability Justice Strategy

As recommended in the Australian Human Rights Commission's report *Equal before the law: towards disability justice strategies*, CLCs support the implementation of a Disability Justice Strategy in each jurisdiction. The strategies should be developed in partnership with people with disabilities and address the core principles of:

- Appropriate communications
- Early intervention and diversion
- Increased service capacity
- Effective training
- Enhanced accountability and monitoring
- Better policies and frameworks.³³

³³ Australian Human Rights Commission, *Equal before the law: towards disability justice strategies* (2014) p 31. See <http://www.humanrights.gov.au/publications/equal-law>