



**public interest**  
ADVOCACY CENTRE LTD

## **Equality before the law for people with disability**

**Submission in response to Australian Law Reform Commission Issues Paper: Equality, Capacity and Disability in Commonwealth Laws**

**20 January 2014**



## Table of Contents

<b>Introduction .....</b>	<b>2</b>
The Public Interest Advocacy Centre .....	2
PIAC's work on disability .....	2
PIAC's work with people with disability through the Homeless Persons' Legal Service .....	3
This submission .....	4
<b>Responses to Questions in Issues Paper.....</b>	<b>5</b>
United Nations Convention on the Rights of Persons with Disabilities .....	5
Question 1 .....	5
A uniform approach to legal capacity? .....	6
Question 4 .....	6
Anti-discrimination law .....	8
Question 6 .....	8
Administrative law .....	26
Question 9 .....	26
Competition and consumer law .....	28
Question 10 .....	28
Privacy .....	31
Question 11 .....	31
Citizenship rights, public service and board participation .....	32
Question 16 .....	32
Question 17 .....	33
Question 20 .....	38
Question 22 .....	40
Access to justice, evidence and federal offences .....	41
Question 23 .....	41
Social security, financial services and superannuation .....	44
Question 26 .....	44
Question 30 .....	45
Question 31 .....	49
Health care and aged care .....	51
Question 34 .....	51
Restrictive practices .....	54
Question 37 .....	54

# Introduction

## The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from NSW Trade & Investment for its work on energy and water, and from Allens for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

## PIAC's work on disability

PIAC has a long history of involvement in the area of disability. This work includes both legal casework and advocacy on behalf of clients, especially disability discrimination litigation, and public policy development. PIAC's policy development in this area relies heavily on PIAC's experience – especially in representing and working with clients with disability.

PIAC has run a number of significant test cases in the area of transport for people with disability. These include *Killeen v Combined Communications Network Pty Ltd* [2011] FCA 27, *Haraksin v Murrays Australia Ltd (No 2)* [2013] FCA 217 and *Innes v Rail Corporation of NSW (No 2)* [2013] FMCA 36, the facts of which are outlined in the body of PIAC's submission below.

In 2008, PIAC launched the Mental Health Legal Services (MHLS) Project, a two-year pilot program that aimed to explore the unmet legal needs of people in NSW with mental illness. In early 2009, with funding from the NSW Public Purpose Fund and supplemented by a grant from the Federal Attorney-General, PIAC established four service delivery pilots that aimed to improve access to justice for people with mental illness in NSW. The MHLS Project also piloted community legal education training for consumers, their carers and advocates, and continuing legal education for legal and related professionals to assist them provide effective services to people with mental illness.

PIAC has published several papers and submissions and participated in public consultations about people with disability in a wide range of related areas, including mental health,<sup>1</sup> accessible public transport,<sup>2</sup> access to justice,<sup>3</sup> housing<sup>4</sup> and electricity.<sup>5</sup> It is well established that people with disability often have many non-legal needs in addition to their legal needs. They tend to suffer multiple types of disadvantage, such as poverty, poor housing, unemployment and crime victimisation. The statistics indicate that people with mental illness, in particular, are more likely than members of the community as a whole to be:

- the victims of crime;
- living in poverty;
- imprisoned; or
- homeless.<sup>6</sup>

Consequently, people with disability have been described as the 'most socially excluded' of all disadvantaged groups.<sup>7</sup>

### **PIAC's work with people with disability through the Homeless Persons' Legal Service**

Through the Homeless Persons' Legal Service (HPLS), PIAC has significant experience working with people with disabilities, in particular mental illness, intellectual disabilities and brain injuries.

HPLS provides free legal advice and ongoing representation to people who are homeless or at risk of homelessness. It operates ten clinics on a roster basis at welfare agencies in the greater Sydney area. These agencies provide direct services, such as food and accommodation, to people in housing crisis. The clinics are coordinated by HPLS and staffed by lawyers acting pro bono. Since 2004, HPLS has provided free legal advice and representation to almost 8,000

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- <sup>1</sup> Peter Dodd and Michelle Cohen, *A Mental Health Act for the 21<sup>st</sup> Century* (19 December 2012) Public Interest Advocacy Centre  
<[http://www.piac.asn.au/sites/default/files/publications/extras/12.12.19\\_a\\_mental\\_health\\_act\\_for\\_the\\_21st\\_century.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/12.12.19_a_mental_health_act_for_the_21st_century.pdf)>.
  - <sup>2</sup> Michelle Cohen, Alexis Goodstone, Camilla Pandolfini and Edward Santow, *Get on Board! 2012 Review of the Disability Standards for Accessible Public Transport* (31 May 2013) Public Interest Advocacy Centre  
<[http://www.piac.asn.au/sites/default/files/publications/extras/13.05.31\\_-\\_get\\_on\\_board\\_2012\\_review\\_of\\_the\\_dsapt.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/13.05.31_-_get_on_board_2012_review_of_the_dsapt.pdf)>.
  - <sup>3</sup> Jessica Roth, Deirdre Moor and Edward Santow, *Equal before the law: submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements* (4 November 2013) Public Interest Advocacy Centre  
<[http://www.piac.asn.au/sites/default/files/publications/extras/13.11.04\\_equal\\_before\\_the\\_law\\_-\\_submission\\_in\\_response\\_to\\_the\\_productivity\\_commission\\_issues\\_paper\\_about\\_access\\_to\\_justice.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/13.11.04_equal_before_the_law_-_submission_in_response_to_the_productivity_commission_issues_paper_about_access_to_justice.pdf)>.
  - <sup>4</sup> Sam Sowerwine and Louis Schetzer, *Skating on thin ice: difficulties faced by people living with mental illness accessing and maintaining social housing* (15 October 2013) Public Interest Advocacy Centre  
<[http://www.piac.asn.au/sites/default/files/publications/extras/13.10.15\\_skating\\_on\\_thin\\_ice\\_-\\_difficulties\\_faced\\_by\\_people\\_living\\_with\\_mental\\_illness\\_accessing\\_social\\_housing\\_-\\_briefing\\_paper.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/13.10.15_skating_on_thin_ice_-_difficulties_faced_by_people_living_with_mental_illness_accessing_social_housing_-_briefing_paper.pdf)>.
  - <sup>5</sup> Carolyn Hodge, *More power to you: electricity and people with physical disability* (26 November 2012) Public Interest Advocacy Centre and Physical Disability Council of NSW  
<[http://www.piac.asn.au/sites/default/files/publications/extras/20120829\\_ewcap\\_morepowertoyou.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/20120829_ewcap_morepowertoyou.pdf)>.
  - <sup>6</sup> Jeanne Choe, Linda Teplin and Karen Abram, 'Perpetration of Violence, Violent Victimization, and Severe Mental Illness: Balancing Public Health Concerns' (2008) 59(2) *Psychiatric Services* 158-161; Kristie Carter, Tony Blakely, Sunny Collings, Fiona Gunasekara and Ken Richardson, 'What is the Association Between Wealth and Mental Health?' (2009) 63 *Journal of Epidemiology and Community Health* 222-225; Eris Perese, 'Stigma, Poverty, and Victimization: Roadblocks to Recovery for Individuals with Severe Mental Illness' (2007) 13 *Journal of the American Psychiatric Nurses Association* 286 & 288-290.
  - <sup>7</sup> Law and Justice Foundation of NSW, 'Legal needs of people with a disability in Australia', (Updating Justice No 16, November 2012) 2.

people who are homeless or at risk of homelessness. During 2012-13, HPLS assisted 1,354 clients.

Since 2008, PIAC has employed an HPLS Solicitor Advocate to provide legal representation for people who are homeless and charged with minor criminal offences. Since commencing in 2008, the HPLS Solicitor Advocate has provided court representation to 362 individual clients in 554 matters. From January 2010 to December 2012, the HPLS Solicitor Advocate provided court representation to 241 individual clients facing criminal charges. Of these:

- 48 per cent disclosed that they had a mental illness;
- 63 per cent disclosed that they had drug or alcohol dependency;
- 41 per cent disclosed that they had both a mental illness and drug/alcohol dependency;
- 72 per cent had either a mental illness or drug/alcohol dependency;
- 46 per cent disclosed that they have previously been in prison.

The percentage of people that disclosed they had a mental illness, drug/alcohol dependency or previous imprisonment is likely underreported. Recent research shows that people with disability are at greater risk of homelessness. Researchers at the University of Adelaide recently completed a report funded by the Australian Government to understand the homelessness risks confronting persons with a disability and how best to meet their needs. The research clearly found that people with a disability are more vulnerable to the risk of homelessness, in particular people with a mental illness.<sup>8</sup> The research also provides evidence that people affected by other forms of disability such as intellectual disability and brain injuries are likely to be at greater risk of homelessness than the general population.<sup>9</sup>

## **This submission**

PIAC welcomes the opportunity to participate in the Australian Law Reform Commission's (ALRC) review of equal recognition before the law and legal capacity for people with disability.

PIAC has addressed selected questions where we believe we can most add value to this inquiry. This submission draws, as far as possible, on an evidence base acquired through PIAC's experience from its own litigation, policy and training work.

PIAC endorses the framing principles the ALRC has identified in the Issues Paper: dignity; equality; autonomy; inclusion and participation; and accountability. Equality is particularly important for PIAC's own disability discrimination work, and this is explained further in response to Question 6. Given the limited time available for this submission, PIAC has not addressed Question 41 in its own right – how Commonwealth laws and legal frameworks affect people with disability from particular disability communities – but has occasionally referred to the situation of particular communities in response to other questions.

This submission was co-ordinated by Jessica Roth, Senior Policy Officer. Contributions were made by:

- Samantha Sowerwine, Senior Solicitor

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<sup>8</sup> Andrew Beer, Emma Baker, Shelley Mallett, Deb Batterham, Anne Pate and Laurence Lester, *Addressing homelessness amongst persons with a disability: Identifying and enacting best practice*, The University of Adelaide, 2012.

<sup>9</sup> *Ibid*, 24.

- Michelle Cohen, Senior Solicitor
- Camilla Pandolfini, Senior Solicitor
- Chelsea Tabart, Solicitor
- Szu-Han Wang, Professional Legal Training placement
- Jakob Friedman, Professional Legal Training placement
- Jillian Mitford-Burgess, Pro Bono Senior Associate
- Edward Santow, Chief Executive Officer.

## Responses to Questions in Issues Paper

### United Nations Convention on the Rights of Persons with Disabilities

#### Question 1

**Australia has an Interpretative Declaration in relation to Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*. What impact does this have in Australia on:**

- provision for supported or substitute decision-making arrangements; and**
- the recognition of people with disability before the law and their ability to exercise legal capacity?**

Article 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) provides that persons who require help with exercising their legal capacity must be given the support they require, in the form of supported decision making.

PIAC considers that the CRPD requires ‘supported decision making’ rather than ‘substituted decision making’. This is found specifically in paragraphs 2 and 3 of Article 12, which are concerned with the issue of capacity. They require governments to ensure that people with disability receive the support they need to exercise their legal capacity on an equal basis with others, in all aspects of their lives. The CRPD requires capacity to be assessed as proportionate and particular to the need of the individual concerned, at the relevant period of time. This approach takes into account that the mental health of a person will often fluctuate over periods of time.

Supported decision making can take a number of forms. On one end of the spectrum, it can involve making sure that people have the appropriate means to make decisions (such as access to technology and relevant communication formats, providing additional time, and discussion of options) and, on the other, it can involve family or nominated support persons making some decisions, based on the known preference of the person with a disability. In essence, a supported decision-making model means that all decisions will be made in a way that maximises the ability of the person with disability to participate in decisions that affect them, where they have the capacity to do so.

By way of example, the proposed reforms for the new Mental Health Act for Victoria adopt some of the key principles of a supported decision-making model.<sup>10</sup> These include:

<sup>10</sup> Victorian Government, *A new Mental Health Act for Victoria: Summary of proposed reforms* (October 2012) <[http://docs.health.vic.gov.au/docs/doc/128700DBBE24DDFDCA257C0B0079D75E/\\$FILE/mhreform.pdf](http://docs.health.vic.gov.au/docs/doc/128700DBBE24DDFDCA257C0B0079D75E/$FILE/mhreform.pdf)>. Drafting of the Mental Health Bill is continuing with new legislation expected to commence in 2014.

- Persons with a mental illness have the same rights and responsibilities as other members of the community and should be empowered to exercise those rights and responsibilities.
- A person with a mental illness is presumed to have the capacity to make decisions about matters relating to their mental illness if the person appears to be capable of doing specified things.
- A person with a mental illness must as far as is reasonably possible in the circumstances be supported to enable the person to make his or her own decisions.
- Treatment services should be provided for the benefit of the person and only for therapeutic or diagnostic purposes and never be administered as a punishment or for the convenience of others.

The Interpretative Declaration states that Australia understands that the CRPD allows for fully supported or substituted decision-making arrangements in certain circumstances. As said above, PIAC believes that Article 12 does not allow for substitute decision-making.

PIAC notes that in September 2013, the Committee on the CRPD recommended that Australia review its Interpretative Declarations in order to withdraw them. PIAC supports this recommendation.

The approach adopted by the CRPD is also supported by the World Health Organisation, which has indicated that it has a formal view that even though the presence of a mental illness may affect capacity, a person with a mental illness may still have the capacity to carry out some decision-making functions.<sup>11</sup>

## **A uniform approach to legal capacity?**

### **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?**

PIAC considers that there should be a nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity. The significant variation across jurisdictions which currently exists is complex and unnecessarily confusing. The various definitions are susceptible to inconsistent, unpredictable or even arbitrary interpretation.

PIAC submits that there should be a test for capacity, written in plain English, that is understandable to those who have to interpret and understand it – namely, lawyers, health practitioners, consumers and others. This test for capacity must also be consistent with human rights principles and the CRPD. There are many regulatory options for achieving this goal, but it is important to bear in mind that any Commonwealth or nationally consistent approach must not adopt the current 'lowest common denominator' approach.

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<sup>11</sup> World Health Organisation, *Quality Rights Toolkit* (2012)  
<[http://www.who.int/mental\\_health/publications/QualityRights\\_toolkit/en/index.html](http://www.who.int/mental_health/publications/QualityRights_toolkit/en/index.html)>.

The principle at common law is that an adult must be presumed to have legal capacity. McHugh J in *Re Marion*<sup>12</sup> restated this, where he found that:

The common law accepts that a person has rights of control and self-determination in respect of his or her own body which other persons must respect. Those rights can be altered with the consent of the person concerned. Thus, the legal requirement of consent to bodily interference protects the autonomy and dignity of the individual and limits the power of others to interfere with that person's body.<sup>13</sup>

In any new definition of capacity, PIAC submits that there should be a restatement of the common law position that there is a presumption of capacity for any adult person. This presumption is consistent with the CRPD and also reflects the first assessment principle in the *NSW Capacity Toolkit*.<sup>14</sup>

In a previous submission to the NSW Government's statutory review of the *Mental Health Act 2007* (NSW) (MHA),<sup>15</sup> PIAC recommended a new capacity test should require that any medical practitioner wishing to detain a person involuntarily must be satisfied that the person lacks capacity to make decisions about their own treatment and care. To continue involuntary treatment, the Mental Health Review Tribunal (MHRT) must also be satisfied, to the *Briginshaw* standard,<sup>16</sup> that the person lacks that capacity.

PIAC also submitted that a new test for capacity should clearly set out the criteria that would be required to maintain the principle that persons who have the capacity to make their own decisions about their mental health treatment and care should not be detained. PIAC suggests that the test found in the recent draft Victorian Bill could be seen as a model for part of a nationally consistent test for both involuntary detention and treatment and involuntary treatment (ie, Community Treatment Orders (CTOs)).

As per the Exposure Draft of the Victorian Bill, before an involuntary order for detention and treatment or a CTO is made, the medical practitioner or the MHRT must be satisfied that:

because of the person's mental illness the ability of the person to make decisions about the provision of treatment is significantly impaired as the person is unable to:

- (i) understand the information relevant to the decision; or
- (ii) retain that information; or
- (iii) use, weigh or appreciate that information as part of the process of making the decision.<sup>17</sup>

## **Recommendation**

*PIAC recommends there should be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity. It should*

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<sup>12</sup> *Re Marion* (2002) 175 CLR 218.

<sup>13</sup> *Ibid* 309-310.

<sup>14</sup> New South Wales, Attorney General's Department, *Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales* (2008) <[http://www.diversityservices.lawlink.nsw.gov.au/divserv/ds\\_capacity\\_tool/divserv\\_assess\\_principles.html](http://www.diversityservices.lawlink.nsw.gov.au/divserv/ds_capacity_tool/divserv_assess_principles.html)> at 27.

<sup>15</sup> Dodd and Cohen, above n 1.

<sup>16</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336

<sup>17</sup> Victorian Government, above n 10. It was clause 70 of the Exposure Draft Mental Health Bill 2010 (Vic).

*include a presumption of capacity, which is the foundation of the supported decision-making model. Persons who have the capacity to make their own decisions about their mental health treatment and care should not be involuntarily detained and there should be clear criteria to maintain this principle. The Exposure Draft of the Victorian Bill contains a possible model for a nationally consistent approach for involuntary detention and treatment.*

## **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?**

There are at least eight systemic issues relating to the nature and operation of Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity. PIAC addressed many of these issues in its submissions to the Attorney-General's Department about a consolidated equality or anti-discrimination Act.<sup>18</sup>

PIAC's preferred approach is that there be a single consolidated statute, which incorporates the existing separate statutes such as the *Disability Discrimination Act 1992 (Cth)* (DDA). PIAC welcomed the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012 (Cth) (HRAD Bill), and proposed some amendments to improve its eventual operation.<sup>19</sup>

If the Australian Government opts not to introduce a consolidated anti-discrimination Bill, PIAC recommends the following changes to the DDA. PIAC does not address the definition of discrimination in these comments, even though PIAC is in favour of a single definition of discrimination in a consolidated Act that expressly includes both direct and indirect discrimination.

### **1. Standing**

The individualised nature of the anti-discrimination system means that enforcement relies heavily on individual complaints. The current individual complaint-based process is not appropriate for adequately and equitably addressing the implementation of the DDA, and especially the *Disability Standards for Accessible Public Transport 2002* (Transport Standards).

Currently, there is inconsistency regarding the rules of standing to bring a complaint to the Australian Human Rights Commission (AHRC) and a complaint to the relevant federal courts. Complaints to the AHRC can be made by or on behalf of a 'person aggrieved' (section 46P(2) of

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<sup>18</sup> Gemma Namey, Lizzie Simpson, Jessica Roth and Edward Santow, *Improving Access to Equality: Submission to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws Discussion Paper* (1 February 2012) Public Interest Advocacy Centre <[http://www.piac.asn.au/sites/default/files/publications/extras/12.02.01\\_improving\\_access\\_to\\_equality\\_-\\_submission\\_to\\_ag\\_department.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/12.02.01_improving_access_to_equality_-_submission_to_ag_department.pdf)>.

<sup>19</sup> Michelle Cohen, Jessica Do, Camilla Pandolfini and Edward Santow, *Aligning the pieces: consolidating a framework for equality and human rights* (21 December 2012) Public Interest Advocacy Centre <[http://www.piac.asn.au/sites/default/files/publications/extras/12.12.21\\_aligning\\_the\\_pieces\\_-\\_submission\\_to\\_the\\_senate\\_legal\\_and\\_constitutional\\_affairs\\_committee\\_-\\_human\\_rights\\_and\\_anti-discrimination\\_bill\\_2012\\_0.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/12.12.21_aligning_the_pieces_-_submission_to_the_senate_legal_and_constitutional_affairs_committee_-_human_rights_and_anti-discrimination_bill_2012_0.pdf)>.

the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act)). However, only an 'affected person' (section 46PO(1)) can bring proceedings in the courts if the complaint does not resolve at conciliation. This means that an organisation, such as a peak body representing people with disability, can bring a complaint on behalf of an individual to the AHRC, but if the matter does not settle then only the individual with the disability can bring the complaint to court, as only the individual is an 'affected person'.

In PIAC's experience, the inconsistencies in standing can create problems. PIAC advised a disability organisation that had brought complaints on behalf of a number of individuals around Australia regarding access to a particular service. PIAC advised that, given the inconsistencies between ss 46P(2) and 46PO(1), it would be difficult for the organisation to continue acting on behalf of the individuals in the Federal Court. Given the individual complaints related to the same service, it would have made sense for the complaints to be heard together and brought by the organisation on behalf of the individuals.

It is PIAC's view that, given the difficulties in pursuing a discrimination complaint in the courts, including the financial, time and emotional resources required, it is important that organisations be able to bring such complaints to court on behalf of individuals, who are often vulnerable or marginalised, as they are generally better equipped to do so.

PIAC submits that standing be extended in the Act to allow organisations to have standing to bring such complaints on behalf of individuals. The courts should also have residual power to refuse to allow an organisation to have standing on public interest grounds. In considering whether an organisation should be refused standing, the court should be permitted to take into account the relationship between the individual and the organisation. PIAC considers this to be a practical way of promoting access to justice, without running the risk of 'opening the floodgates' to inappropriate, vexatious or unmeritorious litigation.

Additionally, PIAC submits that organisations should be able to bring complaints, in their own right, as opposed to on behalf of individual members.

### **Case study**

PIAC represented Access for All Alliance (Hervey Bay) Inc (**AAA**) in a disability discrimination action against Hervey Bay City Council regarding a breach of the Transport Standards, relating to inaccessible bus stop infrastructure.<sup>20</sup> AAA, an incorporated association, was established to ensure equitable and dignified access to premises and facilities for all members of the community. The complaint was dismissed by Collier J on the basis that AAA was not a 'person aggrieved' within the terms of section 46P and therefore did not have sufficient standing to bring the complaint. Although the applicant was an organisation that represented people with disability, the Court found that the applicant itself was not affected by inaccessible public transport infrastructure to an extent greater than an ordinary member of the public. The Court found that the applicant needed to establish that it was a 'person aggrieved in its own right'.<sup>21</sup>

This decision appears to have inhibited other organisations making complaints about systemic discrimination.

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<sup>20</sup> *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* (2007) 162 FCR 313 (**Access for All**).  
<sup>21</sup> *Ibid* [58].

PIAC's primary submission is that the DDA should adopt a liberal approach to the question of standing. PIAC recommends the DDA include open standing for discrimination complaints, in similar terms to section 123 of the *Environmental Planning and Assessment Act 1979* (NSW). It is also arguable that the NSW Act<sup>22</sup> and Western Australian Act<sup>23</sup> include open standing provisions, which permit any person, whether personally affected or not, to lodge a complaint that a contravention of the Act has occurred.

In PIAC's experience, open standing provisions would be particularly useful to bring actions in the area of disability discrimination relating to access. PIAC has represented a number of individuals, who at great personal cost – in terms of time, stress and financial risk – have brought proceedings in the Federal Court against public transport operators in relation to inaccessible transport.

**Case study – *Haraksin v Murrays Australia Ltd* [2013] FCA 217**

Julia Haraksin is reliant on a wheelchair for mobility. Murrays Australia Ltd, operates an Australia wide bus service. On 14 August 2009 Ms Haraksin telephoned Murrays Australia (**Murrays**) and tried to book a seat on a wheelchair accessible bus travelling from Sydney to Canberra for a work conference. The staff member at Murrays who took her call told Ms Haraksin that they did not have any wheelchair accessible buses that she could travel on.

Ms Haraksin made a complaint of direct discrimination, indirect discrimination under the DDA, as well as a complaint of a breach of the Transport Standards. The complaint was not resolved at conciliation at the AHRC. Ms Haraksin filed proceedings in the Federal Court of Australia on 22 July 2010 and the Hearing took place in November 2011.

Justice Nicholas found that Murrays discriminated against Ms Haraksin on the basis of her disability for the purposes of section 5(2) of the DDA, because Murrays did not accept Ms Haraksin's booking, as it did not have any vehicles equipped with wheelchair access. His Honour had also found that there was a breach of the Transport Standards.

Justice Nicholas made an order that until 12 April 2015, Murrays Australia is to ensure that at least 55% of its fixed route services between Sydney and Canberra (which percentage is to be calculated on a monthly basis) are to be provided by coaches fitted with a wheelchair lifter unless the failure to so ensure is attributable to a cause or causes beyond its control.

Such an order is quite unusual in discrimination cases, where Courts generally do not make orders for compliance. In this matter, the order made by Nicholas J will ensure that Murrays Australia does not breach the Transport Standards in respect of the fixed route service that Ms Haraksin travelled on for a particular period of time. While Ms Haraksin was ultimately successful in her claim of discrimination and breach of the Transport Standards, the case was run at great personal cost to her in terms of the time and effort that was required, and the case took over four years to resolve.

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<sup>22</sup> NSW Act s 87A(1).

<sup>23</sup> *Equal Opportunity Act 1984* (WA) s 83(1).

Other examples include Greg Killeen in *Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27 and Maurice Corcoran in *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864.

In each case, the problems identified about access not only affected the individuals involved, but also affected many other people with disability. In this sense, they were cases of genuine public interest. An open standing provision would have allowed a disability organisation, or an organisation such as PIAC, to bring the proceedings, rather than the individuals. The Access to Justice taskforce recognised this and recommended:

The Government should consider amendments to allow representative and advocacy groups to bring actions based on claims of discriminatory conduct under the *Disability Discrimination Act 1992* (Cth) ... before the federal courts (when conciliation in the Australian Human Rights Commission has failed). Action would be constrained by the requirement that there be a justiciable issue, and that actions may only be taken by established groups with a demonstrated connection to the subject matter of the dispute.<sup>24</sup>

PIAC strongly endorses this recommendation and urges the ALRC to adopt it. The experience in environmental law reveals the benefits that could flow from broader standing provisions, in terms of the development of law and policy. An open standing provision would make it easier for organisations to bring proceedings to address systemic discrimination, taking the pressure off individuals who are often less equipped in bringing such claims. Courts already have the power to dismiss an action which is frivolous or has no reasonable prospects of success. In PIAC's view, this power would be sufficient to address any concerns that open standing would result in a flood of unmeritorious claims being brought before the courts.

If the ALRC were not inclined to recommend the introduction of an open standing provision, PIAC submits that the test for standing contained in s 27(2) *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) in respect of organisations is another possible model. Section 27(2) enables an organisation to bring proceedings provided that the decision being challenged relates to a matter included in the objects of the organisation. While not as broad as the test proposed by the Access to Justice Taskforce or contained in s 123 of the EPA Act, PIAC is of the view that this provision would overcome the problems of the existing test thereby encouraging valuable public interest litigation. PIAC notes that in 2012, the Administrative Review Council proposed a similar provision to be added to the *Administrative Decisions (Judicial Review) Act 1977* (Cth).<sup>25</sup>

Broadening the standing provisions in the Federal human rights jurisdiction is likely also to have an impact on the likelihood of settlement in conciliation at the AHRC. Amendments to legislation to enable representative proceedings as already contemplated under the DDA and the AHRC Act are long overdue and should be introduced as a matter of priority to enable the systemic potential of federal anti-discrimination laws to be more effectively realised.

<sup>24</sup> Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (September 2009) Attorney-General's Department <<http://www.ag.gov.au/LegalSystem/Documents/A%20Strategic%20Framework%20for%20Access%20to%20Justice%20in%20the%20Federal%20Civil%20Justice%20System.pdf>>. Recommendation 8.10.

<sup>25</sup> Administrative Review Council, *Federal Judicial Review in Australia* (Report No. 50, 2012), Recommendation 10.

## **Recommendation**

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*The DDA should be amended to allow organisations to bring a complaint on behalf of a person to both the AHRC and the federal courts. The DDA should provide the courts with residual power to refuse to allow standing for an organisation on public interest grounds.*

*The DDA should provide open standing to allow anyone to bring a complaint to enforce a breach of discrimination provisions. The provision should be modelled on s 123 of the Environmental Planning and Assessment Act 1979 (NSW).*

*Alternatively, the DDA should be amended to grant organisations standing to bring discrimination complaints to the AHRC and to the federal courts in their own right. Such an amendment could be based on s 27(2) of the Administrative Appeals Tribunal Act 1975 (Cth), and it would require an organisation or group to show either:*

- *that a significant portion of the membership of the organisation or group is affected by the conduct in question; or*
- *the alleged discriminatory conduct relates to the objects or purposes of the organisation or group.*

## **2. Costs**

The current costs regime in the Federal Court and Federal Circuit Court, where costs follow the event, represents a significant impediment to pursuing disability discrimination complaints. For many of PIAC's clients, the risk of an adverse costs order is sufficient to dissuade them from pursuing a discrimination complaint in the federal courts, even when they have a strong claim. Enforcement of the DDA is reliant on litigation commenced by persons with disability, many of whom are among the most economically disadvantaged people in Australia.

Proceedings can be lengthy and incur significant legal costs, frequently in the tens of thousands of dollars. It is not unusual for respondents to retain large law firms and senior and junior counsel to represent them and costs, even on a party/party basis, can be significant. Due to the risk of an adverse costs order, many strong discrimination complaints settle. This removes any precedent impact a successful court decision might have. At other times, clients opt to file their complaint under State and Territory legislation as they provide a presumption in favour of each party paying their own costs.<sup>26</sup> Although there are some ways to alleviate paying an adverse costs order (eg. cost capping, legal aid indemnities), the availability of these are uncertain and limited.

Furthermore, this often does not cover the full cost of litigation and if the plaintiff wins, they cannot recover their own legal costs from other side.

PIAC proposes three possible solutions to this problem.

First, PIAC submits that the federal courts should generally be a no-costs jurisdiction for discrimination complaints. If parties bear their own costs, this will ensure consistency with General Protection claims under the *Fair Work Act 2009* (Cth) (Fair Work Act) and State and Territory anti-discrimination laws. It will improve access to justice for individuals who have been victims of discrimination. PIAC notes that the Productivity Commission made a similar

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<sup>26</sup> PIAC's experience is supported by the research of Beth Gaze and Rosemary Hunter who found that the costs rules in the federal courts operate as a barrier to access and a disincentive. See Beth Gaze and Rosemary Hunter, *Enforcing human rights: an evaluation of the new regime* (2010) 8.3.

recommendation in its Report.<sup>27</sup> The HRAD Bill provides that, for discrimination proceedings in the federal courts, each party would bear their own costs.<sup>28</sup> If the HRAD Bill does not become law, this clause should be inserted into the DDA.

Although the jurisdiction should generally be no costs, PIAC submits that in some circumstances it may be appropriate to make a costs order. For example, the court should have discretion to make a costs order if a party has conducted the matter in a way to add unnecessary delay, or if it is frivolous or vexatious. PIAC submits that where a discrimination matter is a public interest matter and the complainant is successful, the court should be able to make a public interest costs order to allow the complainant to recover its costs. PIAC supports the ALRC's previous recommendations in its report, *Costs Shifting - who pays for litigation*,<sup>29</sup> regarding the availability of a public interest costs order. The availability of such an order recognises the benefits to the whole community in having discrimination laws enforced and allows for the costs of pursuing such litigation to be spread more broadly than on the individual who has suffered discrimination or harassment. A public interest costs order would also allow consideration to be given to the resources of the respondent, which are often large well-resourced organisations that have the benefit of litigation insurance and tax deductibility for litigation costs. PIAC submits that in such circumstances it would be appropriate for a successful complainant to be able to recover their legal costs. Even though many complainants do not pay for their legal representation, the ability to recover costs in discrimination matters is an important source of additional income for community legal centres.

Second, another way of alleviating the negative impact of adverse costs orders on disability discrimination litigation would be to strengthen the application of Order 62A rule 1 of the *Federal Court Rules* (Cth). Order 62A provides that the Court may, by order made at a directions hearing, specify the maximum costs that can be recovered on a party-party basis. An Order 62A costs order has the potential to remove uncertainty about the level of risk of an adverse costs order, thereby allowing the applicant to proceed in cases where they otherwise might be unfairly inhibited from doing so.

One problem with the Order (and similar costs-limiting orders in other jurisdictions) is its infrequent use, due to a lack of awareness by practitioners and judges, and in cases where applications have been made, the reticence of judges to make orders limiting costs. The ALRC should consider what more could be done to encourage the judiciary to understand the benefit of such orders in promoting access to justice through enabling public interest litigation.<sup>30</sup>

For example, amendments to Order 62A could be made to ensure that it becomes commonly used in disability discrimination to limit costs. Where an applicant seeks a ruling under Order 62A, there should be a presumption in favour of limiting costs in 'public interest' matters, where 'public interest' is defined broadly to include all cases that could benefit a class of disadvantaged people, even though they may benefit the applicant as well.

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<sup>27</sup> Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30, 2004), Recommendation 13.4.

<sup>28</sup> *Human Rights and Anti-Discrimination Bill 2012* s 133.

<sup>29</sup> Australian Law Reform Commission, *Costs Shifting - who pays for litigation* (Report No 75, 1995) Recommendation 47.

<sup>30</sup> Joanna Shulman, 'Order 62A of the Federal Court Rules' (2007) 32 *Alt LJ* 75.

PIAC successfully represented Ms Haraksin in her application for a costs cap under Order 62A of the Federal Court Rules. This cap meant that PIAC was not able to recover the full costs of the proceeding when it won, but without the costs cap Ms Haraksin would not have been able to bring the case, due to the risk of an adverse costs order.

Finally, consideration should be given to significant reforms of the Attorney-General's Test Case Fund. PIAC, on behalf of a representative body, sought funding under this scheme and found that the process for obtaining funding was so lengthy as to make the Fund practically unobtainable: the decision whether or not to grant the funding was not made until after the matter was determined. This approach to a targeted test case fund is seriously flawed and in effect means that the Fund cannot be used as a means of ensuring that important test cases get to court.

A review of the rules of the Fund and its processes is needed to ensure that funding is available in a timely manner to assist litigants bringing test cases. Consideration should also be given to having the fund operate as an indemnity fund against adverse costs orders in federal proceedings in the same way that a grant of legal aid in NSW provides an indemnity against costs in state proceedings.<sup>31</sup>

As is explained further below in response to Question 23, PIAC also submits that consideration should be given to increasing the funding to specialist disability legal centres to assist in the legal representation of discrimination complainants. PIAC also recommends that consideration should be given to broadening the availability of Commonwealth Legal Aid for discrimination matters.

### ***Recommendation***

*PIAC submits that the federal courts should be made a no-costs jurisdiction for discrimination matters.*

*Provision should be made for the courts to make a costs order when:*

- *a party has conducted proceedings leading to unnecessary delays;*
- *the case is frivolous or vexatious; or*
- *the complaint is successful and the matter is classed by the court as a public interest matter.*

*Consideration should be given to increasing the funding to community legal centres and broadening the availability of Commonwealth legal aid for discrimination matters.*

### **3. Intersectional discrimination**

People may be subject to discrimination based on several aspects of their identity. In Australia and internationally, there is a growing recognition of intersectional discrimination, which is also sometimes referred to as 'intersectionality' or 'multiple discrimination'.<sup>32</sup> Although these terms are often used interchangeably, it has been argued that intersectional discrimination is a form of multiple discrimination. Multiple discrimination occurs when someone experiences discrimination on the basis of more than one protected attribute; for example, being treated less favourably on the grounds of both age and disability. Intersectional discrimination occurs when multiple aspects of a person's identity compound each other and cannot be separated. Intersectional

<sup>31</sup> *Legal Aid Commission Act 1979 (NSW) s 47.*

<sup>32</sup> See, eg, Report of the United Nations Expert Group Meeting on Gender and Race Discrimination held in Zagreb, Croatia, 21-24 November 2001 <<http://www.un.org/womenwatch/daw/csw/genrac/report.htm>>.

discrimination means people are discriminated against in qualitatively different ways as a consequence of the combination of their individual characteristics.<sup>33</sup>

Australia's existing anti-discrimination laws do not adequately allow for the recognition of discrimination that occurs on the basis of more than one protected attribute. Currently, if a person believes they have been subjected to discrimination based on more than one attribute they must plead each ground separately; a court then considers each ground of discrimination one at a time, not in combination.

Intersectional discrimination is one of many reasons in support of a consolidated anti-discrimination law. If this does not happen, then PIAC supports the inclusion of a specific provision addressing intersectional discrimination in the DDA.

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### ***Recommendation***

*The DDA should expressly cover intersectional discrimination in relation to both direct and indirect discrimination. The provision should also make it clear that it is not necessary to establish that each ground amounts to discrimination separately.*

## **4. Exceptions and defences**

PIAC submits that there should be a general limitations clause that replaces all the exceptions under the DDA. A general limitations clause would simplify the regime by imposing a single defence provision that will be easier to apply and understand, removing the need for other defences such as unjustifiable hardship.

A requirement for duty holders to set out why their proposed behaviour is not unlawful discrimination, by stating that 'the action was a proportionate means of achieving a legitimate aim', creates a standard that can adapt over time in line with changing community expectations.

If the ALRC recommends the retention of any exceptions, they should be subject to a three-year sunset clause to enable careful consideration of the rationale for their continued retention.

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### ***Recommendation***

*All of the existing exceptions should be repealed and replaced with a new provision that provides that discrimination will be justified if it is a proportionate means of achieving a legitimate aim. This provision should be included in the DDA, even if the existing exceptions are retained.*

*If the ALRC is not minded to recommend the repeal of the existing exceptions, these provisions should all be made subject to a three-year sunset clause.*

## **5. Burden of proof**

Currently, the burden of proof for direct discrimination falls almost entirely on the complainant. This includes proof that:

- the complainant has a disability;
- an action is discriminatory under the DDA, that is that the complainant was treated less favourably;
- the respondent was responsible for the discriminatory act;

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<sup>33</sup> Gay Moon, *The legal implications of multiple discrimination*, European Network Against Racism (1 August 2011) <<http://www.edf.org.uk/blog/?p=12670>>.

- the action was taken because of their disability;
- the action is not justified or excused by a defence; and
- the action is not covered by an exception.

The onus is only on the respondent to prove the existence of a defence or an exception if the complainant has proved the discrimination. This causes a number of difficulties for complainants as usually all evidence of the reason for the action lies with the respondent.

It is often necessary for a complainant to prove matters relating to the state of mind of the respondent. For example, a complainant who claims they were not employed because of their disability has to prove that their disability was the reason they did not get the job. Evidence about subjective motivation is not easily available to a complainant. Therefore, many cases fail because the court is not satisfied that the action was taken because of the protected attribute.

For indirect discrimination, the elements that need to be proved are that:

- the complainant has a disability;
- a condition, requirement or practice covered by the legislation has been imposed;
- the respondent was responsible for imposing the condition, requirement or practice;
- the requirement disadvantages people with a disability;
- the complainant does not or cannot comply;
- the condition, requirement or practice is not reasonable in the circumstances;
- the action is not excused by a defence; and
- the action is not covered by an exception or exemption.

In indirect discrimination matters under the DDA, once the complainant provides sufficient evidence that a condition, requirement or practice has the required effect of disadvantaging people with disability, the burden of proving that the condition, requirement or practice is reasonable in the circumstances then shifts to the alleged discriminator.<sup>34</sup> In other words, the respondent only bears the onus of proof once the complainant has shown that a condition, requirement or practice disadvantages people with disability.

PIAC submits that the burden of proof should be borne by the party most able, in a practical sense, to adduce the evidence in each situation. PIAC submits that for both direct and indirect discrimination, there should be a 'rebuttable presumption' of discrimination on the basis of disability once the complainant establishes a prima facie case. This means that a presumption will then arise that an action was taken for the reason alleged by the complainant and the onus falls on the respondent to rebut that presumption. This approach is consistent with the common law principle that evidence is to be 'weighed according to the proof which it was in the power of one party to produce and the power of the other party to contradict.'<sup>35</sup>

Under a shared burden of proof, the complainant rightfully does not bear the unreasonably difficult burden of establishing the state of mind of the respondent in a direct discrimination claim. For indirect discrimination, it means that the respondent has the burden of proving that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a

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<sup>34</sup> DDA s 6(4).

<sup>35</sup> *Qantas Airways Limited v Gama* [2008] FCAFC 69, citing *Medtel Pty Ltd v Courtney* [2003] FCAFC151; (2003) 130 FCR 182 per Branson J at [76].

legitimate aim (or is reasonable under the current test). Of course, the burden of justifying the action should remain with the respondent.

This proposed position reflects the approach taken under the Fair Work Act. Under the Fair Work Act, once a complainant alleges that a person took an action for a particular reason, this is presumed to be the reason for the action unless the respondent proves otherwise.<sup>36</sup> The current burden of proof is therefore inconsistent with the Fair Work Act. A shared burden of proof therefore harmonises the burden of proof for employment discrimination at the federal level. It is a common sense approach that allows case law about both provisions to develop together.

The HRAD Bill contained a provision adopting a shared burden of proof. This proposal was the subject of considerable debate and, it must be acknowledged, some controversy.<sup>37</sup> Part of this controversy stemmed from a concern that such a reform might lead to what has been described as a 'reversal' of the traditional onus of proof. That concern, while understandable, seems overstated given that, in fact, the conventional onus of proof is not displaced except insofar as there is a strong evidentiary rationale to do so. Certainly in respect of this area of anti-discrimination law, PIAC submits that a shared burden of proof represents a fair, practical and common-sense approach.

PIAC also submits that a shared burden will not unduly hamper respondents. There must first be facts from which the court could decide that discrimination has occurred in the absence of any other explanation. The burden of proof will only shift to the respondent where the complainant has already shown there are proper grounds to believe that discrimination might have occurred.

In the UK, EU and Canada, the burden of proof shifts to the respondent once the complainant has established a prima facie case of discrimination. This does not seem to have caused any problems in these jurisdictions. In fact, the UK Court of Appeal in *Ingen Ltd v Wong* [2005] EWCA Civ 142 noted that the burden of proof made 'good sense given that a complainant can be expected to know how he or she has been treated by the respondent whereas the respondent can be expected to explain why the complainant has been so treated.'<sup>38</sup>

In relation to direct discrimination, the respondent can rebut the presumption by providing evidence that the reason for the conduct does not relate to disability; that is, there was some other legitimate reason for the conduct.

For indirect discrimination, the respondent can show that the condition, requirement, practice, provision or criterion was a proportionate means of achieving a legitimate aim. This is broadly consistent with the existing burdens under the DDA in relation to the respondent showing the condition, requirement or practice is reasonable in the circumstances.

In cases of both direct and indirect discrimination, the respondent could show that the discriminatory behaviour was justified as it was a 'proportionate means of achieving a legitimate aim'.

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<sup>36</sup> *Fair Work Act 2009* (Cth) s 361.

<sup>37</sup> See, eg, 'Roxon defends proposed anti-discrimination law change', *The Australian Financial Review* (Sydney), 20 November 2012; Editorial, 'New discrimination laws undermine civil society', *The Australian* (Sydney) 27 December 2012.

<sup>38</sup> *Ingen Ltd v Wong* [2005] EWCA Civ 142 at [31].

## **Recommendation**

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*The DDA should be amended to provide that a rebuttable presumption of discrimination should arise once the complainant establishes a prima facie case.*

### **6. Positive duty**

PIAC believes that the DDA should expressly provide that public sector organisations have a positive duty to take reasonable steps to eliminate disability discrimination and promote equality.

As already discussed, discrimination law is currently largely reactive and change relies on individual complaints. This characterises the discrimination as a personal dispute and does not encourage organisations to look at holistic change, particularly since the penalties are generally minor. A positive duty would ensure that public sector organisations are proactive in preventing discrimination rather than simply responding after a complaint is made. Imposing a positive duty on public sector organisations would promote substantive equality and eliminate systemic discrimination.

A positive duty to take reasonable and proportionate measures to eliminate disability discrimination as far as possible is not a new concept. A positive duty was introduced in the *Equality Opportunity Act 2010* (Vic) and applies to not only public sector organisations but also businesses, clubs and sporting organisations.<sup>39</sup> The Victorian Act contains a list of factors that must be considered in determining whether a measure is reasonable and proportionate, and also contains examples.<sup>40</sup> The Victorian Equal Opportunity and Human Rights Commission (VEOHRC) may investigate a breach of this duty or conduct a public inquiry, but it cannot receive individual complaints.<sup>41</sup> If the VEOHRC finds a breach of the duty, it can issue a compliance notice and the Victorian Civil and Administrative Tribunal can enforce the notice.<sup>42</sup>

The UK is an interesting model for such a duty. Under the *Equality Act 2010* (UK) (UK Act), public authorities have a duty to have due regard to the need to eliminate discrimination, harassment and victimisation, advance equality of opportunity between persons who share a protected characteristic and persons who do not share it, and foster good relations between persons who share a protected characteristic and persons who do not share it.<sup>43</sup>

These requirements are further defined as removing or minimising disadvantages suffered by people due to their protected characteristics, taking steps to meet the needs of people with protected characteristics and encouraging people from protected groups to engage in public life. Disability is only one of a number of characteristics that are covered by the duty. Under the previous UK legislation, the now-repealed *Disability Discrimination Act 2005* (UK), a positive duty existed for the public sector in relation to disability. Therefore, this model is not only relevant if Australia adopts a consolidated anti-discrimination statute, but it could be adopted specifically as an amendment to the DDA.

A breach of the provisions in the UK Act does not give rise to a cause of action at private law.<sup>44</sup> The UK Equality and Human Rights Commission (UK Commission) has a number of statutory

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<sup>39</sup> *Equality Opportunity Act 2010* (Vic) s 15(2).

<sup>40</sup> *Equality Opportunity Act 2010* (Vic) s 15(6).

<sup>41</sup> *Equality Opportunity Act 2010* (Vic) s 15(3) and s 15(4).

<sup>42</sup> *Equality Opportunity Act 2010* (Vic) s 139 and 151.

<sup>43</sup> *Equality Act 2010* (UK) s 149(7).

<sup>44</sup> *Equality Act 2010* (UK) s 156.

powers to enforce the duty, including undertaking assessments to assess to what extent a body has complied with the duty, serving compliance notices and then enforcing the notices through the courts.<sup>45</sup> The provisions can also be enforced through an application to the High Court for judicial review.<sup>46</sup> A person or a group of people with an interest in the matter, or the UK Commission, could make an application for judicial review.

#### *What should the positive duty consist of?*

The positive duty to eliminate discrimination needs to be carefully defined. First, PIAC submits that public sector organisations should be required to take *reasonable steps* to eliminate discrimination and harassment, rather than just pay *due regard* to the need to do so. This makes the duty more action and outcome focused. In this regard, the Victorian legislation is a better model than the UK Act.

Public sector organisations should be required to set defined goals in relation to substantive equality and discrimination and harassment. There should be mandatory reporting on the progress towards these defined goals.

The UK *Equality Act 2010 (Specific Duties) Regulations 2011* requires public authorities to publish information to demonstrate their compliance with the general equality duty at least annually. The information must include information relating to people who share a relevant protected characteristic who are its employees (for authorities with more than 150 staff); and people affected by its policies and practices, such as service users. The information must be published in a manner that is accessible to the public.

The DDA could set out similar requirements to the UK in relation to requiring public authorities to report and publish information bearing on their compliance with the general equality duty.

Second, PIAC submits that public sector organisations should be required to ensure that their policies, practices and services do not have an unjustifiable adverse impact on people with disability. This requires public sector organisations to conduct an audit of their policies, practices and services to monitor compliance with this obligation.

Ideally, such a positive duty should be enforceable by individuals. The effectiveness of the positive duty is limited if it does not give rise to any enforceable private law rights. The availability of judicial review of decisions by public sector authorities is not sufficient as there is rarely an order for compensation in judicial review proceedings.

This would not have an undue burden on these organisations as many larger organisations already have policies that aim to eliminate discrimination and harassment. Furthermore, employers are required under the DDA to take reasonable steps to prevent discrimination and harassment to avoid vicarious liability.

#### *The importance of having a broad definition of a public sector organisation*

One of the most important questions for the operation of the positive duty is determining the definition of 'public sector organisations', which in turn determines the application of the duty.

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<sup>45</sup> *Equality Act 2006* (UK) s 31 and 32.

<sup>46</sup> Explanatory Notes to the *Equality Act 2010* (UK) [521].

PIAC submits that the definition of 'public sector organisations' needs to be broad and detailed. The definition should expressly include the following:

- public officials;
- government departments;
- statutory authorities;
- state-owned corporations;
- police;
- local Government;
- Ministers;
- Members of Parliamentary Committees when acting in an administrative capacity;
- an entity declared by regulations to be a public authority for the purposes of the legislation;
- an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and
- any entity that chooses to be subject to the legislative obligations of a public sector organisation.

PIAC recommends that the DDA include a power to make regulations so that organisations can be added to the category of 'public authority'. This will ensure that the DDA will retain a degree of flexibility.

PIAC also recommends that the DDA provide some guidance on the definition of 'an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority'. It is a common feature of modern government that various non-state actors, for example, not-for-profit organisations, religious or faith based bodies and private companies, are involved with the delivery of government and public services. PIAC recommends that the DDA should include guidance, such as examples and a list of indicia, as to when an entity is performing a 'function of a public nature'.<sup>47</sup>

PIAC recommends that the DDA provide that certain specified functions, which are central to effective public service delivery, are taken to be of a public nature. The functions that should be specified include the operation of detention places and correctional centres, the provision of the following services: gas, electricity and water supply, emergency services, public health services, public education, public transport, and public, community or social housing.

The DDA should not be limited to those non-government service providers who provide services funded or controlled by government. The fact that a service is funded and/or controlled by government should not definitively determine whether it is a function of a public nature. PIAC also recommends that the DDA allow any entity that is not a public sector organisation to choose to be subject to the legislative obligations of public sector organisations.

### ***Recommendation***

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*There should be a positive duty on public sector organisations to take reasonable steps to eliminate disability discrimination and promote equality.*

*Public sector organisations should be clearly and broadly defined to include:*

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<sup>47</sup> This is the approach adopted in the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4(2) and the *Human Rights Act 2004* (ACT) s 40A(1).

- *public officials;*
- *government departments;*
- *statutory authorities;*
- *state-owned corporations;*
- *police;*
- *local Government;*
- *Ministers;*
- *Members of Parliamentary Committees when acting in an administrative capacity;*
- *an entity declared by regulations to be a public authority for the purposes of the legislation;*
- *an entity whose functions include functions of a public nature, when it is exercising those functions on behalf of the State or another public sector organisation; and*
- *any entity that chooses to be subject to the legislative obligations of a public sector organisation.*

*The DDA should include a power to make regulations so that organisations can be added to the category of 'public authority' as required.*

### **Duty to make reasonable adjustments**

The duty to make reasonable adjustments was inserted into the DDA by the *Disability Discrimination and Other Human Rights Legislation Amendment Act 2009*, which came into force on 5 August 2009. These provisions, ss 5(2) and 6(2), have yet to be judicially considered.

PIAC recommends that the DDA provides that the failure to make a reasonable adjustment is itself unlawful discrimination on the basis of disability.

### ***Recommendation***

*The DDA should provide that the failure to make a reasonable adjustment is, by itself, unlawful discrimination on the basis of a protected attribute.*

### **7. The AHRC's conciliation process**

PIAC has two recommendations in relation to the AHRC's conciliation process.

#### *Option of no conciliation conference*

The enforcement of the DDA relies on a two-stage process: an individual making a complaint to the AHRC, and if following investigation and conciliation the matter does not resolve, then commencing proceedings in the Federal Court or Federal Magistrates Court. State and Territory anti-discrimination laws rely on the same model of enforcement. PIAC submits that the DDA should include a provision for a complaint to be lodged directly with the federal courts, bypassing the AHRC's investigation and conciliation processes.

PIAC generally supports the use of conciliation conferences to resolve discrimination complaints. Conciliation is an informal, flexible, low-cost method of resolving disputes and in many cases results in a satisfactory outcome for all parties. Therefore, PIAC supports the AHRC's power to require attendance at conciliation conferences.

However, while many discrimination complaints are successfully resolved at conciliation, some complaints are plainly unlikely to resolve at conciliation. Examples include cases in which the parties have a fixed position, where the case may have significant implications for the parties, or other people, or where there is a significant power imbalance between the parties. Many of the matters PIAC acts in fall into this category as they tend to be test cases and not susceptible to conciliated results. PIAC submits that in such circumstances it would be preferable for complainants to be able to file directly with the courts, rather than be delayed by the AHRC's investigation and conciliation process. A similar provision exists in section 122 of the Victorian Act. Additionally, the benefits of conciliation or alternative dispute resolution are often not lost if a complaint is lodged with federal courts as parties are generally ordered to attend compulsory dispute resolution at the first directions hearing.

PIAC submits that the DDA should include a provision for a complaint to be lodged directly with the federal courts, bypassing the AHRC's investigation and conciliation processes.

#### *Registration of conciliation agreements*

PIAC submits that provision should be made in the DDA for the compulsory registration of conciliation agreements with the Federal Court and Federal Magistrates Court so that they are enforceable as if they were orders of the Court. PIAC notes that the Productivity Commission made a similar recommendation in its report on the DDA.<sup>48</sup> Unlike many State and Territory anti-discrimination statutes,<sup>49</sup> there is no provision in the DDA or the AHRC Act for the registration of conciliated agreements with the Federal Court or Federal Magistrates Court. As a result, many discrimination complaints settle at conciliation but the respondent often never implements the terms of the settlement agreement.

The process of enforcing conciliated agreements should be low-cost and straight-forward. PIAC submits that the provisions in section 164(3) of the *Anti-Discrimination Act 1991* (Qld) and section 62 of the *Human Rights Commission Act 2005* (ACT) provide good models for the compulsory registration of conciliation agreements.

#### **Recommendation**

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*The DDA should include provision for a complaint to be lodged directly with the federal courts, bypassing the AHRC's investigation and conciliation processes.*

*Conciliation agreements should be automatically registered with the federal courts. Such a provision should be modelled on s 164(3) of the Anti-Discrimination Act 1991 (Qld) and s 62 of the Human Rights Commission Act 2005 (ACT).*

#### **8. Remedies and enforcement**

Finally, the area of remedies and enforcement is a systemic issue in the anti-discrimination framework.

Although the provision in the AHRC Act that refers to remedies, s 46PO(4), is broad and permits the court making any order it thinks fit, PIAC would support extending the list of orders that a court may make. In PIAC's experience, notwithstanding the wide terms of s 46PO(4), the power of the court to make mandatory injunctions is often contested by respondents in court. The power

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<sup>48</sup> Productivity Commission, above n 27, Recommendation 13.3.

<sup>49</sup> See *Anti-Discrimination Act 1977* (NSW) s 91A(6), *Equal Opportunity Act 2010* (Vic) s 120, *Anti-Discrimination Act 1991* (Qld) s 164, *Anti-Discrimination Act 1998* (Tas) s 76, *Human Rights Commission Act 2005* (ACT) s 62.

of the court to make corrective and preventative orders is particularly important for cases of systemic discrimination, in order to ensure future compliance.

In PIAC's experience, it is very important for remedies to be broad and address systemic discrimination. For the vast majority of PIAC's clients, their main aim in bringing a discrimination complaint is to ensure that the discrimination does not continue and the situation is improved for the wider community. For example, PIAC represented Greg Killeen in a disability discrimination complaint regarding wheelchair accessible taxis in NSW.<sup>50</sup> The remedies sought included an order that the respondents' vehicles be modified so that they comply with the Transport Standards and that changes be made to the NSW Department of Transport Wheelchair Accessible Taxi Measurement Protocol. However, given the terms of s 46PO(4) there was some uncertainty about whether the Federal Court would make such remedial orders.

Including explicit powers to make such orders would also assist in conciliating disputes as it provides greater guidance to complainants and duty holders as to what types of orders are possible if the matter proceeds to court. This may assist in eliminating discriminatory practices and enhancing compliance with the DDA.

PIAC also suggests that a power to make orders similar to s 108(3) of the NSW Act (making orders where the respondent's conduct affects persons other than the complainant) should be included in the AHRC Act to assist in addressing systemic discrimination.

#### **Case study – *Innes v Rail Corporation NSW* [2013] FMC 36**

Mr Innes, who happens to be the Commonwealth Disability Discrimination Commissioner, is blind. He relies regularly on train travel. In 2011 he made 35 complaints to the AHRC (in his personal capacity) concerning 35 train trips that he made on trains between March and September that year, regarding either the lack of audible announcements, or the lack of consistency or inaudibility of on train announcements. Announcements are crucial because they allow passengers with vision impairment to know when they have reached the right station. Mr Innes' matter was not resolved at conciliation, and he decided to pursue the matter in the Federal Circuit Court.

Mr Innes alleged that Rail Corporation NSW (RailCorp) had discriminated against him because of his disability. He also alleged that RailCorp (now known as Sydney Trains) had breached parts 27.1 and 27.4 of the Transport Standards, which state that:

#### 27.1 Access to information about transport services

General information about transport services must be accessible to all passengers.

#### 27.4 Access to information about location

All passengers must be given the same level of access to information on their whereabouts during a public transport journey.

The Court looked at the totality of the complaints and found that in 18 to 20 percent of them, Transport Standard 27.4 had been breached. The Judge also found that RailCorp had breached the DDA, and that the failure to make audible announcements on trains was unlawful discrimination. Whilst the Court accepted that clear, audible announcements could

<sup>50</sup>

*Killeen v Combined Communications Network Pty Ltd & Ors* [2011] FCA 27.

not be provided 100 per cent of the time, it held that a failure rate of 18-20 per cent was in excess of what would constitute compliance.

The Judge found that RailCorp's manual on-train next stop announcements systems were 'reactive and haphazard rather than proactive and planned'.<sup>51</sup> In addition, the Judge said that the requirement to provide information to people in an effective way, was obvious: It would appear startlingly obvious to the lay observer that passengers travelling upon trains need to know where to get off. It would be equally obvious that this information should be provided in a way that was effective for all passengers.<sup>52</sup>

PIAC considers that if there were more effective systems in place to enforce compliance with the Transport Standards, this matter would not have had to go to court. Six months prior to lodging the complaints to the AHRC, Mr Innes consulted directly with RailCorp and told them that in his view, in order to comply with the Transport Standards, RailCorp should have been making announcements that could be understood on all trains by December 2007.

While Mr Innes was awarded \$10,000 in damages, the Court made no orders requiring RailCorp to comply with the particular Transport Standards in the future.

Damages in discrimination matters are very low compared to other legal claims such as torts. PIAC believes that damages in discrimination matters are generally low because courts have found it difficult to quantify the effect that discrimination has on an individual. In discrimination matters, the approach taken to damages is usually to 'compare the position the complainant might have been in if the discriminatory conduct not taken place.'<sup>53</sup> Discrimination law expert Chris Ronalds SC has noted that 'courts have not accorded much weight or significance to the emotional loss and turmoil to an applicant occasioned by acts of unlawful discrimination and harassment'.<sup>54</sup> PIAC submits that explicit reference should be made to compensating a complainant for all loss, including past and future loss.

Victims of discrimination and harassment often suffer significant psychological distress. It is important that the courts take account of this loss in assessing damages. Courts have previously stated that awarding damages for hurt, humiliation and distress should be restrained but not too minimal as to diminish the respect for the public policy of the legislation.<sup>55</sup> PIAC submits that explicit reference should be made in the DDA to compensating a complainant for hurt, humiliation and distress. This may result in increases in the amount of damages awarded for such loss.

PIAC submits that in cases where there has been a continuous or repeated breach of the DDA, or particularly the Transport Standards, the Courts should be empowered to award damages that have the purpose of discouraging the particular operator or providers, or other operators or providers, from continuing to provide services that breach the DDA or the Transport Standards. In *Innes v Rail Corporation NSW*, Judge Raphael commented that:

No claim has been made here for exemplary or punitive damages, and there does not exist, within this legislation, the ability to award damages that might serve to discourage others from

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<sup>51</sup> *Innes v Rail Corporation NSW (No 2)* [2013] FMCA 36, 110.

<sup>52</sup> *Ibid*, 168.

<sup>53</sup> *Hall v Sheiben* (1989) 20 FCR 17, 239.

<sup>54</sup> Chris Ronalds, *Discrimination Law and Practice* (3<sup>rd</sup> ed, 2008), 223.

<sup>55</sup> See *Hall v Sheiben* (1989) 20 FCR 217, 256 (Wilcox J).

conduct of this nature, such as is found in s.115(4) of the *Copyright Act 1968* (Cth). It is perhaps for this reason that damage awards for breach of any of the Commonwealth anti-discrimination Acts have generally been conservative.<sup>56</sup>

In relation to Transport Standards, PIAC has previously recommended that a provision similar to s 115(4) of the *Copyright Act 1968* (Cth) be inserted into the Transport Standards. Such a provision would be particularly useful in circumstances where there is no other mechanism to compel transport operators and providers to comply with the Transport Standards. In addition, the relatively inconsequential amount of damages that is likely to be awarded against transport operators and providers in cases that concern a breach of the Transport Standards is likely to have little deterrent effect on its own. PIAC also submits that its use would be appropriate where a breach of the Transport Standards is considered to be 'flagrant', in circumstances where it is proven that a breach of the Standards is systemic, or where transport operators or providers have failed to show that they have taken reasonable steps to comply with the Standards.

PIAC also submits that civil penalty provisions should be included in the DDA. Compensation payments in discrimination law are rather low and as such do not represent a significant deterrent. Civil penalty provisions would encourage compliance. Moreover it would bring consistency with the Fair Work Act, which provides for civil penalty provisions for contraventions of s 351 of up to \$33,000 per contravention for a corporation, and \$6,600 per contravention for an individual.<sup>57</sup>

PIAC also proposes that additional changes are required to adequately address systematic discrimination. PIAC proposes that either the AHRC, or another separate independent body, be empowered with a number of additional functions. These functions include powers to:

- monitor duty holders' compliance with the DDA, including the Transport Standards;
- investigate breaches of the DDA, including by acts of the States or Territories of their own motion in the absence of an individual compliant; and
- commence litigation in court, of their own motion in the absence of an individual complaint.

There is anecdotal evidence suggesting that many duty holders breach disability discrimination law provisions on the basis of a calculation that it is unlikely that an individual will make a complaint, particularly given the difficulties that face individuals in bringing discrimination complaints before the courts. In many respects, such a calculation is a business decision based on weighing up the costs of compliance versus the legal costs should a complaint be made and need to be defended. As a result, as with any legal requirement, compliance is low unless the threat of action as a result of non-compliance is genuine.

Empowering a body, and ensuring it is adequately funded to undertake such monitoring, investigation and enforcement activities, will have a deterrent effect and encourage compliance. In addition, empowering a body to take such action will take the pressure off individuals, such as PIAC's clients, who bring proceedings in the public interest. Moreover, the AHRC, or some other body, is more suited than individuals to bring cases addressing systemic issues. Ideally the body would be strategic in the litigation it pursued focusing on areas where compliance is particularly

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<sup>56</sup> *Innes v Rail Corporation NSW (No 2)* [2013] FMCA 36, 60.

<sup>57</sup> Fair Work Act Part 4-1, Division 2.

low. Strategic intervention by would assist in the development of discrimination law jurisprudence, which, despite a more than thirty-year history, remains underdeveloped.

### **Recommendation**

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*The DDA should include the power to make corrective and preventative orders in the list of orders that a court can make in a discrimination matter.*

*The list of orders should also include the power to make orders relating to conduct of the respondent that affects persons other than the complainant.*

*The DDA should make explicit reference to a court being able to make orders for damages for all loss, past and future, including for hurt, humiliation and distress.*

*The DDA should include the power of the court to impose civil penalty provisions for breach of discrimination or harassment provisions.*

*A new independent body, separate to the AHRC, should be established to perform the following functions:*

- *monitor duty holders' compliance with DDA, including any Disability Standards;*
- *investigate breaches of the DDA, including by acts of the States or Territories, of their own motion in the absence of an individual complaint; and*
- *commence litigation in court, of their own motion in the absence of an individual complaint.*

## **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 and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to administrative law to address these issues?**

The complexity of seeking review significantly impacts the ability of some people with disabilities to exercise legal capacity in relation to government decisions that adversely affect their rights or interests. As the ALRC's Issues Paper states,<sup>58</sup> people with disabilities may face the following barriers to seeking review of administrative decisions, including:

- lack of knowledge about the avenues of review;
- navigating complex processes; and
- concerns about not wanting to 'rock the boat' or challenging government authority where it may result in a loss of services or payment.

Obviously, people with disabilities have extremely diverse levels of education; financial resources; support networks; and levels of impairment. It is the interplay of these factors, among others, that determine whether a person is able usefully to engage with the processes for administrative review, rather than the fact of having a disability.

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<sup>58</sup> Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Issues Paper* (2013) at 44 [128].

However, PIAC's experience is that people with certain kinds of disability are usually less able to begin and maintain legal proceedings, including proceedings seeking review of government decisions, without support and legal assistance. These kinds of disability include cognitive impairments, intellectual disabilities, mental illnesses, and significant vision impairments. The difficulty faced by these groups in seeking review of government action is increased because these kinds of disability often intersect with other kinds of disadvantage: for example, poverty, homelessness, and social isolation. PIAC's experience is that the need for legal assistance is particularly acute at the later stages of the review processes before tribunals and courts, where limited resources and restrictive mandates often mean that front-line community legal centres are unable to assist applicants.

This should be of particular concern to the ALRC. Decisions made by Commonwealth agencies – Centrelink, Medicare, the Australian Taxation Office and the new National Disability Insurance Agency – more often and more significantly affect the rights of people with these kinds of disabilities. Further, the barriers to the exercise of legal capacity are compounded for people who have a disability that fall within other disadvantaged groups, for example, young people, and people from culturally and linguistically diverse backgrounds.

An example is illustrative. Consider a person with a psychiatric illness who applies for a disability support pension. If Centrelink refuses the person's application, the applicant must seek internal review within 13 weeks of being given notice of the decision. If unsuccessful at the internal review stage, the person must then apply for review to the Social Security Appeals Tribunal (SSAT) within 13 weeks. If the application is lodged later, the person loses his or her entitlement to back-pay, unless the applicant can show special circumstances justifying the delay. The SSAT will then set down a timetable for the filing of submissions and evidence, which the person must comply with. Eventually, the person will need to attend a hearing about the matter before Tribunal and represent himself or herself, unless the person has access to a legal representative. If unsuccessful at the SSAT, the person must apply to the AAT for merits review within 28 days. At the AAT, the SSAT process is repeated. The time limit for applying for review may be extended if the Tribunal is satisfied that it is reasonable to grant the extension and that there are special circumstances to justify doing so.<sup>59</sup> If the person is unsuccessful at the AAT, the person must file an application for judicial review of the decision by the Federal Court within 28 days. This involves seeking merits advice, developing an application and filing evidence. It also means that the person may potentially be liable for the Commonwealth's costs, and should be advised about that liability.

This example shows that successfully challenging an adverse Centrelink decision is a complex and time-consuming process. At a minimum, it relies on the applicant understanding the decision made against them, and their being able to understand the process for challenging the decision and to articulate and evidence their challenge convincingly. This is true of all Commonwealth administrative decisions.

PIAC's experience of working with disadvantaged clients with disabilities, particularly those with a mental illness, a cognitive impairment or an intellectual disability, is that most are unable successfully to seek review (beyond, perhaps, near-automatic internal review processes) without legal assistance. Such clients often do not have stable lives: it is difficult to obtain the relevant documents and to obtain timely instructions. When clients are put in contact with PIAC they are

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<sup>59</sup> *Administrative Appeals Tribunal Act 1975* (Cth), s 29(6)-(10).

often already significantly out of time in making an application. Statements of reasons for adverse decisions, if available, are often paltry, making it difficult to determine the prospects of an application for review. Further, PIAC's experience is that many clients do not pursue review either because they do not know that they can resist an adverse decision or because they consider it is too hard to do so.

In PIAC's view, the ability of people with disabilities to challenge adverse decisions would be improved by:

- The provision of short, plain-language reasons for any adverse decision;
- The availability of extensions of time at all stages of review where a person can demonstrate that their disability has adversely affected their ability to comply with the statutory timeframe. This could be achieved, for example, by way of a practice direction that applications for extensions of time made in reliance on disability are to be construed beneficially; and
- Commonwealth Departments being held to a strict standard of procedural fairness when making a decision adverse to the rights of a person with a known mental illness, or a known cognitive or intellectual disability.

Fundamentally, however, PIAC is of the view that the single best way to enhance the legal capacity of persons with disabilities in relation to administrative law is to increase funding for relevant front-line legal assistance, such as Legal Aid Commissions, the Welfare Rights Centre and specialist disability law centres. Administrative law is such a difficult and complex area that many people with disabilities will simply be unable to pursue review without assistance from community legal services. PIAC submits that such funding should not be limited to initial advice and assistance, but should encompass running judicial review test cases in public interest matters.

## **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?**

In 2012-2013, HPLS provided legal advice and casework assistance to 47 clients in relation to consumer complaint issues, as well as advice to 153 clients in relation to credit and debt matters.

For HPLS clients, homelessness and disability lead to greater vulnerability in relation to consumer and credit and debt issues. For many HPLS clients, issues that arise include difficulties in fully understanding contract terms, vulnerability to sales pitches by unscrupulous sales people and a lack of knowledge regarding their consumer rights.

The Australian Consumer Law (ACL) has improved and consolidated safeguards in relation to fair trading and consumer protection. People with a disability have specific rights under the ACL. For example, a debt collector must not take unfair advantage of any vulnerability, disability or other

similar circumstances.<sup>60</sup> This may amount to unconscionable conduct. However, proving unconscionable conduct is a relatively high hurdle. It took an appeal to the Full Federal Court to uphold the Australian Competition and Consumer Commission's (ACCC) case of unconscionable conduct against Lux in relation to the sale of vacuum cleaners to elderly consumers in their homes.<sup>61</sup>

It is pleasing that the ACL includes a provision that it is Parliament's intention that the statutory protection is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour (section 21(4), ACL). This only took effect on 1 January 2012 and did not apply to conduct in the Lux case. It remains to be seen whether this improves the issues in relation to competition and consumer law for people with a disability.

Regardless, a number of outstanding issues remain for people with disabilities in understanding and enforcing consumer rights. In the first instance, people with disability who are homeless are often on low incomes and have a limited engagement with the labour market. As such, they are vulnerable to sales contracts that appear to provide them with a 'special deal' but have hidden costs.

#### **Case study**

Brian is a 52 year old man with significant mental health issues and a physical disability. He is on the Disability Support Pension. In 2001, he suffered a workplace accident and was unable to work. He received workers compensation, but a relative of his 'borrowed' the money and never returned it, leaving him destitute. Last year, his mother died and his sister committed suicide. After seeing an advertisement on television for a special deal, he signed up with a phone company over the phone in order to keep in touch with his family. Soon after signing up, he found that he was paying monthly bills far higher than he expected when signing up. He also found the service unreliable. He constantly tried to ring to query his phone bill, but was on the phone for hours and transferred through to various departments. Finally, he called to terminate the contract, and was left with a debt of \$5000 he could not afford to repay.

In such circumstances, there is a need for greater protection of people with disabilities in signing up for consumer contracts, particularly when this is done over the phone and through door-to-door sales. Responsibility needs to be taken by companies and sellers to ensure that the consumer contract is suitable for the consumer, including making all reasonable enquiries and ensuring that the consumer fully understands the contract terms. Similarly to the Responsible Lending Obligations, this assessment should include a number of steps, including:

1. Making reasonable inquiries about the consumer's financial situation, and their requirements and objectives;
2. Taking reasonable steps to verify the consumer's financial situation;
3. Taking reasonable steps to ensure the consumer understands the terms of the contract, including any additional fees that may be incurred and providing information to the consumer prior to entering the contract (according to disclosure rules that dictate minimum levels of information to be provided to consumers);

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<sup>60</sup> Australian Competition and Consumer Commission, *Dealing with debt collectors*, <<http://www.accc.gov.au/consumers/debt-debt-collection/dealing-with-debt-collectors>>.

<sup>61</sup> *ACCC v Lux Distributors Pty Ltd* [2013] FCAFC 90.

4. Making a preliminary assessment about whether the consumer contract is 'not unsuitable' for the consumer (based on the inquiries and information obtained in the first two steps).

Secondly, lack of knowledge of consumer rights and the enforcement of these rights can leave people with disabilities more vulnerable to accrued debts and financial difficulties. As described in the case study above, Brian tried to resolve the issue regarding his contract directly with the company, but was unable to get a satisfactory resolution and was not aware of his rights in relation to the consumer contract, as well as his options for dispute resolution. Further work needs to be done to promote knowledge of consumer rights at the time of sale, as well as proper access to recourse such as details of the Office of Fair Trading in each state and access to legal services that can provide advice to disabled consumers.

The ACCC publishes a number of guides for consumers, to help them understand consumer rights and guarantees, contracts and agreements, debt and debt collection, misleading claims and advertising, amongst other issues. It is pleasing that it is possible for people to listen to these resources on the ACCC website. However, it does not appear that any of these resources are specifically targeted at people with a disability. PIAC considers it would be beneficial if the ACCC produced more resources, specifically for people with disability, in plain language, easy English and in a range of accessible formats.

PIAC also sees competition and consumer law issues arise in relation to people with disability through its Energy and Water Consumers Advocacy Program (EWCAP). In 2011/12 and 2012/13, EWON received a high number of complaints about door marketing to vulnerable customers, including people with an intellectual disability or serious health problems.<sup>62</sup> Many of them were signed up to contracts despite not being able to provide informed consent. Advocates reported to EWON that customers often find the contact with the door-to-door marketer distressing or intimidating, or they have been confused or misled about the purpose of the visit. It often involves considerable effort on the part of the advocate to have the contract cancelled and any termination fees waived. In some cases, advocates advised that the customer's inability to make an informed consent would have been obvious to the marketer.<sup>63</sup>

It is important for energy and water retailers to communicate with advocates to assist vulnerable customers with a disability. As EWON said in its 2011/12 annual report, the fact that these complaints are brought to EWON for resolution demonstrates that better processes are needed at the retailer's contact centre for dealing with what should be a relatively straightforward matter.

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<sup>62</sup> Energy and Water Ombudsman NSW, *EWON Annual Report 2012-2013*, <<http://www.ewon.com.au/index.cfm/publications/annual-reports/annual-report-20122013/consumer-issues/>>. Energy and Water Ombudsman NSW, *EWON Annual Report 2011-2012*

<sup>63</sup> <<http://www.ewon.com.au/index.cfm/publications/annual-reports/2011-2012/consumer-issues/>>. EWON Annual Report 2012-2013, *ibid*.

# Privacy

## Question 11

**What issues arise in relation to privacy 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 privacy to address these issues?**

PIAC submits that there is a clear public interest in families and friends being involved in the care and treatment of people with a mental illness. This clearly involves the sharing of information, and the general position should be that personal information cannot be disclosed without the consent of the consumer or patient. If there is a conflict between these principles, the right to confidentiality and privacy should prevail.

There are exceptions to common law principles of patient confidentiality and the statutory privacy principles and, in some situations, legislative requirements to disclose otherwise personal information. However, there are no general 'in the best interest of the patient' exceptions to either the common law confidentiality principles or the statutory privacy principles. PIAC would not support any changes that allowed confidential information to be disclosed without patient consent, either contemporaneously or prospectively.

The *Australian Charter of Healthcare Rights*, which has been adopted by all states and territories, recognises a 'right to privacy and confidentiality of ... personal information'.<sup>64</sup> Any exception to the maintenance of patient confidentiality, apart from the established exceptions, would be a direct abrogation of these established patient rights and the principles of the CRPD, which requires equal treatment before the law for people with a disability.

PIAC refers to its submission to the ALRC in relation to its Serious Invasions of Privacy in the Digital Era Inquiry. This submission highlighted a number of deficiencies in the current legal system in relation to people with disability. For example, there may be no legal recourse for a man with an intellectual disability who is filmed without his knowledge or consent while he is defecating in a public space, and the film is subsequently shown on the internet.<sup>65</sup>

PIAC supports a statutory cause of action for serious invasion of privacy. PIAC refers the ALRC to its submission for a full list of recommendations in relation to the detailed legal design of such a cause of action.<sup>66</sup>

The issue of consent is particularly sensitive for people with disability. Some people may have limited or no capacity to give or refuse consent (in a meaningful sense) to an invasion of privacy. PIAC recommends that consent should form part of the cause of action rather than a defence. The statutory cause of action should be framed so that it takes account of whether consent is

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<sup>64</sup> Australian Commission on Safety and Quality in Health Care, *Australian Charter of Healthcare Rights* <<http://www.safetyandquality.gov.au/our-work/national-priorities/charter-of-healthcare-rights/>>.

<sup>65</sup> This scenario is based on a real situation. Jessica Roth and Edward Santow, *Serious invasions of privacy in the digital era: submission to the Australian Law Reform Commission* (14 November 2013) Public Interest Advocacy Centre

<[http://www.piac.asn.au/sites/default/files/publications/extras/13.11.14\\_serious\\_invasions\\_of\\_privacy\\_in\\_the\\_digital\\_era\\_-\\_submission\\_to\\_alrc\\_0.pdf](http://www.piac.asn.au/sites/default/files/publications/extras/13.11.14_serious_invasions_of_privacy_in_the_digital_era_-_submission_to_alrc_0.pdf)>, 7.

<sup>66</sup> *Ibid.*

given genuinely and freely, is not obtained by fraud or duress, and demonstrates actual agreement between the parties.

PIAC notes that in some circumstances, it may be impossible to refuse consent to what is potentially a breach of privacy. For example, one cannot meaningfully consent, or refuse, to being subjected to video surveillance when standing in a lift or using an automatic teller machine. In most, if not all, such circumstances, there is no alternative to using the particular facility to access services. Consideration needs to be given to whether there should also be legislated obligations to disclose the use of video or other surveillance wherever it is used. Arguably, without such obligations, any consent is illusory.

## **Citizenship rights, public service and board participation**

### **Question 16**

**What changes, if any, should be made to the Commonwealth Electoral Act 1918 (Cth) or the Referendum (Machinery Provision) Act 1984 (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?**

Section 93(8) of the *Commonwealth Electoral Act 1918* (Cth) (CEA) disqualifies a person to have their name placed or retained on the electoral roll, and, in association, from voting, if they are found to be incapable of understanding the nature and significance of enrolling and voting, due to being of 'unsound mind'.

The current test as to whether the person in question understands 'the nature and significance of enrolment and voting' is inappropriate. It could be argued that people of 'sound mind' do not understand the 'nature and significance of enrolment and voting', and take chances or make 'bad' decisions regardless of whether their disability impacts on their decision-making capacity.

The recommendations by People with Disability (PWD) and the Australian Centre for Disability Law (ACDL) are informative in relation to this question. PWD and ACDL recognised that the definition of 'unsound mind' used in the federal legislation does not give a clear indication as to whether the person has the capacity to participate in the electoral process.<sup>67</sup> Relying on the judgment of Gleeson CJ in *Roach v Electoral Commission*, they concluded that the rationale for not granting people of unsound mind franchise is related to capacity to exercise choice, and, as such, the definition should be amended to 'a lack of capacity to exercise choice' in relation to electoral questions.<sup>68</sup>

The NSW Attorney General's Department's Capacity Toolkit outlines six capacity assessment principles:

- always presume a person has capacity;
- capacity is decision specific;
- don't assume a person lacks capacity based on appearance;
- assess a person's decision making ability, and not the decision they make;
- respect a person's privacy;

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<sup>67</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law (formerly known as NSW Disability Discrimination Legal Centre), 'Submission: Electoral Reform Green Paper – Strengthening Australia's Democracy', 13.

<sup>68</sup> Ibid.

- and substitute decision-making is a last resort.<sup>69</sup>

Taking these principles into account, the test of legal capacity should be premised on the presumption that a person has the capacity to make all decisions for themselves, and understand the implications of their decision. The onus then falls on the person challenging the presumption to prove on the facts that it is more likely than not that the person lacked the ability to make the decision relating to electoral questions. This evidence should then be put before an independent person or body to assess the person's capacity for the decision in question. The PWD and ACDL recommendations recognised that there should also be an easily accessible avenue of appeal if a determination is made against a person with a disability. This would be in accordance with Australia's obligations under Article 12 of the CRPD, procedural fairness and natural justice.<sup>70</sup> In fact, the Committee on the Rights of Persons with Disabilities recommended that Australia enact legislation to restore the presumption of the capacity of persons with disabilities to vote and exercise choice, and ensure that all aspects of voting in an election are made accessible to all citizens with disabilities.<sup>71</sup>

It is important to note that a person's capacity can vary in different circumstances, and depend on the type of decision that is required. Any determination as to whether a person lacks capacity to vote should be decision specific, and only apply to voting at a particular election as opposed to a blanket disqualification from the electoral process.<sup>72</sup>

## Question 17

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

There are four main issues that arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity.

### **1. Lack of easily understood information about candidates, voting and preferences**

The provision of information about voting must address the various needs of people with disability to ensure their autonomy and ability to vote independently. This information should be made available to people with disability in a timely and accurate manner both prior to, and at the time of, voting.

The information about the voting process, including voting registration forms, public notices about voting and information on polling cards, are often written in complex legal language, making it difficult for many people to understand, particularly voters with intellectual disability. This is further compounded by the fact that much of the information produced by political parties – policy documents and political broadcasts for example – are often conveyed in complex language that is not accessible for people with cognitive impairment.

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<sup>69</sup> NSW Government, above n 14.

<sup>70</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67, 13.

<sup>71</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Australia*, 21 October 2013, CRPD/C/AUS/CO/1 [51].

<sup>72</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67.

Disability discrimination advocates have recommended that electoral process information produced by the Australian Electoral Commission (AEC) and its State and Territory counterparts be written in easy English, and made available in a range of accessible formats.<sup>73</sup>

While the AEC produced an official guide to the 2013 Federal election which was available in several alternative formats, including audio CD, in Braille, large print, e-text and MP3 file,<sup>74</sup> this information was only made available 2.5 weeks prior to the election date.<sup>75</sup> It is important to reiterate that information should be made public as quickly as possible, because people with disability need to seek out in advance information that affects their voting experience, such as accessible polling places and available methods of voting.

The NSW Electoral Commission has developed a variety of resources to provide electors with easy-to-understand, relevant and accessible information about enrolment, elections and voting which is available for people with all disabilities including those with intellectual and/or psychosocial disabilities. These include audio, AUSLAN (with captioning and voice over), Braille, large print, animation/slideshow/video and Easy Read guides.<sup>76</sup> These resources contain a small number of words and clear illustrations to convey meaning, and it would greatly assist people with disability if such formats were implemented across all State and Territory jurisdictions.

PWD and ACDL recognised that information at the time of voting must also be in accessible formats, including measures such as the availability of augmentation systems and the presence of AUSLAN interpreters.<sup>77</sup> Since people with disability are also at risk of being pressured to vote in a particular direction by a family member or carer,<sup>78</sup> the presence of trained staff who are able to communicate the steps required to fill out the ballot paper and who are able to provide plain language information instructions, would result in improved voter autonomy, and further enhance the franchise for people who are deaf or hearing impaired.

It is important that political parties communicate with voters with disability to explain their policies, preferences and candidates. The AEC and its State and Territory counterparts could consider creating some conditions for the receipt of government funding, such as the information parties produce be accessible for people with disability, particularly those with cognitive impairment.<sup>79</sup>

## 2. Access to voting

It is important that all stages of the voting procedure are accessible for people with disability. These stages include:

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<sup>73</sup> Ibid, 6.

<sup>74</sup> Braille, large print, and audio CDs were only made available upon request.

<sup>75</sup> See media release of the Australian Electoral Commission, 'Official election guide delivered to nearly 10 million households', <<http://www.aec.gov.au/media/media-releases/2013/e08-21.htm>>.

<sup>76</sup> For details of the available formats, see Electoral Commission NSW, *Community Information Formats*, <[http://www.elections.nsw.gov.au/about\\_elections/community\\_information\\_resources/community\\_information\\_formats](http://www.elections.nsw.gov.au/about_elections/community_information_resources/community_information_formats)>.

<sup>77</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67, 6.

<sup>78</sup> Ibid, 7. See for example the case study provided by PWD: 'One of our clients stated that at his local polling booth there was no easy English information available. The polling booth official was unable to communicate the steps required to fill out the ballot paper. Fortunately, he had visited the booth with his father, and his father provided instructions. Our client did feel pressured to vote for a particular candidate, as he was aware that his father had voted for that party all his life.'

<sup>79</sup> For discussion about government funding for political parties, see National Disability Authority (Ireland), Discussion Paper – Accessible Voting, <[http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/1BDE21B926A1BE728025760100517AA7/\\$File/Accessible\\_Voting\\_2012\\_finalamended.htm](http://www.nda.ie/website/nda/cntmgmtnew.nsf/0/1BDE21B926A1BE728025760100517AA7/$File/Accessible_Voting_2012_finalamended.htm)> 20.

- transport to the polling station;
- physical access to the polling station;
- availability of assisted voting; and
- alternative methods of voting.

#### *Accessibility of polling places*

The polling venues used by the electoral commissions across Australian jurisdictions should increase accessibility with the aim of achieving full accessibility. This could be achieved by ensuring that there is one accessible polling site in each locality contained within an electorate. However, accessibility in this context would only be effective if the needs of people with physical disability, vision impairments and cognitive impairments are addressed. For this reason, disability discrimination advocates have recommended that polling sites be fully compliant with Australian Standard 1428: Design for Access and Mobility, Part 2.<sup>80</sup>

It is also important that the availability of accessible transport options is considered in the selection of polling venues. An accessible building may be of no use if the cost and logistics of getting there is prohibitively expensive, and requires people with disability to get an accessible taxi because of the unavailability of accessible public transport.<sup>81</sup>

In Sweden, the *Local Government Act* contains provisions that have a direct bearing on political participation for voters with disability. Section 4(12) of the Act entitles people with disability the right to compensation for travel if there is no accessible polling station in the municipality. The Australian federal legislation could be amended to contain similar provisions.

#### *Postal voting*

Sections 183, 184A and Schedule 2 of the CEA do not permit a person to cast a postal vote on the ground of disability. A postal vote is permitted under various circumstances, including for example, where a person is more than 8 kilometres away from the nearest polling booth on the day of the election. However, it must be reiterated that not all polling venues are accessible, and therefore people with disability may have to incur additional travel costs to attend the nearest accessible polling booth. NSW has reformed its legislation to allow for a person to cast a postal vote on the ground of disability as defined by the *Anti-Discrimination Act 1977 (NSW)*,<sup>82</sup> and it is recommended that the relevant federal legislation should be amended to follow suit.

### **3. Lack of secrecy for people with disability casting a vote**

Ensuring a secret ballot is an essential element of Australia's democracy, yet this is not readily made available to people with disability. Whilst section 234 of the CEA provides for the elector's right to have an assisted vote by providing for their preferences to another person, it nonetheless fails to provide reasonable adjustment for people with disability so that they may cast their vote independently and in secret on an equal basis with other voters. PWD and ACDL believe that this is breach of section 24 of the DDA as the service of providing electors with the facilities to enable

<sup>80</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67, 6.

<sup>81</sup> Ibid. See for example the case study provided by ACDL: 'One of our clients stated that her closest accessible polling booth was 45 minutes away by electric wheelchair and would cost around \$20-\$50 if she caught a taxi. Consequently, our client decided to vote at her closest polling booth, which was ten minutes away by electric wheelchair. However, as the polling booth was not accessible, she was forced to vote outside. She did not have sufficient privacy and felt undignified. Furthermore, our client was unable to place the ballot in the ballot box herself as the ballot box was inside the building and therefore had to rely on electoral officials to do it for her'.

<sup>82</sup> *Parliamentary Electorates and Elections Act 1912 (NSW)*, s 114A.

them to vote is provided on different terms and conditions.<sup>83</sup> For this reason, it is recommended that section 234 be amended to provide for reasonable adjustments to enable people with disability to vote independently and in secret.

There are a number of methods used in other jurisdictions that allow people with disability to vote independently. The following systems are in use in Germany, Austria and parts of the USA:

- templates;
- assisted voting;
- electronically assisted voting; and
- outreach models.

#### *Electronically assisted voting*

Work is underway to have all State and Territory Electoral Commissions adopt a single form of electronic voting based on a telephone keypad.<sup>84</sup> A system has been in operation in NSW since 2011 through the use of iVote. The system has allowed blind, vision impaired, and disabled voters, as well as those living in remote areas, to cast a secret and unassisted vote remotely using an interactive voice recognition-based phone number or an internet-enabled computer. Once lodged, iVotes are printed out in a central location as completed ballot papers and included in the manual count processes.

At the 2010 Federal election, telephone voting was available to voters who are blind or have low vision, to provide the voter with a secret vote.<sup>85</sup> The official marked off the elector's name and escorted them to a private area, telephoning a call centre and arranging for a trained voting assistant to take the elector's vote. The voting assistant did not know the elector's name, and the AEC official was not in the room when the elector's vote was correctly recorded, and thereby verifying that the elector's intentions were indicated correctly on the ballot paper.

Electronic assisted voting has greatly improved the franchise of people with disability, with many electors who are blind or have low vision responding positively to the use of electronic voting machines.<sup>86</sup> Furthermore, the AHRC supported the use of electronic assisted voting for Australians who cannot complete a secret ballot using pencil and paper by reason of physical disability, as well as for people who by reason of intellectual or learning disabilities, or other language or literacy difficulties cannot effectively use written instructions in completing a ballot paper, but could have effective access to a secret and independent ballot through being able to have their input read back to them electronically.<sup>87</sup>

In fact, submissions to the Joint Standing Committee in Electoral Matters from electors who are blind or have low vision and who had used electronically assisted voting at the 2007 federal election were positive, with many electors reiterating views of the value that they placed in being

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<sup>83</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67, 8.

<sup>84</sup> In Australia, electronic voting to enable voters with a disability to vote independently and secretly is used by the ACT Electoral Commission and has also been used in trials by the VEC and AEC in 2006 and 2007.

<sup>85</sup> Part XVB Electronically Assisted Voting for Sight Impaired People, *Commonwealth Electoral Act 1918* (Cth).

<sup>86</sup> For example, 90 per cent of electors who are blind or have low vision who participated in the 2007 federal election trial responded to an evaluation survey that they were 'very satisfied' or 'satisfied' with the use of electronic voting machines. See Sheridan and Associates, *Evaluation of the electronic voting trial for blind and sighted impaired electors at the 2007 federal election: Final evaluation report* (2008), 40.

<sup>87</sup> Joint Standing Committee on Electoral Matters, *Report on the 2007 Federal Election Electronic Voting Trials: Interim report of the inquiry into the conduct of the 2007 election and matters related thereto*, 61-62.

to cast an independent and secret vote, many for the first time in their lives. Some of the comments included:

As a vision impaired person who has an intense interest in politics I was delighted to be able for the first time in my 53 years of life to be able to vote independently and with dignity at the last federal election. This was due to the availability of an electronic voting system designed for use by blind and vision impaired persons.

This measure provided me with my first opportunity to exercise my right to an independent and secret vote. At previous elections I had been obliged to ask an AEC officer to mark a print ballot paper on my behalf because I am vision-impaired to the extent that I cannot read print or write by hand. I commend the AEC for implementing this initiative. While I had been looking forward to casting a vote for myself for many months leading up to the election, I was nonetheless overwhelmed by the positive and empowering experience of voting. I found the technology used ... very easy to use.

I am a 65-year-old person, totally blind from birth. I have never been able to vote independently - until last year! I am lucky enough to live in one of the constituencies taking part in the trial. I was able to vote completely unaided, once the system had been explained to me. Information material was available in braille, large print and audio. The help function on the computer was excellent.

As a blind person I would like to applaud Government for taking onboard the trial for electronic voting for the 2007 Federal election it enabled me to vote unassisted for the first time in my voting life. The sense of total independence was liberating.<sup>88</sup>

### *Outreach model*

An outreach model refers to a system where polling staff bring a computer (and printer) to residential institutions, nursing homes, community centres and other locations for voters who are unable to access the traditional voting process. This process, in effect, brings the polling station to the voter. This model, otherwise known as 'flying electoral commissions', has been in use in Austria, and was more recently trialed in Oregon (USA) using iPad computers and portable printers.<sup>89</sup> Although the pilot program in Oregon experienced a few minor technical glitches, the disabled voters who used the service gave positive feedback for this innovative approach to voting.<sup>90</sup>

Well-designed software would allow voters with disability to express their preferences relatively easily and accurately. The software could use touch-screen technology, similar to buying a train ticket, and the use of earphones could further protect privacy. More importantly, the resulting vote is confidential, and not seen by anyone during the voting process. The costs involved in designing, developing and testing the relevant software along with providing at least one printer and either a computer or telephone for every polling station would be significant. However, it would enable one group of electors, including those who are blind, have low vision, or suffer from a cognitive impairment, exercise the same quality of franchise as most of the community.

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<sup>88</sup> Ibid, 52.

<sup>89</sup> For a media report on this trial, see Mackenzie Weinger, 'Oregon iHappy with iVoting', *Politico*, (9 November 2011) <<http://www.politico.com/news/stories/1111/67983.html>>.

<sup>90</sup> Ibid.

#### **4. Fines associated with not voting where people with disability are not assisted to vote**

Section 245 of the CEA provides for penalty notices for those who fail to vote at an election. PWD and ACDL recognised that people with disability may inadvertently suffer under this section under certain situations. For example, a person with an intellectual disability may not understand when polling booths are open or their location, and a person with a psychiatric disability may be unwell during an election. Accordingly, this section should be amended to include people with disability, who because of their disability and other mitigating circumstances such as described above, are unable to vote at an election, as sufficient reason under section 254(4)(d) for the failure to vote.<sup>91</sup>

#### **Question 20**

**What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure that people with disability are not automatically or inappropriately excluded from serving on a jury or being eligible for jury service?**

PIAC believes that people with disability should not be automatically or inappropriately excluded from serving on a jury or being eligible for jury service. The issues that are relevant to allowing people who are deaf or blind to serve on juries are considered briefly below.

#### **Secrecy of the Jury Room**

Although there appear to be some concerns about maintaining the secrecy of the jury room and allowing a thirteenth person (ie, the translator/interpreter assisting the blind or deaf person), these concerns can be addressed through a series of measures, as suggested by the Disability Committee of the Bar Council of England and Wales in its submission to the Auld Review and quoted in the NSW Law Reform Commission's Report on Blind or Deaf Jurors. The measures are as follows:

[T]he anxieties about an interpreter are met if the interpreter takes an oath when first taking office in the jury box

- (i) To act as an interpreter as per the standard oath
- (ii) Not to communicate with any other member of the jury except to communicate the deaf juror's words to them, and their words to the deaf juror
- (iii) Not to discuss the case with the deaf juror
- (iv) Not to communicate with any other person about what was said by any member of the jury unless ordered to do so by the judge, or unless the deaf person is foreman and he is asked to deliver the jury's verdict to the Court.

The risk of disclosure by an interpreter can be dealt with by administering an oath requiring secrecy in relation to all that takes place in the jury room or by a statutory restriction. There is no reason to suppose that interpreters would not respect this obligation to any less degree than jurors who are subject to a similar non-disclosure obligation arising under the *Jury Act 1977* (NSW).

If a deaf juror were permitted to use real time transcription during deliberations, court stenographers would require access to the jury room in a manner similar to that of interpreters, that is, by swearing an oath. At present while not subject to express confidentiality provisions or oaths court reporters are present when evidence of a sensitive nature is given, for example in closed court. There is similarly no reason why they should not be trusted to comply with a

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<sup>91</sup> People with Disability Australia Incorporated and Australian Centre for Disability Law, above n 67, 13.

non-disclosure obligation arising following the taking of an oath or arising under a similar statutory obligation to that binding jurors.<sup>92</sup>

### **Length and cost of trial**

Changing existing trial processes and infrastructure so as to accommodate blind or deaf jurors raises potential concerns over the increased cost and duration of trials.

The submission from the Law Society of NSW to the NSW Law Reform Commission on Blind or Deaf Jurors estimated that it would be a costly exercise to 'provide a wide range of supports that may be utilised only rarely', as well as their ongoing maintenance.<sup>93</sup> This becomes especially relevant when considering that the NSW Law Reform Commission inquiry was in relation to trials in the NSW State jurisdiction where jury trials are far more prevalent than in Commonwealth jurisdiction.

Deaf jurors require the provision of computer-aided real time transcription CART or the hiring of two Auslan interpreters per day. CART is used in some US jurisdictions as the standard method of court reporting by means of machine shorthand using computer-aided transcription, and is used in some complex NSW trials. The NSW Law Reform Commission suggested that after the initial investment is made in CART technology, there are minimal ongoing costs and the CART system actually requires less staff than the current court reporting system.<sup>94</sup> Likewise, it was proposed that the cost of hiring Auslan staff is similarly insignificant. In relation to accommodating deaf jurors in NSW State jurisdiction, the NSW Law Reform Commission quoted PWD in saying that 'the costs of these adjustments as a proportion of the total cost of court administration is marginal and therefore no cause for concern.'<sup>95</sup>

In relation to blind jurors, computer programs exist that are able to translate printed documents into ones that can be printed by a braille printer on a virtually instantaneous basis. Computer programs also exist that are able to convert electronic documents to high quality synthetic speech. The Royal Blind Society claims that the only support required for blind jurors in courtrooms would be a sighted guide within the vicinity of the court, provision of written material in an appropriate form, and descriptions of visual evidence.<sup>96</sup> It may also be necessary to accommodate guide dogs in the courtroom.

Apart from cost and inconvenience, other issues that have been raised are that blind jurors have an inability to observe visual evidence effectively, and an inability to observe the demeanour of witnesses.

In some trials visual evidence will be imperative to the central issue/s in the case. In such circumstances, one option could be to give the Sheriff discretion to exclude potential jury members who are visually impaired. With this in mind, the NSW Law Reform Commission said

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<sup>92</sup> NSW Law Reform Commission, *Blind or deaf jurors*, Report No 114 (2006).

<sup>93</sup> Law Society of NSW, *Submission to the NSW Law Reform Commission inquiry into blind or deaf jurors*, (2006) 4.

<sup>94</sup> NSW Law Reform Commission, above n 92, 36.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, 49.

that visually impaired potential jury members should not automatically be excluded simply because there will be some evidence in the form of documents, diagrams or photographs.<sup>97</sup>

It is a fact that blind jurors will be unable to observe the visual demeanour of witnesses giving evidence in court. However, the importance of such observations in assisting jurors to discharge their duty is unclear. There are various suggestions in the NSW Law Reform Commission's findings that a witness's physical demeanour can actually be misleading with regard to assessing a witness's credibility.<sup>98</sup> The Royal Blind Society has argued that even though blind jurors are unable to observe a witness's demeanour visually, this shortcoming will be balanced and compensated by the heightened observation blind people may possess in relation to non-visual clues.

PIAC supports the 2006 recommendations of the NSW Law Reform Commission insofar as they are relevant to the Commonwealth jurisdiction:

1. Blind and deaf people should be qualified to serve on juries, taking into account the following:
  - a. Blind or deaf people have the right to claim exemption from service.
  - b. The court reserves the power to stand aside a blind or deaf person summoned for jury duty, if it appears to the court that, notwithstanding the provision of reasonable adjustments, the person is unable to discharge the duties of a juror in the circumstances of the trial.
  - c. Any interpreters, stenographers or other staff allowed by the trial judge to assist the deaf or blind juror should swear an oath to faithfully interpret or transcribe the proceedings or jury deliberations.
  - d. Any interpreters, stenographers or other staff allowed by the trial judge to assist the deaf or blind juror will be permitted in the jury room without breaching secrecy principles, so long as they are bound by requirements enforcing secrecy of deliberations.
  - e. Offences should be created for any interpreters, stenographers or other staff who do not fulfil their duties.
2. The Sheriff should develop guidelines for the provision of reasonable adjustments, including interpreters, transcribed, technology and other aids for use by blind jurors during the trial and deliberation.
3. Upon receiving notice of inclusion in the jury roll, a blind or deaf person should be asked to either claim an exemption from jury duty or notify the court of the reasonable adjustments the person will require to serve on the jury.

## Question 22

**What issues arise in relation to identity documents for people with disability? In what ways, if any, should Commonwealth laws and legal frameworks relating to identity documents be amended to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?**

People with disability who are homeless commonly have problems relating to proof of identity. Many HPLS clients have been homeless and itinerant for so long that they have lost all identification documents, such as passports, drivers' licences, etc. Also, they may no longer be in

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<sup>97</sup> Ibid, 53, 54.

<sup>98</sup> Ibid, 52, 53.

touch with family or friends who could swear a statutory declaration to say they have known the person for an extensive period and confirming their identity. As such, many HPLS clients are not able to access identity documents.

Though most of these identity documents are regulated under state legislation (eg, driver's licences and birth certificates), clients with disabilities accessing national identity documents such as a passport would face similar problems in confirming their identity. The need to have a certain number of identity documents and a fixed address can act as a barrier, as can application fees that are often prohibitive for HPLS clients. In addition, people with disability often need assistance in completing the various forms and navigating the bureaucracy relating to identity documents.

## 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?**

The LAW survey, completed by the NSW Law and Justice Foundation in 2012, involved 20,716 telephone interviews with household residents aged 15 years or over across Australia. It provides the first comprehensive quantitative assessment across Australia of an extensive range of legal needs on a representative sample of the population, examining the nature of legal problems, the pathways to their resolution and the demographic groups that struggle with the weight of their legal problems. In the LAW Survey, 'disability' was defined as any long-term illness or disability that had already lasted, or was likely to last, at least six months, and included a wide range of sensory, intellectual, learning, mental health, neurological and physical conditions.<sup>99</sup> The survey found:

In all jurisdictions, people with a disability stood out as the disadvantaged group that had the highest prevalence [of legal problems] according to the greatest number of measures.<sup>100</sup>

The regression results showed that people with a disability were about twice as likely overall to experience legal problems than other respondents. In addition, 61% of respondents with a disability experienced one or more legal problems compared to 47% of other respondents.<sup>101</sup> LAW Survey respondents with combined mental and physical illness/disability of a high severity were more than 10 times as likely to report legal problems as those with no illness/disability.<sup>102</sup> In fact, LAW Survey respondents with combined mental and physical illness or disability of a high severity were the most disadvantaged in accessing civil justice.<sup>103</sup>

There is also a lower level of finalisation of legal problems for people with a disability. This may indicate a reduced capacity to achieve legal resolution for people with a disability. The LAW

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<sup>99</sup> Law and Justice Foundation of NSW, above n 7, 1.

<sup>100</sup> Christine Coumarelos, Deborah Macourt, Julie People, Hugh M McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, *Legal Australia-Wide Survey: Legal Need in New South Wales* (2012) xv.

<sup>101</sup> Law and Justice Foundation of NSW, above n 99, 2.

<sup>102</sup> Christine Coumarelos, Pascoe Pleasence and Zhigang Wei, 'Law and disorders: illness/disability and the experience of everyday problems involving the law', (Updating Justice No 22, April 2013) 1.

<sup>103</sup> Coumarelos et al, *Legal Australia-Wide Survey*, above n 100.

Survey suggested that a number of factors could contribute to this reduced capability, such as the possibility that they have lower legal knowledge or legal capability, the fact that they have to deal with a greater number of substantial legal problems, and the possibility that their health and other non-legal needs complicate the legal resolution process.<sup>104</sup>

It has been suggested that the link between disability and legal problems is bidirectional: the impact of legal problems on people with a disability may further entrench their social exclusion, and people with a disability are more likely to experience legal problems.<sup>105</sup> They are also potentially subject to specific mental health laws and have extremely limited access to legal support in respect of the operation of those laws. In a paper on advocacy and legal representation in mental health tribunals, the authors reported:

Representation at Australian MHT hearings is still comparatively rare (5-10% in Victoria), partly because legal aid concentrates on involuntary in-patient admissions, neglecting the vast bulk of people on Community Treatment Orders (CTOs). In Swain's 2000 Victorian study, advocates appeared in just 8 per cent of cases, a rate that has remained stable. Similar rates (8.3%) apply in WA. Representation was higher in NSW in 2006 (16.2%), but mostly for inpatient rather than CTO reviews. This low rate of legal representation is not for lack of evidence about need.<sup>106</sup>

PIAC agrees with all the personal and systemic issues that are highlighted in the Issues Paper and may affect people with disability's ability to attain access to justice: communication barriers; difficulties accessing the necessary support, adjustments or aids; capacity to give instructions to legal representatives and capacity to participate in litigation; costs of legal representation; and misconceptions and stereotypes about people with disability as witnesses. PIAC highlights a few of these and associated recommendations below.

### **Communication barriers and accessing support**

PIAC has had a number of clients where communication barriers and accessing the necessary support, adjustment or aids, has been a problem in accessing justice. The Committee on the Rights of Persons with Disabilities was concerned at the lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as the lack of guidance on access to justice for persons with disabilities.<sup>107</sup> The Committee recommended that standard and compulsory modules on working with persons with disabilities be incorporated into training programmes for police officers, prison staff, lawyers, the judiciary and court personnel.

In PIAC's experience, legislation is often not accessible to people with disability. While ensuring that legislation is drafted in plain English is an important step towards improving the accessibility of legislation, there are also other practical issues that need to be addressed. For example, often 'the law' on an area is not contained in a single piece of legislation but is found in a number of

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<sup>104</sup> Law and Justice Foundation of NSW, above n 99.

<sup>105</sup> Christine Coumarelos and Zhigang Wei, 'The legal needs of people with different types of chronic illness or disability' (Justice Issues No 11, Law and Justice Foundation of NSW, 2009).

<sup>106</sup> Terry Carney, Fleur Beaupert, Julia Perry and David Tait, 'Advocacy and Participation in Mental Health Cases: Realisable Rights or Pipe Dreams?' Mental Health Review Board of Victoria [3] < [https://wic041u.server-secure.com/vs155205\\_secure/CMS/files/cms/283\\_Carney\\_T.pdf](https://wic041u.server-secure.com/vs155205_secure/CMS/files/cms/283_Carney_T.pdf) > [Internal citations deleted].

<sup>107</sup> Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session (2-13 September 2013)' (United Nations, 4 October 2013) [28].

different sources, spanning primary and subordinate legislation, policy and other soft-law instruments, and the common law. Furthermore, it is impossible to pick up a piece of legislation and read it like a book: established rules of statutory interpretation govern how legislation is interpreted, yet most lay-people have no knowledge of these rules. PIAC submits that in addition to plain English drafting, community legal centres and legal assistance centres be provided with additional funding to provide community-based training or guides on important areas of law that impact vulnerable groups such as people with disability.

### **Legal representation and costs**

Many people with a disability do not currently pay for legal representation, as they are usually represented by community legal centres, legal aid or by a pro bono private lawyer. PIAC is concerned that the existing disability discrimination legal centres that operate throughout Australia be properly funded. These specialist community legal centres provide important advice, legal representation and advocacy to people with disability. People with disability need specialist representation. Consideration should be given to increasing the funding of such specialist community legal centres. For example, the Australian Centre for Disability Law only has four staff.

A related issue to the costs of paying for legal representation is the risks associated with pursuing litigation. As was explained earlier, even where pro bono legal representation or representation on a conditional fee is secured, many meritorious cases do not proceed due to the risk of an adverse costs order. PIAC repeats its recommendations in relation to costs in response to Question 6:

PIAC submits that the federal courts should be made a no-costs jurisdiction for discrimination matters.

Provision should be made for the courts to make a costs order when:

- a party has conducted proceedings leading to unnecessary delays;
- the case is frivolous or vexatious; or
- the complaint is successful and the matter is classed by the court as a public interest matter.

Consideration should be given to increasing the funding to community legal centres and broadening the availability of Commonwealth legal aid for discrimination matters.

There is also a lack of funding for disbursements, which can often be substantial, and this can impede access to justice. PIAC refers the ALRC to its submission to the Financial Assistance Consultation of the Attorney General's Department in relation to its consultation paper about a new scheme for assistance with disbursements.<sup>108</sup> PIAC supports the establishment of a Commonwealth-funded consolidated financial assistance scheme to cover the cost of disbursements in a wide variety of legal matters, including disability discrimination.

### **Integrated approach**

Even if all these recommendations are adopted, they will not solve the problem of access to justice for people with disability. An integrated response from legal and non-legal services is vital for vulnerable clients for both civil and criminal law problems. The LAW Survey has underlined 'the importance of more integrated responses across both legal and non-legal services for people

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<sup>108</sup> Alexis Goodstone, *Where are the gaps? Consultation paper – a new scheme for assistance with disbursements* (18 May 2012) Public Interest Advocacy Centre <<http://www.piac.asn.au/publication/2012/06/where-are-gaps-consultation-paper>>.

who face interrelated legal and non-legal problems.’ In so far as illness and disability play a role in bringing about or exacerbating legal problems, the integration of legal and health services provides a means to secure early intervention to prevent problem escalation. In so far as legal problems cause illness or disability, the availability of legal help becomes directly relevant to health promotion, both in general and in relation to reducing health inequalities.<sup>109</sup>

In relation to criminal law, PIAC has recently released a discussion paper, *Sentencing Contradictions: Difficulties faced by people living with mental illness in contact with the criminal justice system*,<sup>110</sup> which illustrates some of the benefits and problems with alternative diversionary sentencing initiatives available in NSW.

Using case studies from HPLS, the report details some ‘best practice’ programs available in Australian jurisdictions and internationally. In particular, the paper examines ‘justice reinvestment’ and ‘problem-solving justice’ approaches. ‘Problem-solving justice’ redirects public resources to address the underlying factors that contribute to offending and re-offending. Examples include strengthening programs that support housing, job training, education, and treatment. Collaboration between legal and non-legal services is vital to properly meet a person’s legal and broader needs.

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

### **Question 26**

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

HPLS assisted 55 clients in 2012-2013 in relation to social security matters. The main problems experienced by HPLS clients include:

- applying for Centrelink payments and appealing adverse Centrelink decisions;
- Centrelink payments and domestic violence;
- meeting activity tests and participation requirements;
- being charged and prosecuted for overpayments;
- penalties for non-compliance;
- waiting (exclusion) periods;
- the effect of compensation payments on social security; and
- social security debts.

For HPLS clients with a disability, the social security system is often central to their lives and yet there are a number of problems. In the first instance, particularly for homeless people, the necessity of proof of identity and address documents is often a major issue in accessing social security benefits. This is addressed above in response to Question 22. Second, if a person is able to access benefits, there are often obligations and conditions attached that may not be fully understood by people with disability or that homeless people may have difficulty complying with due to poor literacy, problems receiving mail, and needing to give priority to more immediate

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<sup>109</sup> Coumarelos, Pleasence and Wei, above n 102, 3.

<sup>110</sup> Sam Sowerwine and Louis Schetzer, *Sentencing Contradictions – Difficulties faced by people living with mental illness in contact with the criminal justice system* (15 October 2013) Public Interest Advocacy Centre <[http://www.piac.asn.au/sites/default/files/briefing\\_paper\\_problemsolvingjustice.pdf](http://www.piac.asn.au/sites/default/files/briefing_paper_problemsolvingjustice.pdf)>.

pressures in their life, such as finding a place to sleep. If these conditions are breached, benefits can be reduced or revoked altogether.

### **Case study 1**

Dave is 52 years old and sleeping rough. He is an alcoholic with a mental health issue. He is on the Disability Support Pension. He received a text advising his next appointment date, however it was on a public holiday. He went in to Centrelink the next day and was forced to wait 2 hours before seeing a staff member, who advised him that it was fine and he would be paid the next day. The next day, he was not paid and had to go back to Centrelink. He waited another 90 minutes and was finally seen by a client services officer, who advised he would be paid the next day. Dave was paid the next day, one day later than expected.

### **Case study 2**

Gail was living in a boarding house. Her rent had been raised from \$130p/w to \$180p/w. As she missed her last appointment at Centrelink, she had not received her payments for two weeks, and fell behind in rent. Her rent was 50 days overdue and she was given a first notice that if she fails to pay then she will be evicted.

These case studies demonstrate the difficulties faced by clients in conforming with Centrelink obligations. In the first case study, the client took the initiative to go in to Centrelink to resolve the issue, but this is not always possible for all clients, as demonstrated through case study 2. These types of problems can lead to significant issues such as a breach, which can lead to homelessness if people do not have access to their income to pay rent.

Accessibility and understanding relevant information is vital, and yet still remains a problem. The move towards online and self-help portals is useful, but for people with disability, these modes of access are not always the most helpful. Often, people with disability will prefer to attend a Centrelink office rather than contact Centrelink online or over the telephone. The importance of having face to face contact where client service officers are properly trained in dealing with people with various disabilities is very important. Further, creating a space that is accessible for people with disability in Centrelink offices, such as ensuring proper seating and that waiting periods are not so long as to cause people distress. Effective communication is vital in ensuring that people understand their obligations and the requirements by Centrelink to avoid any possible issues such as breaches. Furthermore, proper and effective communication of appeal rights and complaints mechanisms are vital in ensuring appropriate resolution of matters where necessary.

## **Question 30**

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

PIAC has provided legal advice and representation to many individuals who allege that they have been unlawfully discriminated against by insurers or their agents, on the basis of their mental illness. In conducting this work, PIAC believes that in some cases, refusal by an insurer to provide a person with insurance or the benefit of an insurance policy because of their mental illness, constitutes unlawful discrimination.

PIAC has provided advice to individuals in circumstances where concerns about their mental illness are causing insurers to offer cover that is more expensive, or deny insurance altogether,

despite there being no diagnosis of a mental illness from a mental health professional. For example, a person may be denied insurance cover for all forms of mental illness in the future, just because they have seen a work counsellor for a short period, but have no other history of mental illness.

In other cases, some insurers appear to be overestimating the risks involved in insuring people who can demonstrate a high level of functioning despite their mental illness. For example, a person may be denied income protection insurance at a certain level because they have been diagnosed with depression, even though their doctor reports that their illness is highly unlikely to affect their ability to work, and despite the person being able to prove that they have not taken any sick leave at all during the years that they have been experiencing the depression.

These practices do not seem to apply in relation to people with physical ailments. A history of one mental illness can mean that people are refused insurance for other mental illnesses. But in the absence of a proven and significant link between the two different mental illnesses, such a practice is irrational. After all, a person with a broken leg obtained from a car crash is not excluded from making claims in relation to any physical injury obtained in a car crash in the future.

Discrimination against people with mental illness in the provision of general insurance policies is a significant issue. Nearly half of the Australian population will experience a form of mental disorder at some stage of their life.<sup>111</sup> Many of these individuals will hold or will intend to hold general insurance policies. In 2012, it was estimated that general insurers wrote approximately 54 million policies for general insurance.<sup>112</sup> People who have previously or who presently experienced mental illness may rely on their insurance policies to protect themselves and their families from suffering varying degrees of financial loss, depending on the nature and impact of a current or previous mental illness. In our experience however, individuals who have or who have had less severe forms of mental illness, such as minor to moderate depression and anxiety, have had difficulty obtaining general insurance policies for reasons that do not relate to their previous or current mental illness.

Section 46 of the DDA provides that insurance companies can discriminate against someone with a disability, including a mental illness, but only if this discrimination is reasonably based on relevant actuarial or statistical data, and other relevant factors, such as a medical opinion. Where no actuarial or statistical data exists upon which it is reasonable for an insurer to rely, the insurer may only rely on relevant factors to determine risk.<sup>113</sup>

In *QBE Travel Insurance v Bassanelli* [2004] FCA 396 ('Bassanelli'), the Federal Court found that an insurer must not rely solely on general assumptions about people of a particular age or sex or particular disability in deciding to refuse cover. In a practical sense, this might mean that insurance companies should consider whether a person who is receiving treatment for their mental illness, such as taking a prescribed course of medication or seeing a psychologist, should be treated as less of a risk than a person who is not receiving any treatment for their condition.

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<sup>111</sup> SANE Australia, *SANE Factsheet 13* (2010) <[www.sane.org](http://www.sane.org)>.

<sup>112</sup> KPMG, *General Insurance Survey* (September 2012) <[www.kpmg.com.au](http://www.kpmg.com.au)>.

<sup>113</sup> Similar provisions can be found in state anti-discrimination legislation. For example, see section 49Q of the *Anti-Discrimination Act 1977* (NSW) and section 47 of the *Equal Opportunity Act 2010* (Vic) which each provide a similar exception for insurers in the area of disability discrimination.

In other words, the law recognises that mental illness may increase the risk of a person making a claim on their insurance. The law allows for the different treatment of people with mental illness, but only where such discrimination is based on data that proves an additional risk. The law does not allow for such different treatment to be based on a hunch or on outdated notions about mental illness.

It is not known what data insurance companies rely on to assess the insurance risks of people experiencing mental illness. Based on experience in this area to date, PIAC does not believe that the insurance exception at section 46 of the DDA always operates in the manner in which it was intended. There is a lack of transparency regarding the statistical and actuarial data that insurance companies rely on to support decisions they make in relation to insuring individuals who have or do experience mental illness. This lack of transparency can at times operate to reinforce discrimination against people with mental illness.

PIAC proposes four amendments to section 46 of the DDA to enhance accountability surrounding the operation of the exception, and to ensure that the purpose of the section, and factors that need to be considered in relation to the operation of the section are clarified.

### **1. Reliance on statistical or actuarial data**

PIAC submits that where insurers indicate that they rely on actuarial or statistical data, and other relevant factors, to support their decision to discriminate under the DDA, they should be required to ensure that the evidence they are relying on is available to be provided to the consumer upon request. This material should be provided to the applicant individual in a readily accessible format (eg, in plain English) and it should make reference to the evidence of the specific additional risk that the applicant represents. Information provided to consumers by insurance companies should also include information on what steps the applicant may take if they are not satisfied with the decision.

Such an amendment is appropriate given that under the DDA, insurers bear the onus of proof in showing that they have met the requirement of section 46.<sup>114</sup> The current lack of a specific requirement for insurers to make the material that they rely on available to consumers means that the data is rarely provided. Many of PIAC's clients have experienced difficulties in obtaining data, or an outline of the data, from insurance companies, despite requesting it, leaving them feeling confused and unfairly treated by the decision of an insurance company.

In addition, s 46 of the DDA requires an insurer's decision to be reasonable having regard to 'all other relevant factors', whether or not reliable actuarial or statistical data exists.<sup>115</sup> We submit that an insurance company should be required to advise the consumer what relevant factors it considered, why it considers each of those factors to be relevant, and how those factors affected its decision. We submit that s 46 be amended to include this requirement.

### **2. Refining 'other relevant factors'**

Clarification of 'other relevant factors' should be consistent with current case law in this area. The Federal Court in *Bassanelli* said that 'other relevant factors' means:

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<sup>114</sup> See subsection 39(5)(a)(i) of the Exposure Draft, *QBE Travel Insurance v Bassanelli* [2004] FCA 396 and the Australian Human Rights Commission Guidelines for providers of Insurance and Superannuation (Revised 2005) which place the burden on the insurer to prove that they have reasonably relied upon the data.

<sup>115</sup> See subsections 46(1)(g), 46(2)(f)(ii) and 46(2)(g) of the DDA.

- a. All other relevant factors, and not just the factors selected for consideration by the particular insurer or other person seeking to invoke the exemption. This includes factors that reduce any risk to insurers as well as the factors that increase the risk to insurers; and
- b. Includes the factors that are relevant to the circumstances of the individual applicant, to ensure that insurance companies do not rely solely on generalised assumptions about people with a particular disability.

By way of example in relation to item 'b' above, for an income protection policy, it may not be appropriate for an insurance company to treat a person who has experienced a minor one-off depressive episode from which they had minimal side effects in the same way as an individual who has had a major depressive episode over a lengthy period of time for which they have been required to take considerable time off work.

### **3. Compliance**

To enhance accountability in relation to the operation of s 46 of the DDA, insurers should be required to advise the AHRC how often each year they have declined to provide insurance to someone on the ground of disability, or offered them insurance on different terms for this reason, and state whether they have relied on actuarial and statistical data to reach their decision. The AHRC should publish the number of refusals made every year by each insurer on its website and/or in its annual report, and specify broadly the category of disability invoked by the exception in relation to each instance.

This approach would ensure that consumers, the insurance sector and the AHRC are all able to monitor the extent to which insurance products are able to accommodate people with disabilities on an equal basis and how the exception is being used over time. It may also enhance the quality of decision-making, focusing on the requirement that decisions be evidence based.

### ***Recommendation***

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*PIAC recommends that section 46 of the DDA be amended to:*

- *require insurers to provide actuarial and statistical data that they have relied on to make decisions in relation to an offer of insurance to a consumer within a reasonable time frame upon request. This material should be provided to the applicant in a readily accessible and plain-language format, making reference to the specific additional risk that the applicant represents;*
- *require an insurance company to advise a consumer what relevant factors it considered, why it considers each of those factors to be relevant, and how those factors affected its decision in relation to an offer of insurance;*
- *clarify the meaning of 'other relevant factors' consistent with QBE Travel Insurance v Bassanelli [2004] FCA 396 to mean all relevant factors, including factors that reduce any risk to insurers as well as the factors that increase the risk to insurers, as well as factors that are relevant to the circumstances of the individual applicant.*

*Insurance companies should be required to advise the Australian Human Rights Commission how often they have declined to provide insurance to someone on the grounds of disability, or offered them insurance on different terms, on an annual basis. This information should specify whether the insurer has relied on actuarial and statistical data in making their decision. The AHRC should publish the number of refusals made every year by each insurer on its website and/or in its annual report, and specify broadly the category of disability the exception has been invoked in relation to in each instance.*

## Question 31

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

Explanatory material accompanying the DDA should clearly explain the purpose of the s 46 exception regarding insurance. This will provide guidance to insurers and consumers about the circumstances in which insurers can and cannot lawfully discriminate against people on the grounds of disability. PIAC also proposes that the explanatory material accompanying the DDA explicitly state that it is not reasonable to refuse to insure a person on the grounds of disability simply because of historical practice or the practice of other insurers, however widespread, or to rely on inaccurate assumptions or generalisations about the additional risks posed by people with disability.

PIAC welcomes steps that have already been taken by the Financial Services Council of Australia (FSC) to ensure that insurance companies implement mental health education programs and training for their staff. FSC Standard No 21 came into effect in 2013 and requires financial service providers to obtain annual certification in such training, including the conduct of a review of the effectiveness of the program that states the percentage of representatives who have successfully completed the training. PIAC submits that it would also be beneficial for the FSC Standard No. 21 to require insurance companies to provide training to their staff on the operation and requirements of s 46 of the DDA (the insurance exception).

In PIAC's experience, it would be beneficial for insurance companies to ensure that more extensive training on their products is provided to the insurance 'frontline' who sell those products, including insurance advisers and dealer groups (brokers). Many consumers have advised PIAC that insurance brokers from whom they have purchased general insurance products have not been in a position to advise them why particular adverse decisions have been made in relation to their application for insurance because of their mental illness. The lack of information and explanation has left many individuals feeling hurt, humiliated and confused.

Specifically, insurance companies should ensure that insurance advisors and dealer groups are provided with the necessary information on policies and underwriting guidelines that would allow a dealer to explain to a consumer why the insurance company has made a particular decision. For example, if an individual has had an exclusion or premium placed upon their policy because they have taken medication for mental illness in the past 6 months, a broker should explain to the individual why this is required as per the relevant policy underwriting guidelines. In addition, at the time of advising that an insurance clause has been placed on a policy, the broker should provide the consumer with information on whether and how the consumer may apply for the premium or exclusion to be removed. Training provided to insurance advisors and dealers by insurance companies should also include training on the operation and the requirements of s 46 of the DDA.

More generally, PIAC is of the view that insurance companies and underwriters could take the following steps to enhance the consistency of their operations with the objectives of the DDA, in relation to providing cover to people who have experienced mental illness:

1. Develop and test new insurance products that are specifically tailored towards providing general insurance cover for people who have experienced, or who currently experience

mental illness. Alternatively insurance companies and underwriters may make changes to existing insurance products to achieve the same effect.

2. Insurance companies could improve their complaints processes by increasing responsiveness to complaint and by providing more helpful, practical information and advice on why particular decisions have been made in relation to specific applications, and what would be required to remove any exclusion or premium that has been placed on a policy because of a previous or current mental illness.

### **Recommendation**

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*The objectives of s 46 of the DDA could be further enhanced in the following ways:*

- *Explanatory material accompanying the DDA should be amended to clearly explain the purpose of the insurance exception to insurers and the community. The explanatory material should explicitly confirm that it is not reasonable to refuse to insure a person on the grounds of disability simply because of historical practice or the practice of other insurers, however widespread, or to rely on inaccurate assumptions or generalisations on the additional risks posed by people with a disability.*
- *PIAC submits that training conducted by insurance companies in relation to Financial Services Council 21 should specifically include training on the operation and requirements of s 46 of the DDA (the insurance exception). This training should also be provided to insurance advisors and dealers.*
- *Insurance companies should be required to ensure that insurance advisors and dealer groups are provided with the necessary information on policies and underwriting guidelines that would allow a dealer to explain to a consumer why the insurance company has made a particular decision.*

*Insurance companies and underwriters should take the following steps to enhance the consistency of their operations with the objectives of the DDA, in relation to providing cover to people who have experienced mental illness:*

- *Develop and test new insurance products that are specifically tailored towards providing general insurance cover for people who have experienced, or who currently experience mental illness. Alternatively insurance companies and underwriters may make changes to existing insurance products to achieve the same effect.*
- *Insurance companies should improve their complaints processes by increasing responsiveness to complaints and by providing more helpful, practical information and advice on why particular decisions have been made in relation to specific applications, and what would be required to remove any exclusion or premium that has been placed on a policy because of disclosure of a previous or current mental illness.*

## Health care and aged care

### Question 34

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

As noted in the Issues Paper, the Australian Government provides funding for health services, but the management of health services through nationally set standards remains largely with the states and territories.<sup>116</sup> Accordingly, PIAC has limited its response to this question to changes that should be made to Commonwealth laws and legal frameworks only. PIAC has focused this answer on the area in which PIAC has specific expertise – that is, the provision of health care to those with mental illness, and the provision of health care to those in correctional facilities.

PIAC has a long history of involvement with penal reform. In recent years, PIAC has represented at Coronial Inquests the families of several prisoners who died in custody. PIAC has convened a network of organisations and stakeholders on the issue of mental health care and prisons, and is involved with a range of community organisations working with prisoners and former prisoners.

Prisoners have the right to be treated with humanity, dignity and respect while in detention.<sup>117</sup> The right to humane treatment in detention includes the right to appropriate health care under a number of international treaties and international human rights instruments.<sup>118</sup> These include the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT). Australia has signed and ratified both the ICCPR and CAT, which entered into force generally on 26 June 1987 and for Australia on 7 September 1989.

Additionally, the United Nations *Principles on the Protection of People with a Mental Illness and the Improvement of Mental Health Care* (the Principles) provide that ‘all persons have the right to the best available mental health care’ and that ‘all persons with a mental illness... shall be treated with humanity and respect’.<sup>119</sup> The Principles expressly apply to people serving sentences of imprisonment ‘to the fullest extent possible, with only limited modifications and exceptions as are necessary in the circumstances’.<sup>120</sup> The *Standard Minimum Rules for the Treatment of Prisoners* provide that ‘prisoners with other mental diseases or abnormalities shall be observed and treated in specialised institutions under medical management’ and while in prison shall be placed under the ‘special supervision of medical officer’.<sup>121</sup>

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<sup>116</sup> Australian Law Reform Commission, above n 58, 74.

<sup>117</sup> *International Covenant on Civil and Political Rights*, Articles 7 and 10.

<sup>118</sup> *Keenan v United Kingdom* [2001] ECHR 242 (3 April 2001) at 111, 116.

<sup>119</sup> Articles One and Two of the *Principles for the protection of person with mental illness and the improvement of mental health care*. Office of the United Nations High Commission, *Principles for the protection of person with mental illness and the improvement of mental health care*, (23 January 2012) Office of the United Nations High Commission <<http://www2.ohchr.org/english/law/principles.htm>>.

<sup>120</sup> Office of the United Nations High Commission, *ibid*.

<sup>121</sup> Office of the United Nations High Commission, *Standard Minimum Rules for the Treatment of Prisoners* (23 January 2012) Office of the United Nations High Commission <<http://www2.ohchr.org/english/law/treatmentprisoners.htm>>.

PIAC submits that relevant Commonwealth laws and legal frameworks with respect to the provision of health care in Australia, particularly to those in correctional centres, should comply with Australia's responsibilities under international treaties and human rights instruments. One way in which the Commonwealth government could ensure compliance with international treaties and human rights instruments is through ratification of the *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (OPCAT).<sup>122</sup>

PIAC strongly supports the ratification of OPCAT. We consider this should be done as soon as possible. Australia signed OPCAT in 2009, and as noted above, it has already signed and ratified CAT. On a bipartisan basis in June 2012, the Joint Standing Committee on Treaties recommended the ratification of OPCAT.<sup>123</sup>

In December 2012, PIAC, with 28 other organisations, wrote to the then Attorney-General, the Hon. Nicola Roxon MP, urging the immediate ratification of OPCAT. That letter said:

Our position is based on the serious and well-documented concerns with conditions of detention, including prisons, mental health facilities and immigration detention. We believe that ratifying OPCAT will assist Australian governments to protect the basic rights of people who are detained. There is strong evidence that external scrutiny of places of detention can deter and, where necessary, help to redress torture and other forms of ill treatment.

The Issues Paper identifies that a significant legal issue for people with disability in relation to health care is involuntary treatment.<sup>124</sup> Involuntary treatment can include the use of seclusion and restraint, including in custodial or correctional facilities. Accordingly, OPCAT is relevant not only to people in correctional facilities but also to those individuals with mental health issues held involuntarily in medical facilities.

The National Mental Health Commission has identified the seclusion and restraint of people with mental health issues as an important national issue, in both the health and hospital system and facilities (such as inpatient units and emergency departments) as well as in community, custodial and ambulatory settings.<sup>125</sup> This is discussed further below in response to Question 37.

CAT requires ratifying states to take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. OPCAT does not set any new human rights principles, but is aimed at the prevention of torture and other acts of cruel, inhuman or degrading treatment or punishment, as defined in CAT, through the involvement of national bodies and authorities in its implementation, as well as through visits and inspections by the United Nations Subcommittee on the Prevention of Torture (SPT).

OPCAT obliges the State Party to set up at the domestic level one or several National Preventive Mechanisms (NPMs). Under Part IV of OPCAT, NPMs are independent national preventive mechanisms for the prevention of torture and other acts of cruel, inhuman or degrading treatment

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<sup>122</sup> *Optional Protocol to the Convention Against Torture*, opened for signature on 4 February 2003, UN Doc A/RES/57/199 (entered into force 22 June 2006).

<sup>123</sup> Joint Standing Committee on Treaties, *Report 125: Treaties Tabled on 7 and 28 February 2012* (21 June 2012) 51-52.

<sup>124</sup> Australian Law Reform Commission, above note 58, 74.

<sup>125</sup> National Mental Health Commission, *National Seclusion and Restraint Project*, <<http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project.aspx>>.

or punishment. NPMs may be new bodies established by a State Party for the purpose of facilitating compliance with OPCAT, or they may be existing bodies designated as NPMs for the same purpose. NPMs visit and inspect places of detention, work with government and other detaining authorities to facilitate compliance with OPCAT, and monitor and report on the prevention of torture and cruel, inhuman and degrading treatment in their jurisdiction.

There are currently 65 States Parties that have ratified OPCAT and 71 signatories (including Australia).<sup>126</sup>

The objects of OPCAT are:

To establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.<sup>127</sup>

Therefore, the scope of OPCAT goes beyond the prevention of torture, extending to other practices that may lead to torture. OPCAT may include identifying and eliminating practices and conditions that may amount to cruel, inhuman or degrading treatment, reducing the likelihood of breaches of human rights and promoting a process of constant improvement in relation to conditions in detention.

The ratification of OPCAT is clearly in Australia's national interest. Because OPCAT is focused on preventing mistreatment in places of detention, OPCAT compliant authorities can be proactive in their strategies to avoid problems from occurring.

OPCAT is cost effective in that, for the relatively small outlay required to properly fund its implementation, OPCAT will save costs by improving conditions for those held in detention. This, in turn, will lead to less litigation and fewer deaths and injuries in custody, thereby reducing all the consequent costs to the community that flow from poor conditions or lack of adequate healthcare for those in detention.

OPCAT is based on the proposition that the most effective instruments for the prevention of torture and other forms of cruel, inhuman or degrading treatment or punishment are independent inspectorates with effective monitoring powers.

The extent and quality of independent scrutiny of different places of detention where individuals are held involuntarily in Australia is varied. Western Australia has an Inspector of Custodial Services, which was originally established by the Prisons Amendment Act 1999 and commenced operations in June 2000. In NSW, an Inspector of Corrective Services was appointed in September 2013.

Both the Commonwealth Ombudsman and the AHRC have significant powers of scrutiny over immigration detention, including some power to conduct unannounced inspections. Ombudsmen or other similar bodies, in all jurisdictions, have power to investigate complaints about people in

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<sup>126</sup> Mr Greg Manning, First Assistant Secretary, International Law and Human Rights Division, Attorney-General's Department, *Evidence to the Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia* (7 May 2012, Canberra).

<sup>127</sup> OPCAT, above n 122, Article 1.

prisons or police custody, together with powers to make recommendations flowing from their investigations, but their rights to access the places of detention are limited or non-existent.

The regulation and scrutiny of other places of detention is quite varied. As noted in the Issues Paper, 'state and territory laws generally provide for the involuntary detention and treatment of people with severe mental illness'. These laws also provide for processes of review of involuntary status but there is much less focus on the nature and conditions of places of detention.

### ***Recommendation***

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*PIAC recommends that Australia immediately ratify OPCAT.*

### **National Roadmap to Mental Health**

The Commonwealth government could also ensure compliance with international treaties and human rights instruments with respect to the provision of health care to those with mental illness through the mechanism of the Roadmap to National Mental Health Reform 2012 – 2022 (Roadmap).

On 7 December 2012, the Council of Australian Governments (COAG) endorsed the Roadmap.<sup>128</sup> PIAC commends COAG on the initiative, as PIAC believes that in order for the high rates of mental illness in Australia to be reduced, a national, coordinated strategy such as the Roadmap is essential.

The Roadmap contains a preliminary set of targets and indicators to monitor progress by all governments.<sup>129</sup> The preliminary performance indicators in the Roadmap include 'the use of mental health services in prisons' which has been chosen to 'indicate the extent to which the mental health support services available to prisoners are contributing to improved mental health'.

The Roadmap also includes a number of strategies to improve mental health, which are targeted at individuals in the criminal justice system and in prison. PIAC considers, however, that targets and indicators in the Roadmap should include a greater focus on the mental health of individuals in prison.

Targets and indicators in the Roadmap could also include consideration of whether Australia's current approach to mental health complies with our obligations under international treaties and human rights instruments.

## **Restrictive practices**

### **Question 37**

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

Despite existing safeguards in State and Territory mental health legislation and Australia's ratification of the CRPD, concerns about the widespread use of coercive treatment and detention

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<sup>128</sup> Council of Australian Governments, *Roadmap to National Mental Health Reform 2012 – 2022*, <<http://www.coag.gov.au/node/482>>.

<sup>129</sup> Ibid.

in closed hospital environments persist Australia wide. The closed-door settings of some disability services increase the risk that restrictive practices are being wrongfully carried out on some of the most vulnerable members of society. A recent report highlights this reality 'on the ground'.

The National Mental Health Commission recommends a reduction in the use of involuntary practices and the need to work to eliminate seclusion and restraint.<sup>130</sup> The report concludes that Australia-wide:

The experience of specific treatment practices without a patient's consent (or undertaken involuntarily) are of concern. Rates of involuntary admissions have remained stubbornly around 30 per cent of all mental health hospitalisations.<sup>131</sup>

The report confirms the right of patients to have treatment provided in the 'least restrictive' manner.<sup>132</sup> In February 2013, the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Mendez, said that there should be an 'absolute ban...[on] restraint and solitary confinement, for both long- and short-term application' in all places of detention, including in psychiatric institutions.<sup>133</sup>

A series of articles published in *The Australian* in July and August 2013 reported that hospitals around Australia are continuing to lock patients into seclusion at high and highly variable rates.<sup>134</sup> The articles also reported the magnitude and variety of harms that are linked to restrictive practices for both patients and staff.<sup>135</sup>

The widespread use of restrictive practices risk breaches of the CRPD and CAT and the lack of data on the use of restrictive practices is concerning. In response to the articles in *The Australian*, the AHRC and the National Mental Health Commission called for change, particularly for independent monitoring and oversight of the treatment of patients in psychiatric detention. An independent monitoring system would need to be rolled out nationally to ensure the issues are addressed consistently across jurisdictions. As explained above in response to Question 34, Australia should ratify OPCAT, which would require such monitoring.

PIAC agrees that national regulation or framework for the regulation and reduction of restrictive practices is needed. PIAC considers that any regulation must ensure higher standards of treatment and very tight regulation of restrictive practices. PIAC notes that any regulation needs to reflect the principles reflected in the CRPD and the UN Principles.

Article 12(4) of the CRPD discusses how decisions regarding restrictive treatment of persons with mental illness should be made. It states that:

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<sup>130</sup> National Mental Health Commission, *A Contributing Life: the 2012 National Report Card on Mental Health and Suicide Prevention* (2012) <<http://www.mentalhealthcommission.gov.au/our-report-card.aspx>>.

<sup>131</sup> Ibid, 11.

<sup>132</sup> Ibid, 45.

<sup>133</sup> Juan E. Mendez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/22/53, Human Rights Council (1 February 2013) <[http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)> [89(b)].

<sup>134</sup> Joel Magarey, 'Illegal psychiatric solitary exposed', *The Australian* (18 July 2013); Joel Magarey, 'Alone in a Living Hell', *The Australian* (26 July 2013) at 11; Joel Magarey, 'Burden taking its toll on stressed psychiatric nurses', *The Australian* (6 August 2013).

<sup>135</sup> Ibid.

State Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

In particular, Article 12(4) of the CRPD affirms that safeguards on restrictive and involuntary treatment should be included within mental health legislation. This includes ensuring that there are reliable and accessible mechanisms in place to allow for second opinions with respect to medical decisions, and protections in place to uphold the right for persons to apply for independent review with respect to decisions that affect them.

Specifically, PIAC suggests that any national or nationally consistent approach should ensure that restrictive practices:

- are only implemented as a last resort,
- are implemented for the least amount of time possible,
- are recorded, monitored and reviewed,
- have tight safeguards in place that are focused on minimising risk to staff, patients, carers and family, and
- are undertaken with a focus on ensuring decency, humanity and respect at all stages.