



**Submission of the
Anti-Discrimination Commissioner,
Tasmania,**

to the

**Australian Law Reform Commission's
Inquiry into
Equality, Capacity and Disability in
Commonwealth Laws**

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Office of the Anti-Discrimination Commissioner

Celebrating Difference, Embracing Equality

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1. Introduction

Thank you for the opportunity to make a submission to the Australian Law Reform Commission's Inquiry into Equality, Capacity and Disability in Commonwealth Laws.

The following provides information on issues relevant to the inquiry that have been raised within Tasmania, including summaries of relevant complaints received by me in relation to associated matters.

I would be happy to elaborate on these matters should you wish me to do so.

2. Summary of Recommendations

Recommendation 1

That the *Disability Discrimination Act 1992* (Cth) be amended to include provisions that enact justiciable rights to equality before the law for people with disability and all state and territory governments be encouraged to enact equivalent protections in discrimination laws.

Recommendation 2

That the Parliamentary Joint Committee on Human Rights continues to take a strong and active role in scrutinising Bills, Acts and related legislative instruments to ensure that they are compatible with Australia's human rights commitments, including those rights recognised in the Convention on the Rights of Persons with Disabilities.

Recommendation 3

That work continue to consolidate Commonwealth human rights and discrimination law, based on the principle that there will be no reductions in the protection afforded to rights holders, including people with disability.

Recommendation 4

That a nationally consistent approach to the determination of legal capacity be developed based on the adoption of least restrictive practices and supported decision making wherever possible consistent Article 12 of the *Convention on the Rights of Persons with Disability*.

Recommendation 5

That the *National Disability Strategy 2010–2020* be amended to include an undertaking to develop a nationally consistent approach to defining capacity, involving the establishment of a whole-of-government cross jurisdictional forum, under the aegis of the Council of Australian Governments, to establish core principles and identify the most appropriate option for developing a consistent national approach.

Recommendation 6

That the *Australian Human Rights Commission Act 1986* (Cth) and related legislation include provision for complaints to be made by a person or organisation,

who is not affected by the alleged breach or breaches, on behalf of a person or persons affected by an alleged breach or breaches of the legislation and that amendments be made to the *Federal Court of Australia Act 1976* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) to give a person or organisation that has made such a complaint standing to commence proceedings under the legislation in those courts. The provisions should include criteria for determining where a person or organisation should be granted standing by the Australian Human Rights Commission to make such a complaint with the criteria not being overly onerous.

Recommendation 7

That provisions be introduced for the relevant special-purpose Commissioner or the Australian Human Rights Commission to (a) have standing in respect of all discrimination complaints that proceed to hearing as a party providing assistance similar the role of the Canadian Human Rights Commission under the *Canadian Human Rights Act 1985*; and (b) have standing to prosecute failures to comply with standards made under the future consolidated legislation and current federal discrimination legislation.

Recommendation 8

That consideration is given to introducing provisions that would enable the special-purpose Commissioners or the Australian Human Rights Commission to have standing as a complainant in matters where the Commission has conducted an investigation into systemic discrimination or prohibited conduct and formed the view that a strong *prima facie* case exists and there is no complainant identified.

Recommendation 9

That Police Ministers at a national level commission the development of consistent national protocols for the improvement of police procedures in all jurisdictions to ensure that both victims and alleged offenders with disability are better able to the identified and receive the appropriate support to enable them to understand police procedures and exercise their rights in accordance with those procedures. This should include a commitment to minimum education and training standards in order that police better understand the needs and rights of people with disability and improved arrangements to ensure the availability of support services in situations where police interact with vulnerable people who exhibit signs of possible disability or mental health conditions.

Recommendation 10

That part of the process identified in recommendation 8 above include the development of a simple screening test for use by Officers when they suspect they may be interacting with a person with disability and that relevant Police Manuals be amended to provide guidance on how to identify and address disability and impairment for people coming into contact with the justice system.

Recommendation 11

Relevant legislation be amended to ensure that police have an obligation to have an independent third person present during interviews of a person suspected of having a disability.

Recommendation 12

That court officials, including judges, magistrates, and legal practitioners be required to complete appropriate training to assist in identifying people with disability, and court procedures and associated legislation be amended to ensure that where a person with disability is required to participate in the justice system they are able to participate effectively and equitably.

Recommendation 13

That the courts make available information in Easy English format, using simple and direct language, pictures, icons or photos to add meaning to the text.

Recommendation 14

That specialist legal services be made available in all jurisdictions to assist people with disability who come into contact with the justice system.

Recommendation 15

That members of juries and other participants in the criminal justice system be made aware of the disability of a witness or offender where appropriate and that consideration be given to enabling pre-trial directions hearings for all people with disability undergoing examination where necessary.

Recommendation 16

That arrangements for the participation of people with disability in court processes be reviewed, with amendment to evidence laws and related instruments to include a clear commitment to the use of alternative communication modes to ensure non-discriminatory access to all aspects of the procedures.

Recommendation 17

That relevant state and territory legislation be amended to make provision for the establishment of a Disability Visitors Scheme in order to ensure that people with disability are being treated and cared for with dignity and respect whilst under supervision orders and their concerns are identified and assessed.

Recommendation 18

That improved guidance be provided within Acts such as the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and related Acts at state, territory and federal levels, including those related to the provision of disability and mental health services governing arrangements for those who are detained in circumstances where there has been no offence committed or where the offence has not proceeded to trial. Guidance should include requirements for periodic monitoring and regular consideration of whether detention remains the most appropriate course of action.

Recommendation 19

That transitional facilities be established to enable improved 'step-down' arrangements for those being considered for release.

Recommendation 20

That bail hostels be established and made available in order to ensure that people with disability are not denied bail due to lack of appropriate accommodation or access to mainstream disability support services.

Recommendation 21

That the findings of this report and that of the Australian Human Rights Commission Report in response to the AHRC Inquiry into Access to Justice in the Criminal Justice System for People with Disability, be provided to the Standing Committee of Attorney's General for review and the identification of a co-ordinated and nationally consistent response.

Recommendation 22

That the Insurance Reform Advisory Group be requested to oversee the development of an Insurance Industry Discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exceptions in discrimination law are to apply.

Recommendation 23

That the proposed Insurance Industry Discrimination Compliance Code be the subject of consultation with stakeholders and with members of the Australian Council of Human Rights Authorities (ACHRA)

Recommendation 24

That, subject to the passage of consolidated human rights and discrimination law at the Commonwealth level and agreement by the members of ACHRA, the Australian Human Rights Commission be requested to certify the Insurance Industry Discrimination Compliance Code for application across the insurance sector. In the absence of that consolidation, that IRAG or the Insurance Council of Australia work with ACHRA to identify alternative mechanisms to implement the Insurance Industry Discrimination Compliance Code

Recommendation 25

That the Australian Human Rights Commission be requested to develop national guidelines, in collaboration with ACHRA, on the way in which exceptions for insurance provision in discrimination law are to operate. Such guidelines should include information on how any exception should apply, the nature of the actuarial, statistical or other data required to substantiate a claim for exception and examples of how insurers can meet the terms of the exception in the least discriminatory manner.

Recommendation 26

That the relevant section of the *Disability Discrimination Act 1992* (and equivalent state and territory discrimination provisions) be amended to provide that a condition of insurers having protection from liability by reason of exception include a requirement that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the federal Disability Discrimination Commissioner.

Recommendation 27

That all jurisdictions make provision for the establishment of an independent Official Visitors program for people with disability to enable independent third parties to have regular, unannounced and direct contact with persons with disability in congregate or supported care settings; to monitor conditions of people in institutional and related care settings; and to take and investigate complaints involving practices that may restrict the rights of a person, including those that are imposed as a result of coercion, discipline, convenience or retaliation by staff, family members or others providing support.

Recommendation 28

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that states and territories remove references to disability as a risk factor warranting notification to child protection authorities.

Recommendation 29

That state and territory legislation governing the care and protection of children include provisions making it unlawful to remove a child solely on the basis of parental disability.

Recommendation 30

That state and territory child protection authorities be required to arrange for all professionals involved in the notification, assessment, removal and care of children to undertake certified training in relation to disability and parenthood, including options for supportive assistance to prevent child removal.

Recommendation 31

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include provision for the mandatory referral to advocacy support services of parents with disability facing possible action by child protection.

Recommendation 32

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that legal representation is provided on a mandatory basis for parents with disability at risk of having their children removed by court action.

Recommendation 33

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that judicial officers involved in determining child protection matters undertake certified training in relation to disability and childhood, including coverage of options for implementing support to prevent child removal.

Recommendation 34

That a co-ordinated national approach to implementation of the *Disability Standards for Accessible Public Transport 2002* be adopted by the Standing Council on Transport and Infrastructure.

Recommendation 35

That an intergovernmental agreement be developed by the Standing Council on Transport and Infrastructure to progress implementation of the *Disability Standards for Accessible Public Transport 2002*, establish implementation governance structures and a national reporting framework.

Recommendation 36

That nationally consistent guidelines (including technical standards) specific to each transport mode be developed, including the clear identification of responsibility for overseeing the implementation of the standard and the delivery of accessible public transport services

3. Legislative and policy framework

People with disability in Tasmania

Tasmania has the highest proportion of people with disability of any state or territory in Australia, with around 119,000 or 24.6% of people in Tasmania having some form of disability.¹

The large number of people with disability in Tasmania is, in part, due to the age profile of the Tasmanian population. Tasmania also has the highest proportion of people aged 65 years and over with disability (55%), due to the number of people who have acquired a disability as they age.² Those with profound or severe core activity limitation account for approximately 7% of the total population, again the highest proportion within the population of any state or territory.³

Protection under discrimination law

The *Anti-Discrimination Act 1998* (Tas) (the ADA) provides that it is unlawful to discriminate against a person on the basis of disability.⁴ It also make it unlawful to:

engage in conduct that offends, humiliates, intimidates, insults or ridicules on the basis of disability⁵; or
incite, by a public act, hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of disability.⁶

There is no requirement under the ADA for the disability to be permanent. Nor is the protection afforded under the ADA limited to Tasmanians, but applies to any person who is discriminated against or subjected to other

¹ Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, 2012* (Cat. No. 4430.0 Table 4).

² Ibid .

³ Ibid .

⁴ *Anti-Discrimination Act 1998* (Tas) s 16(k).

⁵ *Anti-Discrimination Act 1998* (Tas) s 17(1) as amended in 2013 with effect from 1 January 2014.

⁶ *Anti-Discrimination Act 1998* (Tas) s 19(b).

prohibited conduct in Tasmania or where there is a sufficient connection between the action or conduct and the State of Tasmania. So, for example, a person with disability visiting Tasmania from interstate has the same protection under the ADA as a Tasmanian resident and a person with disability living in another part of Australia who is discriminated against in relation to an employment opportunity in Tasmania has the same protection under the ADA as a Tasmanian resident, even if the person was not physically in Tasmania at the relevant time.

Discrimination is unlawful in specified areas of activity, including employment; education and training; provision of facilities, goods and services; accommodation; membership and activity of clubs; administration of any law of the State or any State program; and/or awards, enterprise agreements or industrial agreements.⁷

Discrimination prohibited under the Tasmanian Act includes both ‘direct’ and ‘indirect’ discrimination.⁸ The Tasmanian Act provides, in section 14, that:

- (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute ... less favourably than a person without that attribute ...
- (3) For direct discrimination to take place, it is not necessary –
 - (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
 - (b) that the person who discriminates regards the treatment as unfavourable; or
 - (c) that the person who discriminates has any particular motive in discriminating.

Indirect discrimination is defined in section 15 of the Tasmanian Act:

- (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –
 - (a) share, or are believed to share, a prescribed attribute; or
 - (b) share, or are believed to share, any of the characteristics imputed to that attribute –
more than a person who is not a member of that group.

⁷ *Anti-Discrimination Act 1998* (Tas) s 22. Express protection in relation to the administration of any law of the State or any State program and awards, enterprise agreements or industrial agreements has only been applied to disability from 1 January 2014, as a result of amendments to the Act in 2013.

⁸ *Anti-Discrimination Act 1998* (Tas) s 14(1).

- (2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

These provisions are broadly equivalent to those found in the *Disability Discrimination Act 1992* (Cth) (the DDA).⁹

Under the ADA, an ‘exception’ applies where a respondent can demonstrate that the discrimination was ‘reasonably necessary’ to comply with ‘any law of this State or the Commonwealth’.¹⁰ In addition, in respect of compliance with Commonwealth law, an ‘exemption’ is provided in section 47 of the DDA for ‘anything done ... in direct compliance with a prescribed law’.¹¹ However no Tasmanian laws have been prescribed under this provision of the DDA.

Whilst it is open to the Tasmanian Anti-Discrimination Commissioner under section 6(g) of the ADA to examine any legislation and report to the Minister as to whether it is discriminatory or not, once that legislation is in place the extent of the Commissioner’s authority with respect to accepting complaints actions taken to comply with provisions within those laws is limited by section 24(a), but only where those actions are ‘reasonably necessary’ to achieve compliance. However actions taken in the administration of those laws are open to complaint.

Another exception applies where the discrimination ‘is for the purpose of carrying out a scheme for the benefit of a group which is disadvantaged or has a special need because of a prescribed attribute’¹² or is through a ‘program, plan or arrangement designed to promote equal opportunity for a group of people who are disadvantaged or have a special need because of a prescribed attribute’.¹³

Level of complaint about disability discrimination

Allegations of discrimination and prohibited conduct on the basis of disability continue to dominate the number of complaints received under the ADA.¹⁴ Of the 159 complaints made under the ADA in 2012–13, 72 or 45.3% included allegations of discrimination on the basis of disability. Incitement on the basis of disability was alleged in 20 complaints.¹⁵

⁹ *Disability Discrimination Act 1992* (Cth) ss 4, 5, 7 and 24.

¹⁰ *Anti-Discrimination Act 1998* (Tas) s 24.

¹¹ *Disability Discrimination Act 1992* (Cth) s 47.

¹² *Anti-Discrimination Act 1998* (Tas) s 25.

¹³ *Anti-Discrimination Act 1998* (Tas) s 26.

¹⁴ Disability discrimination has been alleged in a significantly higher percentage of complaints made under the ADA in all years since 2003–04. Records for the years prior to that seem to indicate the same pattern..

¹⁵ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2012–13* (2013) 29 and 42.

The provision of facilities, goods and services is the most often identified area of complaint involving those who identify disability as an attribute, followed by employment.

Table 1: Disability complaints made by area of activity¹⁶

Area of Activity	# of complaints alleging disability discrimination
Provision of facilities, goods and services	83
Employment	58
Education and training	15
Accommodation	20
Membership and activities of clubs	8
Administration of State laws and programs*	0
Industrial awards and enterprise agreements*	0

* This area of activity did not apply to disability discrimination during the reporting period. The protection in this area of activity extended to disability from 1 January 2014.

Government commitment to equality and equal opportunity on the basis of disability

Action to address discrimination in the provision of services delivered and regulated by State Government agencies, including under State laws and programs, is set out with the Tasmanian Government's *Disability Framework for Action*. First adopted in 2005, the current *Framework* was adopted by the Tasmanian Government in 2013.¹⁷ It covers the period 2013–2017.

The 'vision' outlined in the *Disability Framework for Action* is for '[a] fully inclusive and participatory society in which people with disability are valued and respected as equal and contributing members of the community'.¹⁸ This includes having their independence recognised so that they are able to make choices about decisions that affect their lives.

The *Disability Framework for Action* requires that each Tasmanian Government Agency prepare a Disability Action Plan and work collaboratively with other levels of government, industry and the non-government sector to achieve outcomes.¹⁹

¹⁶ Ibid 38–39.

¹⁷ Government of Tasmania, *Disability Framework for Action 2013-2017* (DPAC December 2012) <http://www.dpac.tas.gov.au/divisions/cdd/policy/our_policies/disability_framework_for_action> at 16 January 2014.

¹⁸ Ibid 15.

¹⁹ Ibid 12.

In relation to the protection of rights and access to justice the *Disability Framework for Action* commits the Tasmanian Government to ensure that appropriate laws and regulations are in place to protect the rights of people with disability. It also commits to ensuring that appropriate complaints mechanisms and support for people with disability to exercise choice and control over their lives. This includes exercising the right to vote, to stand for election and become a member of a jury. The following table outlines areas for action identified in the DFA in the areas of protection of rights, justice and legislation.²⁰

Table 2: Areas for Action: Rights Protection, Justice and Legislation²¹

2.1	Increase awareness and acceptance of the rights of people with disability
2.1.1	Promote awareness and acceptance of the rights of people with disability.
2.2	Protect rights
2.2.1	Ensure that relevant Tasmanian legislation complies with the principles and articles in the Convention on the Rights of Persons with Disabilities.
2.2.2	Maintain and strengthen protections and supports for people with disability who experience or are at risk of experiencing violence, sexual assault, abuse and neglect.
2.3	Enable rights and responsibilities to be exercised
2.3.1	Ensure people with disability have every opportunity to be active participants in the civic life of the community—as jurors, board members and elected representatives.
2.3.2	Ensure supported decision-making safeguards for those people who need them are in place, including accountability of guardianship and substitute decision-makers.
2.3.3	Support independent advocacy to protect the rights of people with disability.
2.3.4	Enable people with disability to exercise their rights through self-advocacy and through appropriate complaints, review and appeal mechanisms.
2.3.5	Review Tasmania’s guardianship legislation to explore how “supported decision making” might be implemented in place of some “substitute decision making” arrangements and ensure that the legislation is consistent with the Convention on the Rights of Persons with Disabilities.
2.3.6	Explore ways to improve the experience of people with intellectual disability who come into contact with the child protection system.
2.4	Provide more effective responses from the criminal justice system to people with disability who have complex needs or increased vulnerabilities
2.4.1	Improve support for people with an intellectual disability, cognitive impairment or mental illness in, or at risk of entering, the criminal justice system, and on leaving it.

²⁰ Ibid 20.

²¹ Ibid 20.

4. Equality before the law

The fact that complaints about discrimination on the basis of disability continue to dominate the number of complaints made under the ADA indicates the need for new approaches to address the discrimination faced by people with disability and reduce the barriers to their participation within the broader community.

Mechanisms to address inequality in legislation

The removal of remaining provisions that involve, require or permit discrimination on the basis of disability in Commonwealth, state and territory law is an important step in this direction. I consider this should be advanced in the first place by a strong commitment to the principle of equality before the law for people with disability along the lines of that provided by section 10 of the *Racial Discrimination Act 1975* (Cth) (RDA).

Section 10 of the RDA operates by modifying any law of the Commonwealth, states or territories that denies or limits the rights of people of a particular race, colour or national or ethnic origin.

There is currently no equivalent of section 10 of the RDA in any other Commonwealth, state or territory legislation. Whilst one of the objectives of the DDA is ‘to ensure, as far as practicable, that people with disability have the same rights to equality before the law as others in the community’²², there are no specific provisions to give effect to this object within the substantive provisions of that Act.

The inclusion of a new provision in the DDA that provides for equality before the law would be consistent with Australia’s international human rights obligations and assist in protecting rights in this area. Where there is a need to limit or otherwise circumscribe the legal rights of people with disability, this should be achieved by the application of exceptions. This approach is consistent with the finding of the Productivity Commission review of the DDA and would assist in answering questions about whether complaints made under the DDA are able to challenge discriminatory

²² *Disability Discrimination Act 1992* (Cth) s 3(b).

provisions within laws themselves, rather than actions taken in the administration of those laws.²³

Similarly, it is important that arrangements to ensure that Commonwealth laws comply international human rights standards continue to be implemented and supported at the Commonwealth level; in particular that the Parliamentary Joint Committee on Human Rights provided for under legislation adopted in 2011²⁴ continues to take a strong and active role in scrutinising Bills, Acts and related legislative instruments for their compatibility with human rights, including the rights recognised by the *Convention on the Rights of Persons with Disabilities* (CRPD), the *International Covenant on Economic Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR).²⁵

It is also imperative that the work commenced in 2011 to consolidate Commonwealth discrimination laws continues so as to achieve greater consistency in the protections afforded at both Commonwealth, state and territory levels. This work must proceed on the basis that there will be no reduction in the current protections afforded specific groups, including people with disability.

Recommendation 1

That the *Disability Discrimination Act 1992* (Cth) be amended to include provisions that enact justiciable rights to equality before the law for people with disability and all state and territory governments be encouraged to enact equivalent protections in discrimination laws.

Recommendation 2

That the Parliamentary Joint Committee on Human Rights continue to take a strong and active role in scrutinising Bills, Acts and related legislative instruments to ensure that they are compatible with Australia's human rights commitments,

²³ Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report No. 30 2004) 264–65.

²⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

²⁵ United Nations, *Convention on the Right of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008; ratified by Australia on 17 July 2008; entered into force for Australia 16 August 2008).

United Nations, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, UNTS 3 (entered into force 3 January 1976; ratified by Australia on 10 December 1975; entered into force for Australia on 10 March 1976).

United Nations, *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966. UNTS 171 (entered into force 23 March 1976; ratified by Australia on 13 August 1980; entered into force for Australia on 13 November 1980, except Article 41, which entered into force on 28 January 1993).

including those rights recognised in the *Convention on the Rights of Persons with Disabilities*.

Recommendation 3

That work continue to consolidate Commonwealth human rights and discrimination legislation, based on the principle that there will be no reductions in the protection against discrimination and related conduct that is currently provided, including the protection against discrimination and related conduct on the basis of disability.

5. Legal Capacity

As outlined in the ALRC Issues Paper, the effect of article 12 of the *Convention on the Rights of Persons with Disability* and associated interpretative documents is to require parties to introduce models for supported decision making wherever possible.

Considerable debate exists, however, on the characteristics of capacity and the circumstances in which denial of legal capacity through guardianship legislation may impact on the rights of people with disability to equality before the law. Key issues relate to how capacity is assessed and the principles upon which those assessments are made.

As a consequence there is no consistent national definition of capacity and the ways in which it is assessed varies across jurisdictions. In a number of cases the approach adopted does not give full effect to commitments arising under the CRPD.

Tasmania was one of the last jurisdictions to introduce ‘modernised’ guardianship legislation. Prior to the introduction of the *Guardianship and Administration Act 1995* (Tas), guardianships were an adjunct to the medical management of persons under the *Mental Health Act* and the legislation was largely used to by-pass legal barriers to involuntary institutional care.²⁶ More recently, the Tasmanian Government’s *Disability Framework for Action* has committed the Government to undertake a review of Tasmania’s guardianship legislation to explore how supported decision making might be implemented in place of existing substitute decision-making arrangements and to ensure that the legislation is consistent with the CRPD.

The *Guardianship and Administration Act 1995* (Tas) provides for the establishment of the Tasmanian Guardianship and Administration Board whose function it is to determine whether an adult with physical, mental

²⁶ Terry Carney, ‘The limits and the legacy of guardianship in Australia’ (1989) 18 *Federal Law Review* 234.

or intellectual disability needs a guardian or administrator and to appoint someone to undertake that role where required.

Prior to making a decision with regard to guardianship or administration, the Board must satisfy itself that the person is incapable of making such decisions. The appointment of a guardian or an administrator is regarded as a 'last resort' option and assessment involves identifying least restrictive options wherever possible. This includes the appointment of either full or limited guardians, depending on the decisions to be made and the individual circumstances and level of capacity of the person. Importantly, the Act makes provision for the Board to periodically review all appointments and to receive reports from appointees. This provides the Board with an important oversight and compliance function, which acts to ensure that the best interests of those subject to orders are met.²⁷

In December 2009, the Tasmanian Department of Health and Human Services released the *Tasmanian Capacity Toolkit*, based on the model adopted and publication developed in New South Wales in 2008.²⁸

The capacity assessment principles adopted in the *Tasmanian Capacity Toolkit* mirror those adopted in New South Wales:

- Always presume a person has capacity
- Capacity is decision specific
- Don't assume a person lacks capacity based on appearances
- Assess the person's decision-making ability – not the decision they make
- Respect a person's privacy
- Substitute decision making is a last resort

These principles form an important basis for the establishment of a positive framework for addressing issues of capacity and are worthy of further consideration at the national level.

By their very nature guardianship laws involve the capacity to make decisions that impinge on a person's individual freedoms and there is often a delicate balance between the objectives of the legislation and ensuring that the interests of the person are protected.

Importantly, the rights of those who are subject to guardianship orders will only be respected in situations where those who are appointed guardians or administrators have the subjective views and best interests

²⁷ *Guardianship and Administration Act 1995* (Tas).

²⁸ Department of Health and Human Services, *Capacity Toolkit: Information for government and community workers, professionals, families and carers in Tasmania* (2009).

of the represented person in mind. It is all too easy for situations to arise where the views, preferences and interests of the guardian are put before those who are under the guardianship arrangement.

Restrictive practices and medical interventions are also capable of undermining a person's freedom of decision and actions and there is a need for close oversight of whether actions are being undertaken in a person's best interests.

Consistent with Article 12 of the CPRD, measures that impact on the exercise of legal capacity must be proportionate, appropriate and include effective safeguards. In practice this requires the adoption of least restrictive practices and supported decision making wherever possible and the effective monitoring of situations where rights are diminished.

There is also a need to improve the overall monitoring of situations where significant responsibilities and decisions about the lifestyle and rights of persons with disability are subject to the decisions of others, whether through guardianship arrangements or through individual circumstance. This includes situations where people with disability are living in congregate care settings.

The Tasmanian Government has undertaken a commitment as part of the *Disability Framework for Action 2013–2017* to review Tasmania's guardianship legislation to explore how supported decision making might be implemented in place of substitute decision making arrangements.

Review of guardianship legislation and of guardianship orders is an important step in ensuring that all jurisdictions meet international obligations, specifically article 14 of the CPRD which states that restrictions on liberty 'must be reviewed regularly to ensure they are only imposed to the extent necessary for effective rehabilitation'.²⁹

It is my view that the *National Disability Strategy 2010–2020* should also include an undertaking to develop a nationally consistent approach to dealing with capacity. I consider that in the first instance a whole-of-government cross jurisdictional forum, possibly under the aegis of the Council of Australian Governments, be formed to establish core principles and identify the most appropriate option for taking this matter forward. This work should be undertaken with involvement from disability advocates, the state and territory guardianship authorities as well as discrimination authorities.

²⁹ Anita Smith, 'Out of the Frying Pan – Have changes to the review process for people found unfit to plead or not guilty by reasons of insanity enhanced the liberty of the subject' (2010) *Law Letter* 107

Recommendation 4

That a nationally consistent approach to the determination of legal capacity be developed based on the adoption of least restrictive practices and supported decision making wherever possible consistent Article 12 of the *Convention on the Rights of Persons with Disability*.

Recommendation 5

That the *National Disability Strategy 2010–2020* be amended to include an undertaking to develop a nationally consistent approach to defining capacity, involving the establishment of a whole-of-government cross jurisdictional forum, under the aegis of the Council of Australian Governments, to establish core principles and identify the most appropriate option for developing a consistent national approach.

6. Discrimination law

Discrimination laws in Australia are almost consistent in their mechanisms for formally challenging discrimination. With the exception of Tasmania³⁰, they require a person affected by the alleged discrimination to make a formal complaint and prosecute that complaint.

A review of discrimination cases in Australia demonstrates that complainants are often at a significant disadvantage in pursuing claims to a binding decision. This is particularly the case where the complainant raises public interest and/or systemic discrimination issues.

Representative proceedings and standing

The current complaints provisions under the *Australian Human Rights Commission Act 1986* (Cth) enable a complaint to be lodged 'by a person or trade union on behalf of one or more other persons aggrieved by alleged actions': section 46P(2)(c).³¹

This provision reflects the now repealed provisions of the DDA that permitted such a complaint.³² These provisions importantly included in the DDA recognition that there will often be situations where an individual with disability or group of people with disability are unable to make a complaint on their own behalf and, in light of that recognition, empowered organisations to act on their behalf.

If this provision had not existed under the DDA, the cases of *Scott v Telstra* and *Disabled Persons International v Telstra* would not have been able to proceed as challenges to the discriminatory practice of Telstra in

³⁰ Amendments to the *Anti-Discrimination Act 1998* (Tas) (the Act) included the addition of provisions in section 60 that enable the Anti-Discrimination Commissioner to effectively become the complainant in a matter before the Anti-Discrimination Tribunal, where the Commissioner has investigated discrimination or prohibited conduct in the absence of a complaint.

³¹ *Australian Human Rights Commission Act 1986* (Cth) s 46P(2)(c).

³² *Disability Discrimination Act 1992* (Cth) then s 69(1)(c).

respect of the failure to provide access to telecommunications networks through the provision of teletypewriters to people who are deaf.

Mr Scott in his claim against Telstra sought a remedy that removed the discrimination affecting him. That remedy was the provision of a TTY (and potentially compensation to redress the wrong done to him). In order for the remedy to respond to the needs of the whole population of people in Australia who are deaf, it was necessary for a claim to be brought on behalf of that broader population group (or for the court or tribunal to be required to consider remedies to others affected by systemic discrimination).

Had this option not been available, the way would have been open for Telstra to resolve the complaint simply by providing Mr Scott with a TTY, thereby leaving the systemic discrimination against all those with hearing impairment unchallenged.

Changes to the legislative framework federally following the decision in *Brandy v Human Rights and Equal Opportunity Commission*, however, resulted in the complaint provisions being removed from the DDA and other federal discrimination laws and placed into the *Australian Human Rights Commission Act 1986* (Cth) (AHRCA).

Under current provisions of the AHRCA there is no mechanism for a person or organisation that had made a complaint under section 46P(2)(c) of the DDA to lodge proceedings in the federal courts on the termination of a complaint.

The standing to commence proceedings in the federal courts is set out in section 46PO of the AHRCA:

46PO Application to court if complaint is terminated

- (1) If:
 - (a) a complaint has been terminated by the President under section 46PE or 46PH; and
 - (b) the President has given a notice to any person under subsection 46PH(2) in relation to the termination;
any person who was an affected person in relation to the complaint may make an application to the Federal Court or the Federal Magistrates Court, alleging unlawful discrimination by one or more of the respondents to the terminated complaint.
[emphasis added]

An 'affected person' is defined in the ACHRA in relation to a complaint as 'a person on whose behalf the complaint was lodged'.³³ This means that a

³³ *Australian Human Rights Commission Act 1986* (Cth) s 3.

person (or organisation) that lodges a complaint under section 46P(2)(c) cannot make an application to the Federal Court or Federal Magistrates Court under section 46PO as they are not a person on whose behalf the complaint was lodged.

Sections 46PB and 46PC of the AHRCA provide for additional rules in respect of ‘representative complaints’. The term ‘representative complaint’ is defined as ‘a complaint lodged on behalf of at least one person who is not a complainant’. As such, complaints made under sections 46P(2)(a)(ii), 46P(b)(ii) and 46P(c) are all representative complaints. The Note following section 46PO states that ‘Part IVA of the *Federal Court of Australia Act 1976* allows representative proceedings to be commenced in the Federal Court in certain circumstances’. Section 33C of the *Federal Court of Australia Act 1976* (Cth) provides that ‘one or more of those persons’ who have claims against the same person may commence proceedings. The next section, section 33D, deals with standing and indicates that:

A person referred to in paragraph 33C(1)(a) who has sufficient interest to commence a proceeding on his or her own behalf against another person has a sufficient interest to commence a representative proceedings against that other person on behalf of other persons referred to in that paragraph.³⁴

These provisions preclude ‘a person’ from commencing representative proceedings in the Federal Court unless they are a person with sufficient interest to commence proceedings on their own behalf.

There are no provisions for representative proceedings in the *Federal Magistrates Court Act 1999* (Cth).

*Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*³⁵ demonstrates the effect of the changes to the federal jurisdiction and the implications that a lack of effective provisions to enable a person or organisation to commence proceedings in the Federal Court based on a complaint that they had lodged under the AHRCA where they are not an affected person. Under this case a complaint by the Access for All Alliance (Hervey Bay) was dismissed by the Federal Court on the basis that the complainant did not have standing to commence discrimination proceedings in relation to a matter affecting its members. The complaint was made as a representative complaint under section 46P(2)(c) of the AHRCA, however, the proceedings in the Federal Court could not continue as representative proceedings because the complainant was not a member of the affected class.

³⁴ *Federal Court of Australia Act 1976* (Cth) s 33D(1).

³⁵ [2007] FCA 615.

This decision effectively brought to an end the prospect of organisations bringing complaints on behalf of affected members or affected people with whom the organisation works. It contrasts starkly with the standing available to Disabled Persons International in the earlier case against Telstra.

It is of significant importance that provision for an individual or organisation to bring a complaint under section 46P(2)(c) of the AHRCA also enables them to pursue that complaint into the federal courts with standing. The continuing failure to address this gap in the transition to the federal courts stands as a significant barrier to systemic discrimination being challenged judicially, particularly where the capacity of those affected by the discrimination is in any way limited financially or intellectually.

Amendments to the AHRCA and to the relevant legislation government the federal courts would assist in cases of systemic barriers to equality, particularly those that are more difficult to challenge effectively through an individual complaint.³⁶ While some types of systemic discrimination can be effectively challenged through an individual complaint (although it places a significant burden on the individual) there are a number of circumstances where an individual complaint cannot effectively challenge the systemic nature of the discrimination because the broader effect of the discrimination is beyond the dispute between the parties.

To illustrate this point, I suggest review of *Cocks v State of Queensland*³⁷ (the *Cocks* case).

Mr Cocks in his claim against the State of Queensland sought a remedy that removed the discrimination affecting him, being the failure to provide non-discriminatory access to the newly constructed Brisbane Convention Centre. In achieving a remedy for his claim, Mr Cocks achieved a remedy for all people similarly affected by the lack of access. The State of Queensland could not effectively have responded to Mr Cocks' complaint by creating an access mechanism that only Mr Cocks was permitted to use. In this way, a representative complaint was not necessary to achieve a systemic outcome, unlike Mr Scott's situation in relation to Telstra.

Some will argue against provisions granting standing to organisations to bring representative complaints on the basis that this will enable 'busy

³⁶ See, for example, Cambridge Pro Bono Project, *Equality for all: Submission on Australia's proposed reform of discrimination legislation* (2011), and Human Rights Law Centre, *Advance Australia Fair: Addressing Systemic Discrimination and Promoting Equality* (2011) 30.

³⁷ [1994] QADT 3 (2 September 1994).

body' litigation. The Hon Michael Kirby writing on barriers to public interest litigation identifies the current approach to standing requirements as one such barrier. His Honour says of the requirement:

If it had a rational purpose, this was usually justified as that of protecting the court from strangers who would otherwise seek to meddle officiously in the business of third parties or the public interest where the stranger had no relevant special or personal interest, over and above that of other members of the public.³⁸

It is my view that there are very few people or organisations that have the time or resources to 'seek to meddle officiously' and many people who do have a direct interest in discrimination proceedings do not have the capacity to pursue litigation. It is an argument that represents the view of those who seek to have the mechanisms of law and justice the domain of a privileged few. It is an argument that fails to give due regard to the nature of human rights and the right to equality, rights that are afforded to every human being, rights the breach of which have the capacity to affect every human being.

Nevertheless in order to pursue an effective representative complaint mechanism and minimise the likelihood of 'busy body' litigation, it would be beneficial to set out specific provisions outlining the circumstances in which an organisation will have standing. These could include, for example, that an organisation:³⁹

- is based in Australia;
- has an object or objects relevant to the protection of the rights or interests of those people whose rights have allegedly been breached; and
- has undertaken work with and/or in respect of those people whose rights have allegedly been breached in the last two years.

Consideration should be given to similar criteria for an individual bringing a complaint on behalf of others.

Own-motion proceedings and standing of the relevant statutory authority

Tasmanian discrimination law recognises that it is not appropriate to restrict the class of persons who may complain under the ADA to those who are personally affected or aggrieved by the conduct. Accordingly a person who is a member of a class of persons against whom alleged

³⁸ Michael Kirby, 'Deconstructing Laws Hostility to Public Interest Litigation' (2011) *Law Quarterly Review* 4.

³⁹ This is based on the provision for extended standing for judicial review under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) s 487.

discrimination or prohibited conduct was directed, may make a complaint on behalf of a class if the Commissioner is satisfied that a majority of those members are likely to consent.⁴⁰

The ADA does not, however, provide an effective mechanism for an organisation to complain on behalf of affected members or on behalf of affected services users or stakeholders. In respect of the Tribunal, the Act provides that it may deal with a complaint as a representative complaint if satisfied that the complaint was made by a person or an agent of a person who is a member of a class of persons against whom the alleged similar discrimination or prohibited conduct was directed.⁴¹

Improvements to collective redress mechanisms at the Federal (and state and territory) level would assist in reorienting discrimination legislation away from complaints procedures that focus on individual claims, to one where systemic improvements to equality are able to be achieved.

There are various ways in which the AHRC could have standing that would be beneficial to the achievement of the objects of federal discrimination laws. These include:

- as a complainant in matters of discrimination or prohibited conduct commenced by own-motion investigation;
- as a prosecutor of breaches of Disability Standards;
- as a friend or assistant (or *amicus curiae*) to the judicial tribunal; and
- as a legal representative of, or provider of legal representation, to an aggrieved person.

Under the ADA, the Commissioner may, under his/her own motion, investigate discrimination or prohibited conduct without the lodging of a complaint.⁴² Under changes recently passed by the Tasmanian Parliament it is possible from 1 January 2014 for the Commissioner to refer these matters to the Tribunal for determination.

The development of Disability Standards under the DDA provides an important compliance approach to federal discrimination law. The effectiveness of those Disability Standards as a compliance mechanism is, however, hampered by the continuing reliance on individual complainants to pursue failures to comply. Where, as was the case in the *Access for All Alliance* (Hervey Bay) (the Alliance) case referred to above, a number of failures to comply with Disability Standards were identified affecting a people with range of disabilities, an individual complainant is unlikely to have standing to challenge all of those failures.

⁴⁰ *Anti-Discrimination Act 1998* (Tas) s 60.

⁴¹ *Anti-Discrimination Act 1998* (Tas) s 82.

⁴² *Anti-Discrimination Act 1998* (Tas) s60(2).

In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council*⁴³, the complainant organisation considered the bus stop infrastructure implemented by the respondent council after the commencement of the *Disability Standards for Accessible Public Transport 2002* (Cth) (the Transport Standards). There were approximately 20 bus stops that were either new or had been significantly modified since the Transport Standards commenced. The Alliance alleged that, in respect of each of those bus stops, the respondent council had failed to comply with a number of requirements of the Transport Standards. These included requirements that affected, for example, people with mobility impairments and people with vision impairments. Because of the multiple failures to comply by the respondent council, a single person with disability would not be able to lodge a claim that encompassed the scope of non-compliance identified.

In other areas of law, failures to comply with a statute or legislated standard can be challenged by a relevant statutory authority. For example, breaches of occupational health and safety obligations, of consumer law protections and of corporation law, are prosecuted by the State.

I strongly support the AHRC having a prosecutorial function in respect of, at minimum, breaches of standards made under future consolidated discrimination legislation and of Disability Standards made under the DDA.

Under the current federal arrangements, the special-purpose Commissioners of the AHRC have standing as *amicus curiae* in the federal courts in specified circumstances and only with leave of the court.⁴⁴

By way of contrast, the Canadian Human Rights Commission is potentially a party in all proceedings. The Canadian Human Rights Tribunal is to notify the following of an inquiry:

... the Commission, the complainant, the person against whom the complaint was made and, at the discretion of the member or panel conducting the inquiry, any other interested party ...⁴⁵

Having given notice, the Tribunal member or panel conducts an inquiry into the complaint and is required to:

⁴³ [2007] FCA 615.

⁴⁴ *Australian Human Rights Commission Act 1986* (Cth) s 46PV.

⁴⁵ *Canadian Human Rights Act*, RSC 1985, c H-6, s 50(1).

... give all parties to whom notice has been given a full [which includes the Commission] and ample opportunity, in person or through counsel, to appear at the inquiry, present evidence and make representations.⁴⁶

The Commission's legal section represents the Commission is those inquiries and is able to provide the Tribunal with consistent legal analysis. This is of particular benefit where a party or parties are unrepresented. There were, for example, 17 cases determined in 2011 by the Canadian Tribunal and the Commission was a party in every one of those cases.

I consider that this model is an effective mechanism for overcoming the difficulties faced by unrepresented parties and judicial officers dealing with cases involving unrepresented parties, without the need to significantly increase the funding available to legal aid to fund legal representation. It has the added benefit of the judicial officer or tribunal being consistently presented with clear and coherent submissions on the application and interpretation of the relevant law. This, in turn, could result in development of a more comprehensive and coherent jurisprudence in respect of federal discrimination laws.

Other approaches to legal assistance in discrimination cases

The UK Equality Commission, under the *Equality Act 2006*, can also assist a person who alleges they are a victim of a breach of the legislation.⁴⁷ Such assistance includes providing or arranging for the provision of:

- (a) legal advice;
- (b) legal representation;
- (c) facilities for the settlement of a dispute;
- (d) any other form of assistance.⁴⁸

Similarly, under the *Equal Opportunity Act 1984* (SA):

the Commissioner may, at the request of the complainant or respondent, provide representation to the complainant or respondent in proceedings before the Tribunal.⁴⁹

⁴⁶ *Canadian Human Rights Act*, RSC 1985, c H-6, s 50(1).

⁴⁷ *Equality Act 2006* (UK) c 3, s 28(1).

⁴⁸ *Equality Act 2006* (UK) c 3, s 28(4).

⁴⁹ *Equal Opportunity Act 1984* (SA) s 95C.

While this is a model that could usefully be considered, it is likely to be highly contentious, with the potential to give rise to a reasonable apprehension of bias.

Recommendation 6

That the *Australian Human Rights Commission Act 1986* (Cth) and related legislation include provision for complaints to be made by a person or organisation, who is not affected by the alleged breach or breaches, on behalf of a person or persons affected by an alleged breach or breaches of the legislation and that amendments be made to the *Federal Court of Australia Act 1976* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) to give a person or organisation that has made such a complaint standing to commence proceedings under the legislation in those courts. The provisions should include criteria for determining where a person or organisation should be granted standing by the Australian Human Rights Commission to make such a complaint with the criteria not being overly onerous.

Recommendation 7

That provisions be introduced for the relevant special-purpose Commissioner or the Australian Human Rights Commission to (a) have standing in respect of all discrimination complaints that proceed to hearing as a party providing assistance similar the role of the Canadian Human Rights Commission under the *Canadian Human Rights Act 1985*; and (b) have standing to prosecute failures to comply with standards made under the future consolidated legislation and current federal discrimination legislation.

Recommendation 8

That consideration is given to introducing provisions that would enable the special-purpose Commissioners or the Australian Human Rights Commission to have standing as a complainant in matters where the Commission has conducted an investigation into systemic discrimination or prohibited conduct and formed the view that a strong *prima facie* case exists and there is no complainant identified.

7. Access to justice

In Tasmania, a number of issues and barriers have been identified that have the capacity to impact on current practices relating to the way in which people with disability interact with the justice system.

As outlined in the Issues Paper, access to justice for people with disability on an equal basis with others may, in a number of circumstances, require procedural and other adjustments to facilitate their role and participation in the justice system. There is also a need to ensure appropriate training for those who work in the justice system, including police, court officials and prison staff, to ensure that people with disability are able to exercise their legal capacity on an equal basis with others.

To assist in understanding the current situation in Tasmania my office recently conducted consultations with a range of key stakeholders and services. The aim was to gain an insight into their experiences of people with disability in the criminal justice system in order to identify structural barriers and systemic problems faced by people with disability. The focus of the consultations was on the experiences of people with intellectual disability and persons with cognitive impairments, such as acquired brain injury, dementia or mental health issues.

The information gained as a result of this process was supplemented by information related to complaints and enquiries made to under the ADA from people with disability who believe that they have been unfairly treated in their interaction with the justice system.

Overall the conclusion reached as a result of these consultations was that whilst there have been improvements over time in the way in which people with disability experience the justice system, there are a range of aspects of the justice system in Tasmania where practice, legislation and protocols could be improved to ensure that people with disability receive the same access to justice as the rest of society. Without changes, however, there is a strong risk that people with disability in Tasmania will not receive equal access to justice.

Access to services and support is crucial in ensuring that people with disability are appropriately treated in the justice system and are able to participate in the community on an equal basis with others. Tasmania lacks appropriate services for people with disability as the existing specialist service system is not able to cope with the level of demand.⁵⁰

Whilst the Tasmanian Guardianship and Administration Board has the capacity to consider applications for the appointment of a litigation guardian or an administrator responsible for assisting a person with disability through some aspects of the justice system⁵¹, often people with disability require the services of an advocate or support person particularly in the early stages of legal processes to assist them in the process. The type of support required will vary considerably, from the provision of information in more appropriate or accessible format to adjustments to the way in which legal processes are engaged to enable a person to express a view and make their own decisions.

Our consultations suggest, however, that the level of support available to people with disability in the justice system is far exceeded by demand.

Furthermore, where services are available, people with disability may not have access to them because they are unaware of their availability or justice system authorities do not identify their disability.⁵² This highlights the importance of training and raising awareness of the difficulties experienced by people with disability in the justice system and adjustments to legislation and associated procedures to ensure that these needs are met.

Police and police procedures

Police are often the first contact that people with disability have with the justice system. Consequently, this interaction can have significant implications for how people with disability experience the justice system and the level of understanding about how to exercise their rights within that system.

Whilst awareness of issues related to disability has improved markedly within the Tasmanian Police service, my office's consultations suggest that there is a lack of regular training or awareness of protocols that

⁵⁰ National Disability Services Tasmania, Submission to Tasmanian Government, Review of the Tasmanian Government's Disability Framework for Action 2005–2010 (2012) 2.

⁵¹ See Guardianship and Administration Board, Tasmania, Litigation by Administrators and Guardians: Background information available at http://www.guardianship.tas.gov.au/_data/assets/pdf_file/0003/79833/Litigation_by_Administrators_and_Guardians_-_Background_In.pdf

⁵² Law Reform Committee, above n2, 138.

ought to be applied in situations where police officers interact with a person with disability.

For example, part 2.37 of the *Tasmania Police Manual* covers how Tasmania Police should interact with people with disability. It requires that ‘members should be aware that it may be necessary to modify their approach and sometimes seek specialist assistance or support from independent persons when dealing with people with a physical disability or mental impairment’.⁵³

The following allegation suggests, however, that Police may not be following those protocols in all instances.

A suffered from severe PTSD and alcoholism. She was taken into custody. In dealing with her, police rang the hospital which refused to admit her. A then stated to the police that she required her medication. The police did not call the hospital back. A was then taken into remand and stripped naked under a blanket by a female officer. A kicked the officer in the face because she had previously been sexually assaulted. Three other officers then helped the officer hold her down whilst they strip searched her. A was then charged with assault of a police officer.

The search of an accused person in custody is lawful under the *Police Offences Act 1935* (Tas).⁵⁴ However, the example provided illustrates that police do not adapt procedures and guidelines to vulnerable people in all circumstances.

A great concern identified during consultations is that many officers lack adequate and regular training to enable them to de-escalate confrontational situations that arise as a result of, for example, being required to deal with someone in an acute psychosocial episode.

A frequent scenario is for police to be called when a person acts out in public. In situations where police use force to intervene that person may become fearful or untrusting of the police, which can have consequences during later interactions.

Further it is apparent that there is often a lack of specialist support, eg, mental health crisis or related services, and this limits the options open to police to deal with situations when they arise.

⁵³ Tasmania Police, *Tasmania Police Manual: Orders, Instructions and Operational Guidance for Members of Tasmania Police* (Department of Police and Emergency Management, 11 November 2010) 204.

⁵⁴ *Police Offences Act 1935* (Tas) s 58B.

Equality, Capacity & Disability

The following allegation illustrates that more regular training on disability is required to prevent discrimination.

Whilst B was on his way back to the Glenorchy Police Station, he noticed an unmarked police car driving along beside him. B said, 'What do you want, you lying f***s.' The officer wound down his car window. B admits that he 'had an attitude' because the police previously physically dragged him and had lied to him. The officers pulled up and B said, 'What do you think you are going to do, you lying f*****g maggots.'

Earlier in the evening B showed a police officer a card indicating the nature of his disability and its impact on his behaviour and appearance. One of the police officers said, 'well you're a f*****g spastic.'

Lack of regular training also results in police officers being unable to identify people with disability and respond appropriately.

C alleged he went to a government services office and the receptionist called him an arsehole and made a phone call. Two officers from Tasmania Police arrived while he was on the phone to the Office of the Anti-Discrimination Commissioner. C was asked to leave and he took the lift with the officers. One of the officers continually poked him in the back and then pushed him so that he staggered forward. C told the officer that was assault. C went to the local Police station to make a complaint. C wants the police officer who poked him in the back dealt with because the police officer knew he had a disability that affected his physical stability. C feels that people in positions of authority, especially police officers, shouldn't behave like this.

As noted in the Victorian Law Reform Committee Inquiry into access to and interaction with the justice system by people with intellectual disability and their families and carers, when people with disability are not identified at an early stage in the justice system it is likely that they will not be linked into the services and programs that are tailored to meet their needs.⁵⁵

Lack of identification or understanding of disability can also lead to incorrect assumptions about that person, such as that they are intoxicated, and can often affect interactions with people with disability, such as attributing lack of eye contact with guilt rather than disability.⁵⁶

⁵⁵ Law Reform Committee (Victoria), Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers (Parliament of Victoria, 2013) 111.

⁵⁶ Ibid 23.

The guiding principle adopted in training of Tasmanian Police officers is to encourage officers to treat every situation on its merits and respond appropriately. However, there is arguably insufficient training to assist police develop specialist skills in identifying mental health or related conditions. Formal training is scheduled only every couple of years, and the view is that officers largely develop these skills 'on the job'.

If police do not identify disability, they may subsequently be unable to determine issues of competency to give evidence; may not take extra steps to ensure evidence is admissible in court; and may not make necessary allowances, such as ensuring a support person is present.

Failure to make the necessary adjustments to ensure effective participation by persons with disability is a potential breach of Australia's obligations under the CRPD, which requires that 'parties shall ensure ... the provision of procedural ... accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages'.⁵⁷

The decisions that the police make following an arrest are significant. The choice to place a person with disability in remand for a period prior to appearing before a Magistrate, for example, can result in that person experiencing setbacks in terms of their disability and impairment. The benefits and application of therapeutic jurisprudence principles by lawyers and Magistrates is severely limited when police are not applying the same principles.

The fact that a person has an intellectual disability can affect their ability to comply with bail conditions, especially if the conditions failure to take account of the person's disability and their related circumstances.⁵⁸

D was taken to a Police Station after problems with a local bus service. The bail condition imposed by the Bailing Sergeant was that D not to enter or remain on any bus, building or premises of the bus operator. D told the Bailing Sergeant that the bus was her only means of transport. When D asked the Bailing Sergeant how she was going to get home the Bailing Sergeant suggested she catch a taxi. D told him the cost was too high and she was reliant on a disability pension.

As people with disability or cognitive impairment experience a number of difficulties when interacting with police, it is important they receive

⁵⁷ CRPD art 12, 13.

⁵⁸ Law Reform Committee (Victoria), *Inquiry into access to and interaction with the justice system by people with an intellectual disability and their families and carers* (Parliament of Victoria, 2013) 63.

greater support. For example, the eagerness of some people with an intellectual disability or cognitive impairment to please authority figures could contribute to them giving false or incriminating evidence. Without advice from an independent support person to assist during interviews, for example, there is a risk that the person interviewed remains unaware of their rights, including the right to remain silent.⁵⁹

Whilst police authorities in Tasmania attempt to facilitate access to support services, such as having a sheet in the custody office with a list of relevant organisations or institutions to contact, they often run out of support options.

Tasmania police have indicated, for example, that often when they make referrals to other services, such as a request for a hospital to admit the person, there is resistance, especially to mandated clients, which manifests in them getting lower priority. This can result in the police releasing someone without necessary support or placing them in custody.

In a recent report, researchers found that early and intensive support and provision of services could help prevent people being caught in the criminal justice system, while at the same time saving the community millions of dollars.⁶⁰ Thus, it is crucial for the Tasmanian community to make greater use of the services available, make sure they are well known and allocate more resources to current services.

Legal representation

Whilst there is a small group of lawyers in Tasmania who support and represent people with disability, Tasmania lacks specialist legal services (such as in New South Wales which has an *Intellectual Disability Rights Service*) which provides specialist legal assistance to people with disability.⁶¹

There is also no consistent process of gaining a lawyer. When a person comes into contact with services or the system, rather than being referred to the services of Legal Aid or the Hobart Community Legal Centre, they are usually first directed to a private lawyer at their own expense. The lack of representation at the initial stage of contact with the police or interview can hinder access to justice as people with disability are

⁵⁹ ICCPR art 14(3)(g); *R v Director of Serious Fraud Office, ex parte Smith* [1993] AC 1, 30.

⁶⁰ Ruth McCausland, Sarah Johnson, Eileen Baldry and Anna Cohen, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-benefit Analysis of Early Support and Diversion* (University of New South Wales and PwC, 2013) 12.

⁶¹ Intellectual Disability Rights Service, *Legal* <www.idrs.org.au/legal/legal.php#sthash.sTmfuO1N.Kqi1GtoC.dpbs>.

unaware that they do not have to give statements, especially when a support person also has not been made available.

People with disability also often lack access to legal aid because they have been charged with minor offences, such as disorderly conduct, for which legal aid is not granted. As a result, the person has a choice to be partnered with a private lawyer or be unrepresented. If there is no grant of legal aid, there is a lack of funding to pay the fees for reports from psychologists that may be necessary to present the most comprehensive and appropriate case.

There have been definite improvements in legal practitioners' understandings of disability, acquired brain injury and mental illness; their ability to recognise people with these conditions; the expertise shown when communicating with clients with disability; and what is required in terms of assistance. While some lawyers can identify capacity issues and the need to appoint a litigation guardian, the need still remains for the broader profession to undergo training and education on recognising when a client has capacity issues and may be unfit to stand trial or where capacity may be assisted by relevant supports.

It is important to ensure that the appointment of a litigation guardian to represent a person in various state and federal courts and tribunals is consistent with the principles applying to the appointment of other guardians or administrators when the decision-making capacity of a person with disability is relevantly impaired. In Tasmania, the threshold for the appointment of a litigation guardian is determined by the rules of court, these include:⁶²

- *Charter of Justice 1831* – clause 22
- *Supreme Court Rules 2000* – Part 10, Division 1, rules 292-301
- *Magistrates Court (Civil Division) Rules 1998* – Part 3, Div 2, rules 20-24
- *Federal Court Rules* – Order 43, rules 1-13
- *Federal Circuit Court of Australia Rules 2001* - rules 11.08-11.15
- *Family Law Rules 2004* – Part 6.3, rules 6.08-6.14

Representing people with disability is a specialised area that requires education. Having a lawyer with strong understanding of their role and their potential to impact on a person's wellbeing would greatly benefit people with disability.

⁶² Guardianship and Administration Board, Tasmania, *Litigation by Administrators and Guardians: Background information* available at http://www.guardianship.tas.gov.au/_data/assets/pdf_file/0003/79833/Litigation_by_Administrators_and_Guardians_-_Background_In.pdf

Courts and court procedures

In some instances adjustments to the court process that would improve accessibility and facilitate participation for people with disability in the criminal justice system are not permitted or available. For example, the complexity of legal language can often present a significant barrier to understanding court matters. This can prevent participation as people become less likely to want to participate if they feel disempowered and lack understanding. This, combined with the complexity of the legal process itself, can exacerbate the challenges people with disability may experience.

In the Tasmanian Magistrates Court system there is limited capacity to assist people with disability understand protocols or read documents. However, if a person wishes to have their own support person assist with proceedings this is acceptable. Both the Magistrate and Supreme Court's staff can arrange for interpreter services to be available for any person who is unable to fully understand, however, this is only on request.⁶³

Diversification approaches

The Magistrates Court of Tasmania commenced a Mental Health Diversion List program in Hobart in May 2007. The program has subsequently been extended to other areas of the State.

The Diversion List program provides separate lists or sittings for people with mental illness. It is aimed at defendants with mental illness and/or disability and cognitive impairment and is intended to offer a more therapeutic response to offending behaviours caused by mental health issues. It operates to divert participants away from the Magistrates regular system and into appropriate treatment aimed at addressing underlying issues associated with their offending behaviour.⁶⁴

A 2009 evaluation of the Mental Health Diversion List program found that rates of offending and incidences of offences decreased in the 6 months following a person's participation in the program (7.7% re-offended) compared with the 6 months prior (82.7% had re-offended). It also found high levels of support for the program among health care and related service providers.⁶⁵

⁶³ Magistrates Court of Tasmania, *Interpreters* (2013) <<http://www.magistratescourt.tas.gov.au/services/interpreters>> ; Supreme Court of Tasmania, *Interpreters* (2013) <http://www.supremecourt.tas.gov.au/going_to_court/witnesses/interpreters>.

⁶⁴ Esther Newitt and Victor Stojcevski, *Mental Health Diversion List Evaluation Report* (Magistrates Court of Tasmania, 2009) 4.

⁶⁵ Ibid.

The program will soon encompass persons with cognitive disability and acquired brain injury, which is a substantial step forward in providing access to justice for these members of these groups.⁶⁶

The Diversion List approach promotes rehabilitation over punishment; therapeutic jurisprudence principles; facilitates access to services; and promotes autonomy. Under arrangements adopted by the Court, the presiding Magistrate is able to step down from the bench, enable the defendant to actively participate and focus on the defendant and their needs as a whole, not just in terms of the crime or intellectual disability. The List has also illustrated the ability to respond to critique, including the removal of the requirement to plead guilty in order to be diverted into the program from its eligibility guidelines.⁶⁷

A review of the operation of the Diversion List approach illustrates that engaging in a diversionary approach results in better outcomes for the defendant and the community by improving the co-ordination of service; saving resources and time and reducing re-offending rates.⁶⁸

However, a number of remaining barriers have been identified:

- No structured documents or reports due to lack of resources.
- Small numbers of people being diverted.
- Rather than dropping the charges, the prosecution will choose to proceed after participation in the list.
- Merely a policy rather than a formalised process.
- Lack of guidelines on relevant stakeholders and contact people.

Many people with disability are not identified as having a disability in the court system unless they declare it themselves. Whilst some identification of disability is occurring at the court level through pre-sentence reports from community corrections and referrals from a forensic mental health liaison nurse, court systems often lack the necessary skills to identify those who may require additional assistance.

This can result in judicial officers failing to divert those with additional needs into the more appropriate programs. This may be due to being unable to identify from the bench or to make enquiries or adjustments; lack of screening and assessment mechanisms; and pressure on the court to get people in and out of the system as quickly as possible to save time and resources.

⁶⁶ Law Society of Tasmania, *Law Society Update* (Issue 30, 7 August 2013).

⁶⁷ *Ibid.*

⁶⁸ Esther Newitt and Victor Stojcevski, *Mental Health Diversion List Evaluation Report* (Magistrates Court of Tasmania, 2009) 75.

Capacity to give evidence

Victims, offenders and witnesses with cognitive impairment or disability are often considered limited in their capacity to give evidence. There is also a widespread view that as witnesses people with disability may not understand what is being asked of them; may not understand the nature of their evidence or may not be believed or understood.

E alleged discrimination by Tasmania Police on the basis that they failed to respond to her complaints about her neighbour who had tried to start a fight with her ex-husband, F.

An officer at the local Police Station refused to take a statement from F in relation to the alleged assault because the officer believed he was affected by alcohol or drugs. F said he was only on medication for back pain.

Police also failed to take action after F was run over by his boss although this had been witnessed by staff.

The *Evidence Act 2001* (Tas) contains rules relating to procedures, admissibility of evidence, questioning of witnesses and competence.

Section 13 relates to lack of capacity and provides that:

- (1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability) –
 - (a) the person does not have the capacity to understand a question about the fact; or
 - (b) the person does not have the capacity to give an answer that can be understood to a question about the fact – and that incapacity cannot be overcome.

However, per 13(6), it is presumed, unless the contrary is proved, that a person is not incompetent because of this section.

For making adjustments for disability, section 30 provides that a witness may give evidence through an interpreter ‘unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions’. Those who have a speech or hearing impairment may be questioned and give evidence by any appropriate means: section 31.

The court can also consider the reliability of admissions by defendants in criminal proceedings. Section 85 provides that evidence of the admission is not admissible unless the circumstances in which the admission was made make it unlikely that the truth of the admission was adversely affected. Under this provision, the court can take into account any mental, intellectual or physical disability to which a person is or appears to be

subject. Thus, the court has discretion to exclude evidence if it believes that the evidence might be unfairly prejudicial or misleading or confusing for a person with disability.⁶⁹

The perception that a person with disability lacks credibility as a witness to or victim of crime often leads to the decision not to prosecute alleged perpetrators. This heightens the vulnerability of people with disability to further harm because the perpetrator is aware that charges are less likely to be brought or prosecuted than if the victim were a person without disability.

The following statement from the case of *R v Dai* highlights the impact evidence rules and the examination processes can have on access to justice:

To set the bar too high for the testimonial ... of adults with mental disabilities is to permit ... to sexually abuse them with near impunity.⁷⁰

At a practical level, the best way to ensure prosecution of the charge is to ensure that a person with disability receives adequate support to participate in the process. This includes the provision of appropriate support services and practical assistance to enable them to participate.

However, there are significant impediments to justice arising from interpretation of the *Evidence Act 2001* (Tas).

The *Evidence Act 2001* (Tas) does not make provision for regulating or adjusting court processes to accommodate people with disability. For example, communication by way of gestures is not viewed as a witness statement, despite this being the only way some people can communicate. Whilst, there have been reforms to the process of examination, including CCTV and the ability to involve support people, problems remain with the ability of people with disability to cope under cross-examination.⁷¹

The Act only enables adjustments such as providing an interpreter in situations where the witness cannot speak or understand English sufficiently, allowing those witnesses with communication or hearing impairment to be questioned or give evidence by any appropriate means, thereby giving the court discretion to exclude unfair evidence.⁷² These

⁶⁹ *Evidence Act 2001* (Tas) s 135.

⁷⁰ [2012] 1 SCR 149, 67

⁷¹ Terese Henning, 'Obtaining the Best Evidence from Children and Witnesses with Cognitive Impairments' (Speech delivered at the International Society for the Reform of the Criminal Law Annual Conference, 17 August 2013).

⁷² *Evidence Act 2001* (Tas) ss 30, 31, 135.

provisions highlight that it is not easy for people with disability to have the process modified to increase their participation.

Further, the Tasmanian courts are reluctant to rely on sections 41 and 42 of the *Evidence Act 2001* (Tas) to exclude improper questions towards people with disability.⁷³ However, as highlighted by Henning, if courts are to activate these provisions, they require knowledge and information about the witness and of their disability prior to examinations.⁷⁴

Henning suggests that an adjustment that could be made to help witnesses cope with examination would be to hold pre-trial directions hearings under section 41, 42 or 192A,⁷⁵ in which ground rules for questioning are set.

Chief Justice Blow has stated that the pre-recording of testimony is soon to be introduced into Tasmania, in order to increase participation and encourage courts to prevent leading questions.⁷⁶ Whilst this will provide additional flexibility, it does not address situations where alternative communication formats are required to participate in court processes.

The difficulties people with disability face in the courts points to the need for a review of the Evidence Act to ensure that people with disabilities are fully and equitably accommodated within court procedures.

As with other jurisdictions, Tasmania Police lay charges where they consider that a crime has been committed, however the Director of Public Prosecutions (DPP) has the capacity to exercise discretion not to proceed with the case to prosecution. Whilst this is within the DPP's power, a decision not to proceed to prosecution may mean that victims do not get heard and feel that justice has not been done.

Guidelines prepared by the Tasmanian Director of Public Prosecutions identify factors that may arise for consideration in determining whether the public interest requires a prosecution. These include the need to consider 'the youth, age, intelligence, physical health, mental health or special infirmity of the alleged offender, a witness or victim'.⁷⁷

⁷³ Ibid 45.

⁷⁴ Ibid.

⁷⁵ *Evidence Act 2001* (Tas).

⁷⁶ Chief Justice Alan Blow, 'Exploring the Intersections of Mental Illness and Criminal Behaviour' (Speech delivered at the International Society for the Reform of the Criminal Law Annual Conference, 17 August 2013).

⁷⁷ Director of Public Prosecutions, 'The role of an independent prosecutor and guidelines for the exercise of discretion to prosecute' available at http://www.crownlaw.tas.gov.au/dpp/prosecution_guidelines .

At least one such matter was the subject of prolonged dispute.⁷⁸

EKS suffered from an extremely rare progressive neurological disorder that falls within the spectrum of mitochondrial encéphalopathies. Her condition meant that she had limited verbal communication skills, but able to express herself to a limited degree and let her needs be known, especially to those who knew her well. In April 1999 following a period of respite with another family, EKS communicated to her parents that she had been sexually assaulted by a male carer of the host family. The police were notified and following an interview at a local police station (in which EKS had to crawl upstairs and sit in an ordinary chair propped upright against a table), the complaint was referred to the Director of Public Prosecutions. The DPP subsequently decided not to prosecute the alleged perpetrator for the commission of any offence. Central to his decision not to prosecute was the difficulty of EKS giving evidence and being cross-examined because of her limited communication skills.

The implications of being found unfit to be tried

The conduct of criminal proceedings relating to a person with impaired capacity is governed by a number of statutes in Tasmania.

Section 16 of the Tasmanian *Criminal Code* provides that a person is not criminally responsible for an act or an omission made:

- (a) when afflicted with mental disease to such an extent as to render him incapable of –
 - (i) understanding the physical character of such act or omission; or
 - (ii) knowing that such act or omission was one which he ought not to do or make; or
- (b) when such act or omission was done or made under an impulse which, by reason of mental disease, he was in substance deprived of any power to resist.

This is known as the defence of insanity and is commonly used as a defence in relation to criminal charges. A person found guilty by virtue of section 16 was likely to be detained in custody under a restriction order.

Prior to 1999, the effect being placed on a restriction order by virtue of being unfit to plead or not guilty by reason of insanity, was incarceration

⁷⁸ *Secretary of the Department of Justice and Industrial Relations v Anti-Discrimination Commissioner* [2003] TASSC 27 (15 May 2003).

within Tasmania's Risdon Prison hospital for an indefinite period – not unusually for the term of a person's natural life.⁷⁹

In 1999, the Tasmanian Parliament approved the *Criminal Justice (Mental Impairment) Act 1999* (Tas) to govern the way in which mental impairment was dealt with by the courts. Under the Act, the Supreme Court continues to be able to make a restriction order or a supervision order. Importantly, however, the Act makes provision that the Court is also responsible for determining any change in the order and specifically whether a person found guilty by way of insanity may be released.

In 2006, further changes to the State's legislative framework in this area were made to account for the establishment of the Wilfred Lopes Centre (WLC): the State's secure mental health facility. Changes also resulted in the establishment of a specialist Forensic Tribunal to review supervision orders annually and, if satisfied that a person had recovered or their illness could be stabilised with appropriate supports or health interventions, issue a certificate which would enable him/her to apply to the Supreme Court for release from the facility.

Following the introduction of these changes, there has been a noticeable increase in the number and type of cases where defence practitioners believe that 'unfit for trial' is a viable alternative to a plea or a trial, particularly for lesser crimes than murder.⁸⁰

As a result of being deemed unfit for trial, however, a client may be placed on an order and may end up in a secure mental health facility for periods well in excess of those expected if their case had progressed through the courts. It is questionable whether lawyers understand the ramifications of choosing this defence given it is very difficult to ever get off an order.

If an accused is found not guilty on the grounds of disability and deemed 'unfit for trial' they will often find themselves in a situation where they are not able to exercise legal capacity, even when the circumstances surrounding the making of the order have changed.⁸¹

Once a person is issued with a forensic order that follows being a finding of being unfit to plead it is extremely difficult to be discharged from the

⁷⁹ Anita Smith, 'Out of the Frying Pan – Have changes to the Review Processes for People Found "Unfit to Plead" or "Not Guilty by Reason of Insanity" enhanced the Liberty of the Subject?' (2010) 107 *Law Letter*.

⁸⁰ Ibid

⁸¹ Gregory James, 'Mad, Bad and Dangerous to Know' (Speech delivered at the International Society for the Reform of the Criminal Law Annual Conference, 17 August 2013).

order. This is due in part to a medical approach to disability and a view that if you have an illness for life, you will have an order for life.

In her 2006 report examining the outcomes for people who are deemed ‘unfit to plead’ or ‘not guilty by reason of insanity’ in the Tasmanian justice system, Smith found that of 64 reviews since 2006, the Forensic Tribunal has issued a total of 25 certificates, relating to 15 individuals, enabling defendants to proceed to the Supreme Court to apply for a discharge of orders.⁸² Out of these 15 people, only four had been discharged from a forensic order since 2003. All orders discharged were supervision orders; no-one has been discharged from a restriction order since 2003.⁸³

The following case illustrates that the court and judges may not recognise that a person can improve, stabilise and become a voluntary patient with regular case management and are not taking into account the fact that at the time of the offence that person lacked medication, support and services.⁸⁴

CJS v State of Tasmania

The Magistrate found CJS to be not guilty by reason of insanity and became subject to a supervision order in 2005. The Forensic Tribunal issued a certificate on 4 April 2007 on the basis that the order was no longer needed. On appeal, all four judges of the Supreme Court held that CJS should not be discharged, despite stating ‘there, however, was no evidence at all to suggest that, while medicated, the appellant was a danger to anyone. In fact the reports before the Court suggested otherwise.’ At both hearings CJS was appropriately medicated.

It also illustrates that the application of orders under the *Criminal Justice (Mental Impairment) Act 1999* (Tas) does not necessarily result in better outcomes for the defendant. The application of a Supervision Order risks diminishing personal liberty and does not appear to increase the prospects of a rehabilitated defendant’s release. Ultimately this impacts on Australia’s ability to meet its commitments under the CRPD and further highlights the need for magistrates, judges and in some cases juries to be provided with increased resources and training.⁸⁵

⁸² Anita Smith, ‘Out of the Frying Pan – Have changes to the Review Processes for People Found “Unfit to Plead” or “Not Guilty by Reason of Insanity” enhanced the Liberty of the Subject?’ (2010) 107 *Law Letter*.

⁸³ Ibid.

⁸⁴ *CJS v State of Tasmania* [2008] TASSC 85.

⁸⁵ Anita Smith, ‘Out of the Frying Pan – Have changes to the Review Processes for People Found “Unfit to Plead” or “Not Guilty by Reason of Insanity” enhanced the Liberty of the Subject?’ (2010) 107 *Law Letter*.

As stated by Smith, a practitioner must weigh up the alternatives and implications of whether the effects of a forensic mental health order outweigh any likely sentence that would have been imposed if the defendant had been found guilty.⁸⁶

The following table from data available to the Forensic Tribunal compares the period that all 28 forensic patients placed on a mental health order since 2006 have been incarcerated with the median sentence for the offences with which they have been charged.⁸⁷ It illustrates that for offences other than murder, the period of detention under an order is substantially more than what it would have been if they had been found guilty of the offence.

Table 3: Restriction orders

Offence:	Period of incarceration of defendant	Median sentence
Wounding	7 years and continuing	6 months
Murder	13 years, converted to a supervision order which has run for 8 years and continuing	Head sentence
	2 years, converted to a supervision order which has run for 8 years and continuing	21 years
	16 years and continuing	Non-parole period 14 years
Fraud	2 years and continuing	12 months
Indecent assault	6 years and continuing	8 months
	Average term of orders 7.33 years and continuing	

As the situation within Tasmania demonstrates, despite the fact that legislation may have been introduced with the purpose of amending criminal law concerning offenders with mental health problems, the operation of the legislation has resulted in few improvements in situations where a defendant has been rehabilitated or where there are alternative treatment or support options.

The shortcomings of legislation such as the *Criminal Justice (Mental Impairment) Act 1999* (Tas) relate in some measure to the absence of guidance within the legislation regarding sentencing options or a requirement to ensure that punishment is consistent with the punishment that may have been imposed had the defendant been found guilty. In

⁸⁶ Ibid.

⁸⁷ Ibid.

large part, however, the failure to provide a range of more flexible therapeutic treatment options outside of the forensic mental health system to promote rehabilitation and integration back into the community. For example, Smith refers to the fact that many forensic patients often present with symptoms of schizophrenia, which may have gone undiagnosed prior to the offence. However, while schizophrenia is a highly treatable condition, the particular characteristics of the illness appear to carry little weight in considering the nature and type of sentence to impose on offenders. Thus, while the Forensic Tribunal has the capacity to recommend the discharge a forensic order, the reality is that this is rarely approved by the courts.

An example was provided during our consultations of one man who has been the subject of a restriction order for 16 years.⁸⁸ Despite reports from the Tasmanian Forensic Tribunal suggesting that the restriction order be lifted and replaced by a supervision order allowing him to reside in the community subject to the supervision of the Chief Forensic Psychiatrist, the courts have been reluctant to revoke the restriction order on the basis that they have no evidence of how the person will operate in community. In something of a 'catch 22' situation, for someone who is under a restriction order it is almost impossible to gather evidence to present to the court to demonstrate how they would operate in a different setting.

This case illustrates the lack of flexibility in the *Criminal Justice (Mental Impairment) Act 1999* (Tas) for sentencing orders and has led to calls for a step-down unit or other forms of transitional facilities, which would enable those on supervision orders to transition back into the community. On average, Wilfred Lopes has about 17 or 18 patients. If a step-down unit or other supervised setting for people with disability were available, several patients would be less likely to remain in the centre. Having a step-down unit would help to ensure that people are not kept on orders unnecessarily and diminish the risk of breaching Australian obligations under the ICCPR and CPRD.

Tasmania also lacks a broad legislative framework for protecting people with disability (other than mental illness) in situations where they are detained for offending.

People with intellectual disability can sometimes be subject to a restriction order largely as a result of the failure to provide an appropriate level of community support to prevent offending behaviours. The Tasmanian Forensic Tribunal (TFT) points to the difficulties in the following manner⁸⁹:

⁸⁸ Ibid

⁸⁹ Tasmanian Forensic Tribunal, *Annual Report 2011–12* (Tasmanian Government, October 2012) 6.

Equality, Capacity & Disability

In Tasmania patients with intellectual disability, subject to a Supervision Order, are typical of those noted in international research. They are for the most part young, are all male, with an elevated prevalence of sex offending, arson, and aggression and they have experienced severe psychosocial disadvantage.

The enduring nature of their intellectual disability, together with a propensity to engage in impulsive, poorly thought through and potentially hazardous acts means that they require an intensive level of supervision and guidance if they are to be maintained in the community.

Their safe management in the community is dependent on the provision of resources to manage the behavioural manifestations of their intellectual disability. These behaviours are unlikely over time to be seriously modified and thus the level of risk to the community is unlikely to substantially decline. It is only with appropriate levels of supervision that the risk of reoffending can be mitigated.

It is thus the role of Disability Services to provide intellectually disabled persons, subject to Supervision Orders, with a level of support that allows them to remain in the community in accordance with the Supreme Court's ruling

The Tribunal has found, however, that an appropriate level of support is often not maintained by the Service with the consequences that the person behaves in a manner that places both themselves and others at substantial risk. When this occurs the patient is apprehended and detained at the [Wilfred Lopes Centre].

... the WLC is a psychiatric hospital and as such is focused on the treatment of those with mental illness. The detention of those with intellectual disability in a facility not specifically designed or resourced for their needs is not in the view of the Tribunal ideal. Their detention there because the State has failed to provide them with the services necessary to support them in the community, is a dereliction of the State's duty of care.

The TFT expresses concern that Tasmania's secure mental health facility is effectively being used to 'warehouse' people for whom the State is unable to provide support. The situation is outlined in relation to a case where a young man was detained in WLC for a period of 16 months largely because there was not an adequate support package made available to enable his release:

Mr X was placed on a supervision order in May 2006 after being found unfit to stand trial for a charge of arson. He had a well-established history of moderate intellectual disability. He does not suffer from a major mental illness.

Mr X worked in a full time capacity with forestry and gardening gangs and was by all accounts a reliable worker. He maintained stable accommodation in a shared flat for over 15 months. He was able to successfully adhere to his supervision order for a period of approximately two years. During this period a 24 hour one-to-one care package was in place.

According to reports received by the Tribunal Mr X only began to breach his Order, to a degree that would have caused him to be apprehended, when his support funding was pared back. The paring back of the package resulted in reduced supervision of Mr X. As a result he absconded from his supervision programme for five or so weeks in late 2010 culminating in his apprehension and detention at WLC in February 2011.

Mr X remained in detention at WLC until July 2012 (when an appropriate support package was finally made available).

Whilst the level of intensive therapeutic support for those on Supervision Orders at WLC is in no doubt, WLC is a secure mental health facility adjacent to the Risdon Prison complex and was not designed for those with other forms of impairment. The fact that there are few alternative options for people with intellectual disability means that there is a high level of risk that those who are placed on supervision orders will find it incredibly difficult to work toward lifting restrictions on their freedom that placement at WLC involves.

Prison Service delivery arrangements for people with disability

Aside from those who are found by the courts to be unfit to plead, it is estimated that there are significant numbers of prisoners with disability within the general prison population. Information published in August 2013 on the numbers of prisoners within the New South Wales prison system, suggested that 77% of prisoners had a mental health condition, 49% had a brain injury and 8% had an intellectual disability.⁹⁰ This includes those with dual or multiple diagnoses.

These prisoners are particularly vulnerable. They rarely receive specialised care or interventions that would help to address underlying causes of offending behaviour.⁹¹ Instead, their disability is often seen as

⁹⁰ Ruth McCausland and Eileen Baldry, *People with mental health disorders and cognitive impairment in the criminal justice system: cost-benefit analysis of early support and diversion* (Pricewaterhouse Coopers and University of New South Wales, August 2013).

⁹¹ Gregory James, 'Mad, Bad and Dangerous to Know' (Speech delivered at the International Society for the Reform of the Criminal Law Annual Conference, 17 August 2013).

secondary to the fact they are in prison; with security being the overriding consideration. In Tasmania, prisoners with intellectual disabilities are likely to be placed in the general population blocks or incarcerated in the Mercy block if their disability requires greater support. However, anything done to support them must be done within the confines of the prison system, which significantly limits support.

Prison administrators indicate that ‘the needs of prisoners with intellectual disabilities are assessed as part of the reception and assessment process and appropriate programs and accommodation will be determined at this point’.⁹² However, the Tasmanian Prison Services (TPS) has also indicated that the identification process of people with disability coming into prison is not always as robust as needed. Thus, the needs of people with disability may go unidentified. Whilst the TPS advises that it is currently working on developing a better screening process, there is still a need for staff in Tasmanian prisons to undergo training on understanding and interacting with people with disability, in order to meet inmate’s needs.

It is estimated that 60% of prisoners in the United States, United Kingdom, Australia and New Zealand have acquired brain injury.⁹³ There is no reason to think that this is not reflective of the level in the Tasmanian system.

Overall, Tasmania lacks appropriate accommodation options (including therapeutic support) for people with disability in the general prison population. The Tamar Unit at Risdon Prison was designed for people with disabilities and special needs; however, it has never had this function and has instead become a unit for housing maximum security prisoners.⁹⁴

To compound matters if a person with disability lacks appropriate accommodation options or supports, they are unlikely to be released on parole and the mechanism for engaging disability support is often difficult for those who may be due for release.

On entering prison, for example, any guardianship orders relating to the prisoner are revoked. Whilst the Guardianship and Administration Board

⁹² Department of Justice, *Prison Infrastructure Redevelopment Program* (25 July 2013) <http://www.justice.tas.gov.au/pirp/background/special_needs>.

⁹³ Bernadette McSherry, ‘Unfit to Plead: why does the law jail those with intellectual disabilities indefinitely?’ (2013) *The Conversation* <<http://theconversation.com/unfit-to-plead-why-does-the-law-jail-those-with-intellectual-disabilities-indefinitely-15504>>.

⁹⁴ Department of Justice, *Prison Infrastructure Redevelopment Program* (25 July 2013) <http://www.justice.tas.gov.au/pirp/background/special_needs>.

will try to have the order reinstated prior to a prisoner's release, this can be difficult and people with disability are likely to find it difficult to reintegrate back into mainstream services on release as no single community service has any obligation to provide housing or other services to this cohort.

Bernadette McSherry, Foundation Director of the Melbourne Social Equity Institute at the University of Melbourne, cites the example of Gregory Yates who was sentenced to 7 years imprisonment in 1987 for the sexual assault of a young girl:⁹⁵

He served his time for the offence, but due to a judicial order under section 662 of the Criminal Code (WA) – a section that has since been repealed – Yates was detained 'at the Governor's pleasure'. He remained in prison for 25 years.

Mr Yates' case is similar to that of Marlon Noble who was imprisoned in Western Australia for a period 10 years without conviction.

Detention without any attempt to rehabilitate or provide appropriate supports resulting as it did in the case of Mr Yates of the deprivation of liberty beyond a comparable sentence for a person committing a similar offence who does not have a disability, raises serious questions about discriminatory practices operating within the criminal justice system and is likely to amount to 'cruel and unusual punishment' under both the CRPD and related instruments such as the United Nations' *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*.

Summary

It is clear from the foregoing that there are a number of areas in which the potential exists for serious miscarriage of justice against people with disability, both as victims and offenders.

Whilst this is in large part due to the lack of resources available to provide appropriate supports, there is also a need for significant review of legislation governing the justice system to ensure that people with disability are able to enjoy equal access to the law and justice system and the development of nationally consistent protocols for the identification, treatment and support of people with disability by police and other justice services.

⁹⁵ Bernadette McSherry, 'Unfit to Plead: why does the law jail those with intellectual disabilities indefinitely?' (2013) The Conversation
<<http://theconversation.com/unfit-to-plead-why-does-the-law-jail-those-with-intellectual-disabilities-indefinitely-15504>>.

To facilitate this approach, it is recommended that the findings of this report and that of the Australian Human Rights Commission Report in response to the AHRC Inquiry into Access to Justice in the Criminal Justice System for People with Disability, are provided to the Standing Committee of Attorney's General for review and the identification of a coordinated and nationally consistent response.

Recommendation 9

That Police Ministers at a national level commission the development of consistent national protocols for the improvement of police procedures in all jurisdictions to ensure that both victims and alleged offenders with disability are better able to the identified and receive the appropriate support to enable them to understand police procedures and exercise their rights in accordance with those procedures. This should include a commitment to minimum education and training standards in order that police better understand the needs and rights of people with disability and improved arrangements to ensure the availability of support services in situations where police interact with vulnerable people who exhibit signs of possible disability or mental health conditions.

Recommendation 10

That part of the process identified in recommendation 8 above include the development of a simple screening test for use by Officers when they suspect they may be interacting with a person with disability and that relevant Police Manuals be amended to provide guidance on how to identify and address disability and impairment for people coming into contact with the justice system.

Recommendation 11

Relevant legislation be amended to ensure that police have an obligation to have an independent third person present during interviews of a person suspected of having a disability.

Recommendation 12

That court officials, including judges, magistrates, and legal practitioners be required to complete appropriate training to assist in identifying people with disability, and court procedures and associated legislation be amended to ensure that where a person with disability is required to participate in the justice system they are able to participate effectively and equitably.

Recommendation 13

That the courts make available information in Easy English format, using simple and direct language, pictures, icons or photos to add meaning to the text.

Recommendation 14

That specialist legal services be made available in all jurisdictions to assist people with disability who come into contact with the justice system.

Recommendation 15

That members of juries and other participants in the criminal justice system be made aware of the disability of a witness or offender where appropriate and that consideration be given to enabling pre-trial directions hearings for all people with disability undergoing examination where necessary.

Recommendation 16

That arrangements for the participation of people with disability in court processes be reviewed, with amendment to evidence laws and related instruments to include a clear commitment to the use of alternative communication modes to ensure non-discriminatory access to all aspects of the procedures.

Recommendation 17

That relevant state and territory legislation be amended to make provision for the establishment of a Disability Visitors Scheme in order to ensure that people with disability are being treated and cared for with dignity and respect whilst under supervision orders and their concerns are identified and assessed.

Recommendation 18

That improved guidance be provided within Acts such as the *Criminal Justice (Mental Impairment) Act 1999* (Tas) and related Acts at state, territory and federal levels, including those related to the provision of disability and mental health services governing arrangements for those who are detained in circumstances where there has been no offence committed or where the offence has not proceeded to trial. Guidance should include requirements for periodic monitoring and regular consideration of whether detention remains the most appropriate course of action.

Recommendation 19

That transitional facilities be established to enable improved 'step-down' arrangements for those being considered for release.

Recommendation 20

That bail hostels be established and made available in order to ensure that people with disability are not denied bail due to lack of appropriate accommodation or access to mainstream disability support services.

Recommendation 21

That the findings of this report and that of the Australian Human Rights Commission Report in response to the AHRC Inquiry into Access to Justice in the Criminal Justice System for People with Disability, be provided to the Standing Committee of Attorney's General for review and the identification of a co-ordinated and nationally consistent response.

8. Financial Services and Insurance

In May 2013, I released an investigation report into Volunteers, Age and Insurance.⁹⁶ The investigation in to this matter arose because the practice of a number of insurance companies placing conditions within their insurance policies on the coverage and benefits available to persons of particular ages.

The objective of the investigation was to examine the practices of insurers using age as a basis for placing restrictions on volunteer insurance policies and whether the way in which the exception from insurance coverage applied is unlawful under Tasmanian discrimination law. In particular, the investigation aimed to test whether or not the exception set out in section 34 of the ADA properly applied to decisions to discriminate on the basis of age in the provision of volunteer insurance. In order to apply, the decisions must be based on actuarial, statistical and other data and be reasonable having regard to that data and other relevant factors.

Given the similarity of wording of the exception in the provision of insurance for both age and disability, the legal context in which that investigation was undertaken is also relevant to a consideration of the way in which the exceptions on the basis of disability under both Tasmanian and Commonwealth laws are applied.

As I pointed out in my report on this matter, exceptions are defences whereby otherwise unlawful conduct is not unlawful if the respondent person or organisation can establish on the balance of probabilities that the circumstances are such that the exception properly applies.⁹⁷ Exceptions do not automatically exclude entities, areas of activity or particular conduct from the reach of discrimination law. For the exceptions stipulated under the ADA to apply, the case for their

⁹⁶ Anti-Discrimination Commissioner (Tasmania), *Volunteers, Age and Insurance: Investigation report* (2013) Office of the Anti-Discrimination Commissioner <<http://www.antidiscrimination.tas.gov.au/publications#publications>>.

⁹⁷ *Anti-Discrimination Act 1998* (Tas) s 101.

application to the particular circumstances must be made and be capable of being objectively sustained.

Section 44 of the *Anti-Discrimination Act 1998* (Tas) provides the basis for an exception from disability discrimination being unlawful in the provision of insurance services as follows:

- (1) A person may discriminate against another person on the ground of disability in the provision of services relating to any annuity or insurance or finance if the discrimination –
 - (a) is based on actuarial, statistical or other data from a reliable source; and
 - (b) is reasonable having regard to that data and any other relevant factors.
- (2) Sub-section (1) only applies if a person discloses to the Tribunal, when required to do so
 - (a) the sources on which the data are based; and
 - (b) the relevant factors on which the discrimination is based.

The effect of section 44 is not to exempt all insurance from coverage by the *Anti-Discrimination Act 1998*.

The exception only applies to decisions or restrictions that are ‘reasonable’ and that are based on actuarial, statistical or other data that comes from a reliable source.

The Tasmanian Act requires insurers to make the case that the exception properly applies. It does not apply automatically for the reasons outlined above.

At issue in relation to the application of the exception found under section 44 of the ADA is the reliance on a particular attribute or characteristic, such as disability, as the basis for determining eligibility for insurance benefits or amendments to the conditions on which that insurance is delivered and the ‘reasonableness’ of the actuarial, statistical and other data on which such decisions are based.

As with the exception available to insurers on the basis of age, the wording in section 44 of the Tasmanian Act establishes an objective test that an insurer must meet in order to lawfully discriminate against another person on the basis of disability.⁹⁸ The test has three elements:

⁹⁸ As set out in *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT23. In this case, the Anti-Discrimination Tribunal of Queensland was considered section 74 of the *Anti-Discrimination Act 1991* (Qld), which is similarly worded to section 34 of the Tasmanian Act.

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- the actuarial, statistical or other data must exist;
- the source of the actuarial, statistical or other data must be reliable; and
- the decision to discriminate must be reasonable having regard to the data and other relevant factors.

Actuarial, statistical or other data

For insurers to rely on the exception in section 44, they must base the decision to discriminate upon reasonable and reliable data. The use of the expression 'is based on' indicates that such data must exist and the insurer must use it in making its decision to discriminate.

The approach of the Federal Court in *QBE Travel Insurance v Bassanelli* [2004] FCA 396 provides guidance on how this requirement is to be interpreted.⁹⁹

In this case the Federal Court was considering section 46(1)(f) of the *Disability Discrimination Act 1992* (Cth) which is similarly worded to section 44 of the Tasmanian Act. Here the words 'based upon actuarial or statistical data' were interpreted to mean 'that the discriminator actually based its decision upon certain actuarial or statistical data'.¹⁰⁰

Judicial guidance as to what actuarial, statistical or other data can be used to justify discrimination in the provision of insurance services indicates that the data:

- must be contemporarily relevant;¹⁰¹
- must state that the condition of the person seeking insurance is an unacceptable risk;¹⁰²
- should come from an Australian source or, if there is no Australian source for the data, the insurance provider should provide further materials as to the local relevance and applicability of data from overseas and an explanation as to why there is no Australian data upon which to rely;¹⁰³ and
- must be from a reliable source.¹⁰⁴

Actuarial, statistical or other data must be sufficiently detailed to substantiate the argument that discriminating against a person on the basis of their disability is an unacceptable risk.

⁹⁹ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30].

¹⁰⁰ Ibid.

¹⁰¹ *Xiros v Fortis Life Assurance Ltd* [2001] FMCA 15 [17].

¹⁰² *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23 (24 November 1998).

¹⁰³ Ibid.

¹⁰⁴ *Anti-Discrimination Act 1998* (Tas) s 34(1)(b).

The Center for Economic Justice argues that insurers discriminate against consumers when they act solely on the basis of a broad characteristic or shared attribute such as age.¹⁰⁵ In these cases underwriting guidelines are used as the basis for excluding from coverage a class of people who share the same characteristic or attribute on the basis that the shared characteristic alone represents a certain risk profile.

A decision to discriminate based on a risk exhibited by a particular class of consumers may, however, be considered appropriate if the underwriting guideline genuinely identifies a characteristic of consumers in that group that is demonstrably and uniquely related to risk.¹⁰⁶

To assess whether a practice *unreasonably* discriminates against consumers who are excluded from policy coverage, it is necessary to determine whether the risk factors taken into account are demonstrably and uniquely related to the characteristic on which the discrimination is based.¹⁰⁷ The data must be sufficient to enable the analyst to identify the unique contribution of the underwriting guideline or risk factor in question. Identifying the unique contribution is necessary to ensure that the underwriting guideline is simply not correlated, ie, a surrogate, for another rating factor, including prohibited rating factors. Such an analysis enables the analyst to determine whether the practice unfairly discriminates against consumers who do not satisfy the rating guideline. The data will show whether the underwriting guideline properly identifies a group of consumers for whom costs of the transfer of risk are higher or lower.

In other words, to substantiate their claim, insurers are required to prove that there is a proper actuarial basis for the disability-related exclusions contained in their insurance policies.

The actuarial, statistical or other data must also come from a reliable source.

The Court in *QBE Travel Insurance v Bassanelli* held that determining a reliable source requires ‘... an objective judgment about the nature and quality of the actuarial or statistical data relied on’.¹⁰⁸

In outlining his approach to this matter, Mansfield J detailed instances where data would not be considered reliable:

¹⁰⁵ The Center for Economic Justice, *A Consumer Advocate’s Guide to Getting and Understanding Insurance Data* (1999) <<http://www.cej-online.org/publicat.php>>.

¹⁰⁶ Ibid 11.

¹⁰⁷ Ibid.

¹⁰⁸ *QBE Travel Insurance v Bassanelli* [2004] FCA 396 [30].

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- where it is qualified;
- where it has been based on an insufficient sample;
- where it is not directly applicable to the particular decision;
- where the data is incomplete;
- where the data is out-of-date; and/or
- where the data has been discredited.¹⁰⁹

Opinion re: Elizabeth Kors and AMP Society also held that a source would be unreliable where it was not an Australian source, unless further material can be provided to indicate the local relevance and applicability of the data, and an explanation as to why there is no Australian data upon which to rely.¹¹⁰

Insurers should be prepared to explain the basis of decisions including the limitations of information reasonably available, and at the same time be able to demonstrate that new data is being taken into account on a regular basis.

Other relevant information

Section 44(1)(b) of the ADA requires that ‘any other relevant factors’ are taken into account in examining the reasonableness of the decision to discriminate on the grounds of disability.

What is relevant for the purposes of assessing whether an action is discriminatory will differ from case to case.

Whilst no specific guidance is provided under the ADA regarding what constitutes ‘other relevant matters’ in this respect, guidance is available in case law and related statutes. Section 7B of the Commonwealth *Sex Discrimination Act 1984*, for example, makes reference to matters to be taken into account in deciding whether a condition, requirement or practice is reasonable in the circumstances.¹¹¹ This includes the following:

- (a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the condition, requirement or practice; and
- (b) the feasibility of overcoming or mitigating the disadvantage; and
- (c) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the condition, requirement or practice

¹⁰⁹ Ibid.

¹¹⁰ *Opinion re: Elizabeth Kors and AMP Society* [1998] QADT 23.

¹¹¹ *Sex Discrimination Act 1984* (Cth) s 7B.

Clearly, there are factors of this nature that are relevant in relation to any distinctions made in the provision of insurance to people with disability.

As noted in *QBE Travel Insurance v Bassanelli* knowledge of the circumstances of the person seeking insurance is relevant to whether a decision is reasonable:¹¹²,

[The decision to discriminate] requires that the particular circumstances of an individual who is discriminated against be addressed, but not in a formulaic way. Even if the exemption pathway provided ... [by section 46(1)(f) of the Disability Discrimination Act 1992 (Cth)] is utilised, the reference to 'any other relevant factors' confirms that legislative intention.¹¹³

With respect to a broad class of people, such as a group of people who share a similar disability, this includes the extent to which the activity has the capacity to impact on the ability of those who are excluded to participate in public life and their community.

Other factors include the impacts of social exclusion and loss of ability to participate in broader community activities arising from the decision not to provide insurance cover, and the impact on the viability of current service system models.

Information that indicates that some insurers do not have disability exclusions or restrictions in insurance cover is also relevant. As noted in *Bassanelli*:¹¹⁴

The reasonableness of the discrimination is a matter to be judged having regard to any other relevant factors... [T]he fact that another reputable insurer with apparently the same or similar knowledge was prepared to issue a policy ... was a matter which the Magistrate was entitled to consider as relevant.

Taking these factors into account, in order to properly consider whether or not the limits on the provision of insurance are protected by the exception, it is necessary to examine whether the actions of insurers are 'reasonable' in all of the circumstances.

Not all discrimination is unreasonable or improper, or for that matter unlawful. To determine whether an action is reasonable requires an objective judgment made in the context of knowledge about the nature of the discrimination and the impact it will have on those who are excluded.

¹¹² *QBE Travel Insurance v Bassanelli* [2004] FCA 396.

¹¹³ *Ibid* [85].

¹¹⁴ *Ibid* [43].

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As indicated by Federal Court, a decision will not always be ‘reasonable’ simply because it is based on actuarial or statistical data. The data itself must be able to withstand scrutiny and must clearly establish that disability alone is the primary determinant of the distinction being made.

The data must be reasonable to rely on and the decision itself must be reasonable.

The concept of ‘reasonableness’ has been given consideration in a number of cases. In *Waters v Public Transport Corporation*, the majority of the High Court found that ‘reasonableness’ encompassed what was reasonable in ‘all the circumstances of the case’. In setting out his view, Brennan J stated:¹¹⁵

It is not possible to determine reasonableness in the abstract; it must be determined by reference to the activity or transaction in which the putative discriminator is engaged ... first, whether the imposition of the condition is appropriate and adapted to the performance of the activity or the completion of the transaction; second, whether the activity could have been performed or the transaction completed without imposing a requirement or condition that is discriminatory...¹¹⁶

This approach is consistent with that adopted by the Federal Court in *Styles v Secretary, Department of Foreign Affairs and Trade*.¹¹⁷

In that case, Wilcox J held that it is necessary to consider the question of what constitutes ‘reasonableness’ in a ‘practical and not merely theoretical way’ to determine if ‘under all the circumstances’ the discriminatory practice was ‘objectively justified.’¹¹⁸

This view was adopted by Bowen, Pinkus and Gummow JJ:¹¹⁹

The criterion is an objective one, which requires the Court to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the requirement or condition on the other. All the circumstances of the case must be taken into account.

¹¹⁵ *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 (3 December 1991) [16].

¹¹⁶ *Waters v Public Transport Corporation* [1991] HCA 49; (1991) 173 CLR 349 (3 December 1991) [15].

¹¹⁷ *Helen Styles v the Secretary of the Department of Foreign Affairs and Trade and Philip Arthur Harrison* [1988] FCA 364 (18 October 1988).

¹¹⁸ *Ibid* [74].

¹¹⁹ *Re Secretary, Department of Foreign Affairs and Trade v Styles and Philip Arthur Harrison* [1989] FCA 342; 88 ALR 621 23 FCR 251 (28 August 1989) [51].

As outlined by the Australian Human Rights Commission, in its consideration of how the concept of ‘reasonableness’ applies in relation to the *Disability Discrimination Act 1992* (Cth), it is not reasonable to refuse to insure a person simply because of historical practice or to rely on inaccurate assumptions about the people it wishes to exclude.¹²⁰ However, it is appropriate to consider matters related to practical and business considerations; the nature of the risk being considered; and the extent to which the practice impacts on the overriding aims of discrimination law.¹²¹

Findings in relation to the provision of volunteer insurance

As a result of my investigation into the provision of volunteer insurance, I formed the view that the statistical data provided to me did not support the view that age alone is the only or best indicator of risk of accident, injury or other forms of ill-health that may result in a claim under volunteer insurance policies.

I was therefore of the view that the case has not been made for the application of the exception found in section 34 of the *Anti-Discrimination Act 1998* (Tas) and that insurers relying on the data provided to me as a basis for excluding volunteers from insurance coverage were potentially offering services, in the form of insurance, in breach of the Tasmanian Act.¹²²

¹²⁰ Australian Human Rights Commission, *Guidelines for Providers of Insurance and Superannuation* (2005) <[#4](http://www.hreoc.gov.au/disability_rights/standards/Insurance/insurance_adv.htm)> section 4.

¹²¹ Ibid

¹²² Exceptions in the *Anti-Discrimination Act 1998* (Tas) are effectively defences to an allegation of unlawful discrimination. These are legislatively different from exemptions under the Tasmanian Act, which are time-limit orders made by the Commissioner to provide temporary relief from particular obligations under the Act, as specified in the particular order. Care should be taken when considering this report in respect of other jurisdictions within Australia as discrimination statutes in Australia are not consistent in the use of the terms ‘exception’ and ‘exemption’.

The defences to age discrimination in insurance that are substantively similar to section 34 of the Tasmanian Act in federal, other state and territory legislation are: *Age Discrimination Act 2004* (Cth) s 37 (found in Part 4, Division 4 – General Exemptions); *Discrimination Act 1991* (ACT) s 28 (found in Part 4, Division 4.1 – General Exceptions); *Anti-Discrimination Act 1977* (NSW) s 49ZYT (found in Part 4G, Division 4 – Exceptions to Part 4G); *Anti-Discrimination Act 1992* (NT) s 49 – Exemptions, found in Part 4, Division 7); *Anti-Discrimination Act 1991* (Qld) s 74 (found in Chapter 2, Part 4, Subdivision 2 – Exemptions for discrimination in insurance area); *Equal Opportunity Act 1984* (SA) s 85R (found in Part 5A, Division 6 – General exemptions from Part 5A); *Equal Opportunity Act 2010* (Vic) s 47 –

In accordance with this view I made a number of recommendations which I consider also have relevance in the context of the current Inquiry:

- That the Insurance Reform Advisory Group be requested to oversee the development of an Insurance Industry Discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exceptions in discrimination law are to apply
- That the proposed Insurance Industry Discrimination Compliance Code be the subject of consultation with stakeholders and with members of the Australian Council of Human Rights Agencies (ACHRA)
- That, subject to the passage of consolidated human rights and discrimination law at the Commonwealth level and agreement by the members of ACHRA, the Australian Human Rights Commission be requested to certify the Insurance Industry Discrimination Compliance Code for application across the insurance sector. In the absence of that consolidation, that IRAG work with ACHRA to identify alternative mechanisms to implement the Insurance Industry Discrimination Compliance Code
- Noting the work already done by the Australian Human Rights Commission on insurance guidelines in respect of disability, I recommended that the Australian Human Rights Commission develop national guidelines, in consultation with other members of ACHRA, on the way in which exceptions for insurance provision in discrimination law are to operate. Such guidelines should include information on how any exception should apply, the nature of the actuarial, statistical or other data required to substantiate a claim for exception and examples of how insurers can meet the terms of the exception in the least discriminatory manner.
- That insurers unwilling to provide coverage for volunteers in particular age groups, or that provide (or propose to provide) differential benefits on the basis of age or coverage at a different premium, be required as a matter of course to provide reasons and to refer those seeking insurance to another insurer able to provide coverage or to the Insurance Council of Australia or the National Insurance Brokers Association as provided for under Standard 2.1.5(b) of the General Insurance Code of Practice.

I consider these recommendations are also relevant in the context of the ALRC's Inquiry into equality, capacity and disability in Commonwealth laws and that change to the insurance exemption under the DDA along the lines proposed in relation to the ADA should also be introduced.

Exception – Insurance; *Equal Opportunity Act 1984* (WA) s 66ZR (found in Part IVB, Division 4 – Exceptions to Part IVB).

As part of my final report I also recommended in respect of Tasmanian law that the relevant section of the ADA be amended to provide that a condition of having protection from liability by reason of the exception include that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the Anti-Discrimination Commissioner. I am of the view that an amendment of this nature should also be included in the DDA.

I note that following the release of my report, the Actuaries Institute, being the professional body representing actuaries in Australia, published a paper/article on discrimination law and actuarial considerations, *Review: Discrimination – What do Actuaries Need to be Aware of?* In that piece, a number of examples are provided and these include examples of people with disabilities seeking insurance coverage. The piece notes in its concluding section that:

Care must however, be taken in product design to determine what actuarial and statistical data is actually available to support product differentiation by age, gender or disability.

The profession also needs to be mindful of trends in social standards which are moving to less acceptance of discrimination even if ‘actuarial data’ is available. If the profession and the insurance industry do not keep in line with social expectations then Governments may intervene to limit the exemptions under anti-discrimination legislation.¹²³

Recommendation 22

That the Insurance Reform Advisory Group be requested to oversee the development of an Insurance Industry Discrimination Compliance Code, containing both compliance and enforcement mechanisms aimed at providing clarification of the way in which insurance exceptions in discrimination law are to apply.

Recommendation 23

That the proposed Insurance Industry Discrimination Compliance Code be the subject of consultation with stakeholders and with members of the Australian Council of Human Rights Authorities (ACHRA)

¹²³ Actuaries Institute, *Review: Discrimination – What do Actuaries Need to be Aware of?* (2013)
[7]<<http://actuaries.asn.au/Library/AAArticles/2013/185AntiDiscriminationpp47.pdf>>

Recommendation 24

That, subject to the passage of consolidated human rights and discrimination law at the Commonwealth level and agreement by the members of ACHRA, the Australian Human Rights Commission be requested to certify the Insurance Industry Discrimination Compliance Code for application across the insurance sector. In the absence of that consolidation, that IRAG or the Insurance Council of Australia work with ACHRA to identify alternative mechanisms to implement the Insurance Industry Discrimination Compliance Code

Recommendation 25

That the Australian Human Rights Commission be requested to develop national guidelines, in collaboration with ACHRA, on the way in which exceptions for insurance provision in discrimination law are to operate. Such guidelines should include information on how any exception should apply, the nature of the actuarial, statistical or other data required to substantiate a claim for exception and examples of how insurers can meet the terms of the exception in the least discriminatory manner.

Recommendation 26

That the relevant section of the *Disability Discrimination Act 1992* (and equivalent state and territory discrimination provisions) be amended to provide that a condition of insurers having protection from liability by reason of exception include a requirement that insurers provide reasonable access to the data on which exception to the Act is sought if requested to do so by affected parties and/or the federal Disability Discrimination Commissioner.

9. Restrictive practices

The *Mental Health Act 2013* (Tas) is a critical piece of legislation that covers the care and treatment of persons with mental illness and safeguards the rights and decision-making capacities of such people in Tasmania. It will come into force in early 2014, in place of the *Mental Health Act 1996*.

The Act provides for voluntary and involuntary hospital or unit admission of those with a mental illness and establishes the Secure Mental Health Unit, Wilfred Lopes Centre and the Tasmanian Mental Health Tribunal. The Mental Health Tribunal has responsibility for forensic mental health matters.

Under section 4(2)(l) and (m) of the Act, a person is not taken to have a mental illness due to an intellectual or physical disability or the existence of an acquired brain injury. The legal rights of patients are also outlined. Under section 62, involuntary patients have the right to have private contact with a lawyer. They also have the right to receive and send mail and make phone calls to lawyers, the Ombudsman and Office of the Anti-Discrimination Commissioner.¹²⁴ However, a court may proceed in the absence of a forensic patient as long as the patient has legal representation.¹²⁵

The Act also authorises mental health units to apply force to a forensic patient, place a forensic patient in seclusion or under restraint for a prescribed reason, such as to ensure the patient's health or safety.¹²⁶

In Tasmania, in situations where a person has a mental illness and is the subject of a detention order, scrutiny is provided to some extent by the Mental Health Official Visitors Program. Appointed under the Mental Health Act, Mental Health Official Visitors visit approved hospitals and

¹²⁴ *Mental Health Act 2013* (Tas) ss 96, 106, 107.

¹²⁵ *Mental Health Act 2013* (Tas) s 118.

¹²⁶ *Mental Health Act 2013* (Tas) ss 93, 94, 95.

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the secure mental health facility at the Risdon Prison site, the Wilfred Lopes Centre. Their role is as follows:

- Examine the adequacy of the services and facilities for the assessment and treatment of people with mental illnesses.
- Investigate the opportunities and examine the facilities for the recreation, occupation, education, training and rehabilitation of people receiving care or treatment.
- Investigate any suspected contravention of the *Mental Health Act*, particularly in relation to unnecessary bodily restraint, seclusion or other restriction of freedom.
- Visit mental health patients and assess the adequacy of their care and treatment.

The Mental Health Official Visitors also:

- investigate complaints made by people receiving care and treatment for mental illness; and
- report suspected contraventions of the *Mental Health Act* to the Mental Health Tribunal.

Apart from the oversight function of the Guardianship and Administration Board with respect to represented persons, no similar service is available for people with disability.

Under current Tasmanian law, the situation of persons who are the subject of a guardianship order is reviewed less than those on orders covered by the *Mental Health Act 1996* (Tas), which is reviewed by the Mental Health Tribunal.

If a person with disability is appointed a guardian under the *Guardianship and Administration Act 1995* (Tas) there is no requirement that the order be reviewed until the 3-year mark¹²⁷; whereas if they were a forensic patient under the *Mental Health Act 1996* (Tas) they would be reviewed more frequently.¹²⁸

Despite this, it is clear that in many instances people with disability in residential care or other congregate care settings are at great risk of having their rights diminished in a number of ways.

Regulation of the way in which disability services are provided occurs under the framework of the Tasmanian *Disability Services Act 2011* (Tas). The Act makes provision for the appointment of a Senior Practitioner

¹²⁷ *Guardianship and Administration Act 1995* (Tas) s 24.

¹²⁸ *Mental Health Act 1996* (Tas) s 52; *Mental Health Act 2013* (Tas) s 181.

whose role is, in part, to monitor the use of restrictive practices.¹²⁹ Use of unauthorised restrictive interventions is not permitted under the Act.

Restrictive intervention is defined under the *Disability Services Act* as:

... any action taken to restrict the rights or freedom of movement of a person with disability for the primary purpose of the behavioural control of the person but does not include such action that is –

- (a) taken for therapeutic purposes; or
- (b) taken to enable the safe transportation of the person; or
- (c) authorised under any enactment relating to the provision of mental health services or to guardianship.¹³⁰

Examples within my own jurisdiction include, for example, instances where decision making is effectively diminished in the delivery of services such as medical care, through failure to appropriately communicate with service recipients. Situations where action is not taken to provide or repair mobility devices, such that it is impossible for a person with mobility impairment to get out of bed, have also been brought to my attention.

Z was Y's treating doctor since Y entered residential accommodation several years ago. As a result of a stroke Y is unable to communicate with speech and has limited movement. He can, however, communicate using a tablet device and app.

Y lodged a complaint under the ADA that Z did not provide Y with the time needed to ask questions about his medical situation, prescribed medication and other matters related to his health care.

On visiting Y in the residential facility, it was found that Y was unable to leave his bed due to a problem with his mobility equipment that had remained unfixed for a period of time. In addition, Y did not have ready access to his tablet and he was limited in his ability to seek help from carers.

Y's case raised issues that warrant independent investigation.

I note that the Issues paper refers to concerns by the UN CRPD about the use of restrictive practices in Australia and that it has recommended that immediate steps are taken to end such practices, including by establishing independent monitoring process.

I agree with this view. As outlined above, I believe that all jurisdictions should make provision for the establishment of an independent Official

¹²⁹ *Disability Services Act 2011* (Tas) s 36.

¹³⁰ *Disability Services Act 2011* (Tas) s 4.

Visitors program for people with disability to enable independent third parties to have regular, unannounced and direct contact with persons with disability in congregate or supported care settings; to monitor conditions of people in institutional and related care settings; and to take and investigate complaints involving practices that may restrict the rights of a person, including those that are imposed as a result of coercion, discipline, convenience or retaliation by staff, family members or others providing support and those that result from insufficient attention to particular disability-related needs.

Recommendation 27

That all jurisdictions make provision for the establishment of an independent Official Visitors program for people with disability to enable independent third parties to have regular, unannounced and direct contact with persons with disability in congregate or supported care settings; to monitor conditions of people in institutional and related care settings; and to take and investigate complaints involving practices that may restrict the rights of a person, including those that are imposed as a result of coercion, discipline, convenience or retaliation by staff, family members or others providing support.

10. Parenthood and family law

Discrimination legislation provides that having a disability should not prevent a person from participating equitably in the activities of the broader community.

Under Australia's discrimination legal and policy frameworks service providers are to ensure that their services are run without discrimination and that positive action is taken to eliminate discrimination wherever possible.

People with disability want to live in a society where they are treated with equality, dignity and respect.¹³¹ However, assumptions are often made that because they have a disability their capacity to do things is limited and fixed at a certain level.

The *Universal Declaration of Human Rights* (UDHR) (1948, Article 16) clearly states the fundamental right all people have to found a family. It recognises 'family' as a 'natural and fundamental group unit of society'.¹³²

Nevertheless, parents with intellectual disability are disproportionately represented in child protection and care proceedings.¹³³

¹³¹ National People with Disabilities and Carer Council, *Shut Out: The experience of people with disabilities and their families in Australia: National Disability Strategy consultation report* (Commonwealth of Australia, 2009).

¹³² *Universal Declaration of Human Rights*, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).

¹³³ Lamont and Bromfield summarise existing literature on the prevalence of parents with disability in child protection and legal proceeding. Research undertaken in Victoria in 1996-97 indicated that cases in which a parent had a disability were almost twice as likely to be substantiated. A review of NSE court files in 2000 found that 8.8% of cases featured a parent with an intellectual disability. A UK study from 2000 found that 15.1% of cases before two English family courts involved a parent with learning difficulties. See Alister Lamont and Leah Bromfield, *Parental intellectual disability and child protection : key issues* (National Child Protection Clearing House Issues paper No. 31, 2009).

Removal of children from parents with disability without appropriate assessment or the provision of adequate support risks denying people with disability human rights and freedom from discrimination at both domestic and international law.

Research suggests that there are a number of complex factors involved in the disproportionate number parents with disability coming to the attention of child protection services. Mildon, Wade and Matthews identify three in particular:¹³⁴

1. The assumptions and beliefs that people have about disability.
2. The high levels of disadvantage faced by these families.
3. Gaps in effective services, supports and resources.

Higher rates of removal of children from parents with disability arise in part from a stereotyping view that such parents are not able to care for children in a capable way.

Such stereotypical beliefs are widespread in our society, despite international research that demonstrates disability is an unreliable predictor of child maltreatment or poor parenting performance.¹³⁵

Research has shown that with the appropriate supports and targeted skills-based training there is little reason to presume that a person with an intellectual impairment is not likely to develop appropriate parenting skills.¹³⁶

Whilst it is clear that there will be circumstances in which children do need to be removed from parents to ensure their safety, health and wellbeing, a review of court records in child protection cases within New South Wales and Victoria has shown that although child neglect appears to occur more frequently in families where a parent has an intellectual disability, neglect is often related to the parents' lack of experience, and the lack of appropriate support rather than to the disability itself.¹³⁷

Allegations of physical and/or sexual abuse are relatively rare in child protection cases involving parents with disability and where sexual or

¹³⁴ Robyn Mildon, Catherine Wade and Jen Matthews, 'Intellectual disability and parenting' (2006) 11(4) *Every Child magazine* <www.earlychildhoodaustralia.org.au/every_child_magazine/every_child_index.html>.

¹³⁵ David McConnell, Gwynnyth Llewellyn and Luisa Ferronato, 'Parent with a Disability and the NSW Children's Court' (2000) *The Family Support and Services Project 2*.

¹³⁶ Lamont and Bromfield, above n 133.

¹³⁷ McConnell, Llewellyn and Ferronato, above n 135.

physical abuse is reported it is most often perpetrated by a third party. The most common concern raised by child protection authorities related to poor parenting skills or being unable to provide appropriate care, particularly the failure to engage in parenting programs.¹³⁸ Typically many families that include a parent with disability are likely to be referred to child protection services because of their particular needs rather than as a result of crisis.

There is a risk that over-representation of parents with intellectual disability in child protection and care proceedings is related to prejudicial perceptions and discriminatory beliefs.¹³⁹ That is, that children are being removed because of *assumptions* that people with disability are unable to successfully parent, or that there is no capacity to acquire parenting skills or take advantage of supports that would assist them undertake parenting functions.¹⁴⁰ This view stems in part from an underlying belief that parenting deficiencies are irremediable and that the provision of training or rehabilitative services will be a waste of time.

At the heart of many discriminatory practices involving people with disability is a medical model of care. This approach focuses on disability as a deficit and prioritises the lack of capacity to participate fully rather than addressing the barriers that may be impacting on the ability to parent effectively.

In Tasmania and other jurisdictions, the fact that a parent has a disability is identified as a risk factor for possible child abuse. The assumption that disability is a risk to a child is made without qualification and with very little understanding of the complex interactions between disability and parenthood. As a consequence, in situations where it is mandatory to report suspected abuse or neglect of a child, doctors and other professionals are faced with little option but to make a notification to child protection authorities when a woman with disability becomes pregnant. Coupled with the introduction of legislative amendments to child protection legislation that allow the notification of an unborn child and the removal of children at birth (even prior to any assessment of the circumstances of the women and her family) women with disability are, therefore, at far greater risk of involvement in the child protection system.

The listing of disability as an automatic trigger on which child protection alerts may be based serves to perpetuate a deficit-based policies and assumptions and perpetrates prejudicial views about the capacity of

¹³⁸ David McConnell and Gwynnyth Llewellyn, 'Stereotypes, Parents with Intellectual Disability and Child Protection' (2002) 24(3) *Journal of Social Welfare and Family Law* 301.

¹³⁹ *Ibid* 307.

¹⁴⁰ *Ibid* 303–309.

people with disability to parent. In such circumstances little is done to actively plan for or support their choice or address the particular barriers that people with disability as parents may face.¹⁴¹

At the same time, services often lack training or expertise in working with parents with disability and the close scrutiny they are subject to sometimes results in the application of stricter standards of accountability than might be applied to other parents.¹⁴² Under these circumstances parents are often required to meet standards that are not explicit or that seemingly change at the whim of service providers.

The risk of prejudicial treatment is also prevalent in the legal systems that surround the child protection system.

McConnell, Llewellyn and Ferronato cite significant evidence to suggest that discriminatory approaches are adopted in court proceedings ranging from decisions that are made primarily on the basis of evidence about the parent's disability rather than any assessment of parenting skills to situations where few or no supports are provided prior to the decision to apply for a court order to have the child removed.¹⁴³

At the same time concern has been expressed about the lack of involvement of specialist disability support and advice at both the assessment and case management stages of the child protection and family support processes, particularly in situations where joint case management between child protection and disability services has the capacity to resolve or reduce care concerns.

These research findings and reports are reflected in complaints made to me under the ADA with, for example, a grandparent being considered unsuitable for kinship care allegedly because of hearing impairment.

To avoid systemic prejudice against a person with disability who is or wishes to become a parent the following factors are suggested as a guide to non-discriminatory practice interventions where disability has been identified:¹⁴⁴

¹⁴¹ Women with Disabilities Australia, *Parenting Issues for Women with Disabilities in Australia* (WWDA, May 2009) 13–14.

¹⁴² Ibid.

¹⁴³ McConnell, Llewellyn and Ferronato, above n135, 3.

¹⁴⁴ David McConnell and Gwynnyth Llewellyn, 'Parental Disability and the Threat of Child Removal' (1998) 51 *Australian Journal of Family Studies* 36.

Assessment of parenting capacity must focus on how the disability or learning difficulty impacts on parenting skills and knowledge and not on a presumption or expectation of failure or the view that any perceived deficiencies are irremediable.

People with disability are not a homogenous group and the existence of a disability alone should not form the basis of an assessment of parental capacity.

Child protection practitioners and other professionals responsible for undertaking assessments must be able to demonstrate that the assessments conducted have been undertaken in a non-discriminatory manner.

A clear distinction must be made between the impact the existence of disability has on the capacity to parent and social context in which the person lives.

Poverty, lack of appropriate housing options, social isolation, and a past history of abuse are all factors that contribute to the capacity to parent effectively. It is important that these factors are recognised as factors arising from the social situation of the person rather than the disability itself and options are explored to improve parental capacity through the provision of appropriate supports.

There is a need to ensure that processes are inclusive, information is accessible and that the right to appropriate representation is respected.

Mainstream services are often ill-equipped to deal with people with disability. It is therefore important that professionals have appropriate guidelines in place to ensure that people with disability understand the nature and purpose of any decisions that are made in relation to their children, that they are consulted in an appropriate manner, that they are offered as a matter of course an independent advocate and that legal processes involving parents with disability are structured in a way that provides opportunities for their wishes and views to be heard.

Adequate and appropriate support services and interventions should be provided to address the needs of both the parent and child.

This includes services that are family centred; provided over a long time frame; focussed on strengths and not deficits; home based; feature participatory rather than relational elements of practice; and are performance rather than knowledge based.

Work being undertaken under the umbrella of the Council of Australian Governments in relation to implementation of a consistent national framework for protecting Australia's children is aimed at developing

greater national uniformity in the way in which child protection systems operate at a State level.¹⁴⁵

It is important that this work include recognition of the disadvantages faced by parents with disability in the child protection system and associated legal processes and ensure that any reform of national child protection policies are based on a non-discriminatory approach to the assessment of risk. This should include a move away from a medical model to one that emphasises supportive interventions and gives increased weight to the desires and preferences of people with disability to exercise their right to form a family and fully utilise their legal capacity in related processes.

Recommendation 28

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that states and territories remove references to disability as a risk factor warranting notification to child protection authorities.

Recommendation 29

That state and territory legislation governing the care and protection of children include provisions making it unlawful to remove a child solely on the basis of parental disability.

Recommendation 30

That state and territory child protection authorities be required to arrange for all professionals involved in the notification, assessment, removal and care of children to undertake certified training in relation to disability and parenthood, including options for supportive assistance to prevent child removal.

Recommendation 31

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include provision for the mandatory referral to advocacy support services of parents with disability facing possible action by child protection.

Recommendation 32

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that legal representation is provided on a mandatory basis for parents with disability at risk of having their children removed by court action.

¹⁴⁵ Council of Australian Governments, *National Framework for Protecting Australia's Children 2009-2020* (Commonwealth of Australia, 2009) <<http://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business>>.

Recommendation 33

That the *National Framework for Protecting Australia's Children 2009-2020* be amended to include a requirement that judicial officers involved in determining child protection matters undertake certified training in relation to disability and childhood, including coverage of options for implementing support to prevent child removal.

11. Transport Standards

The issue of Disability Standards, including the Transport Standards, as subordinate legislation under the DDA is not addressed in the issues paper. I believe however, that for many people with disability access to transport services is fundamental to the exercise of capacity and the attainment of rights across a range of service areas.

On this basis I include in this submission comments related to the implementation of the existing Transport Standards I made in my June 2013 submission to the 2012 *Review of the Disability Standards for Accessible Public Transport 2002 (Transport Standards)*.¹⁴⁶

The provision of adequate, affordable and accessible public transport underpins social inclusion in Australia. It is how many people get to work, visit friends, get to and from sporting, cultural, theatre or arts events, get to meetings, go on holidays, go shopping and keep up their contact with community, friends and family. Importantly it provides mobility for people who often have the fewest transport options.

People with disability and older people are more likely than others to rely on public transport to go about their business and sustain their relationships because many either cannot drive, cannot afford a private car that meets their needs or cannot afford the costs of upkeep of a car.

While some evidence suggested that operators are making timely progress toward implementation of the national Transport Standards, implementation remains slow and uneven across transport modes, resulting in a continued lack of ‘whole of journey’ accessibility for people with disability.

As a consequence, people with disability are unable to rely on public transport services being accessible.

¹⁴⁶ A full copy of this submission is available at http://www.antidiscrimination.tas.gov.au/news_and_events/submissions

A 2007 review of the Transport Standards was the first opportunity for stakeholders to assess progress on the effectiveness and efficiency of the standards in its first 5 years of implementation.¹⁴⁷

The 2007 review report identified a number of systemic, technical and mode-specific actions for advancing the implementation of the Transport Standards at a national level, including important changes to the governance structures to support the implementation of the Standards.

Table 4 outlines the recommendations arising from the review, including the entity identified by the Australian Government as responsible for overseeing implementation.

Table 4: Recommendations from the 2007 Review of the Transport Standards: Responsibility

RECOMMENDATION	RESPONSIBILITY ¹⁴⁸
1 Establish a national framework for Action Plan reporting and require annual reporting by each State and Territory Government	Australian Transport Council (ATC) Ministers
2 Request the ABS to include questions on public transport patronage in their Disability surveys	Australian Bureau of Statistics
3 A technical experts group be convened, with Standards Australia, to develop technical standards specifically suited to public transport conveyances and infrastructure. Once developed, these Standards should be referenced to the Transport Standards and made available for public use.	ATC Ministers/ Standards Australia
4 Mode specific guidelines be developed by modal sub-committees. These guidelines would be a recognised authoritative source for providers, which can be used during a complaints process.	ATC Ministers
5 A mobility labelling scheme be developed which identifies the weight of the aid and whether its dimensions fit within the dimensions for allocated spaces, boarding devices, access paths and manoeuvring areas on conveyances, as specified in the Transport Standards.	ATC Ministers

¹⁴⁷ The Allen Consulting Group, *Review of the Disability Standards for Accessible Public Transport: Final Report* (2009) 8.

¹⁴⁸ Australian Government, *2007 Review of the Disability Standards for Accessible Public Transport 2002: Commonwealth Government response* (2011).

RECOMMENDATION	RESPONSIBILITY ¹⁴⁸
6 A best practice clearinghouse be established in a government agency or research body to collect and disseminate best practice solutions and ideas relating to accessible transport.	AHRC
7 Commonwealth, State and Territory governments provide funding for projects in regional and rural regions where local government are unable to resource upgrades of public transport infrastructure.	ATC Ministers
8 The Australian Human Rights Commission be tasked to provide greater support for representative complaints on behalf of people with disability, reducing the legal cost burden on individuals.	ATC Ministers
9 New governance arrangements be implemented to establish accountability for progressing recommendations from the five-year review. APTJC should have coordinating responsibility for new initiatives (including modal committees and the technical experts group) in partnership with APTNAC.	ATC Ministers
10 The 2017 compliance milestone for tram conveyances and infrastructure be reduced from 90% to 80% to better reflect vehicle replacement cycles.	ATC Ministers
11 The taxi modal sub-committee be tasked with developing a staged implementation timeframe similar to that for other modes of transport, and an appropriate performance measure, to replace the 2007 milestone for WAT compliance.	ATC Ministers
12 Government commission research into the safety of passengers travelling in conveyances whilst seated in mobility aids (including scooters). This research should make recommendations around whether there is a need for an Australian Standard addressing this aspect of safety for mobility aids.	ATC Ministers
13 The Transport Standards be amended to require new community transport vehicles greater than 12-seat capacity to comply with the Transport Standards commencing in 2017 (with full compliance by 2032).	ATC Ministers
14 Phased application of dedicated school bus services to physical access requirements in the Transport Standards, commencing in 2029 and being fully required by 2044.	ATC Ministers
15 Air travel modal sub-committee (the Aviation Access Working Group (AAWG)) be tasked to develop guidance on the carriage of mobility aids on aircraft.	AAWG in consultation with Office of Best Practice Regulation

Implementation of the 2007 Review findings would have resulted in a more appropriate sharing of responsibility for monitoring, compliance and

enforcement of the Transport Standards from individuals and the Australian Human Rights Commission to the regulatory bodies concerned with transport. It is these bodies that have the technical expertise, regulatory systems and oversight of transport reforms.

Importantly, it would also enable effective and timely compliance with the strategies identified in the National Disability Strategy and, more broadly, Australia's commitments under the UN *Convention on the Rights of Persons with Disabilities*.

However, very little appears to have been achieved.

The lack of progress remains extremely disappointing, and is something that I consider should be addressed as a matter of priority.

The 2007 Review report identified several reasons why progress had been poor:

- The lack of a detailed and comparable reporting framework, including data shortcoming and uniform monitoring and reporting requirements.
- The lack of transparency in the Transport Standards, particularly with regard to specific transport modes.
- Exclusion of critical transport modes, such as school buses.
- The lack of transparent and accessible complaints procedures specific to complaints arising from the implementation of the Transport Standards.
- The lack of mechanisms to enable operators to confirm that actions, including equivalent access provisions, are compliant with the Transport Standards.
- The use of exclusions to prevent or limit improved accessibility of services.
- Shortcomings in governance and oversight of the implementation of the Transport Standards at a national level.

The lack of a detailed reporting framework has significant implications for the capacity to determine with any objective certainty what progress is being made against the timetable for the introduction of accessible services at the end of each 5-year period. As a consequence, it is not possible to provide any definitive assessment of the success or otherwise of duty holders in meeting their obligations under the Transport Standards.

At the same time, little or no progress appears to have been made on addressing critical issues such as including school buses within the framework of the Transport Standards or in addressing matters related to ensuring that the Transport Standards are more transparent and clear guidance is provided to operators regarding their obligations.

Equality, Capacity & Disability

Several factors have contributed to this situation. In addition to the difficulties associated with the way in which the original Transport Standards were cast, it is apparent that the Standing Council on Transport and Infrastructure (SCOTI) have accorded little priority to progressing actions arising from the first review.

Flowing from this is an ongoing lack of confidence in the ability of the industry to make the changes required to provide adequate service levels and frustration among stakeholders with the pace of improvements, resulting in increased tendency to engage in lengthy and costly litigation as the primary avenue of redress.

At the heart of these difficulties is the failure to introduce a compliance system that would ensure that all interests are appropriately represented and system-wide progress is made to implement the Transport Standards.

Of relevance in this context is the relationship between the Transport Standards and the DDA.

Under the current structure, whilst the Transport Standards were formulated under section 31 of the DDA, no clear direction is provided on responsibility for their implementation.

In addition, a matter that appears on the face of the DDA to be clear in relation to the capacity to make a complaint about non-compliance with the Standards has been brought into question by the recent decision in *Haraksin v Murrays Australia Limited* [2013] FCA 217 of Nicholas J. In that case, Nicholas J asserted that non-compliance with the Standards cannot be the basis of complaint:

86. Senior Counsel for the applicant submitted that the applicant was at all material times in and after August 2009 a person aggrieved by the respondent's non-compliance with the Standards. In my view this submission is based upon a misconception as to the scope of s 46P and s 46PO(1) of the AHRC Act. Non-compliance with the Standards does not of itself provide a sufficient basis for a person to lodge a complaint under s 46P or to commence a proceeding under s 46PO(1). This is because non-compliance with the Standards does not of itself constitute unlawful discrimination.

It is not clear how Nicholas J reached this conclusion. Section 31 of the DDA provides for the enactment of Disability Standards. Section 32 states 'It is unlawful for a person to contravene a disability standard'. Sections 31 and 32 are found in Division 2A of Part 2 of the DDA.

Section 46P of the *Australian Human Rights Commission Act 1986* (Cth) provides that a person aggrieved by alleged unlawful discrimination may lodge a written complaint with the Commission. Section 46PO provides that a person affected by conduct that is the subject of a terminated

complaint to the Commission can commence proceedings in the Federal Court or Federal Circuit Court.

Section 3 of that Act defines ‘unlawful discrimination; as follows:

unlawful discrimination means any acts, omissions or practices that are **unlawful** under:

(aa) Part 4 of the *Age Discrimination Act 2004*; or

(a) Part 2 of the *Disability Discrimination Act 1992*; or

(b) Part II or IIA of the *Racial Discrimination Act 1975*; or

(c) Part II of the *Sex Discrimination Act 1984*;

and includes any conduct that is an offence under:

(ca) Division 2 of Part 5 of the *Age Discrimination Act 2004* (other than section 52); or

(d) Division 4 of Part 2 of the *Disability Discrimination Act 1992*;
or

(e) subsection 27(2) of the *Racial Discrimination Act 1975*; or

(f) section 94 of the *Sex Discrimination Act 1984*. [**emphasis added**]

This recent interpretation by Nicholas J is relevant because, despite the DDA being a law that is central to achieving equality of opportunity for people with disability, Nicholas J’s decision adds a further complexity to the enforcement of this law at the Federal level. The Standards were developed to be a pro-active compliance measure and there must be some mechanism by which they can be enforced in the event of non-compliance. Nicholas J’s decision challenges the view that the Standards in and of themselves are judicially enforceable. This simply serves to further undermine already difficult mechanisms to achieve equality for people with disability.

The development of a comprehensive compliance system for the Standards is critical to addressing these shortcomings.

The Federal Attorney-General has responsibility for implementation of the DDA, but transport matters do not fall within her or his portfolio and there is little capacity to effect the changes required by the Transport Standards. Transport policy and associated actions are the joint responsibility of the Commonwealth, state and territory governments and local government.

Part 34.1 of the Transport Standards provides for the Federal Minister for Transport and Regional Services, in consultation with the Attorney-General, to review the Transport Standards (including advising on any necessary amendments), but is silent on Ministerial oversight and responsibility for implementation.

In the absence of clear guidance on Ministerial responsibility for implementation of the Transport Standards, implementation is reliant on

individual complaints to test compliance on a case-by-case basis. This remains far from satisfactory for operators, providers and users, and risks an increasing number of cases being dealt with through the legal system as the only avenue for testing compliance.

In addition, a difficulty for transport operators and providers in implementing the Transport Standards is the lack of specific guidance in relation to specific modes of transport. Implementation of the Transport Standards requires interpretation and the practical application of technical requirements to specific settings. In the absence of an agreed approach to compliance, difficulties are being experienced by operators and providers in understanding what constitutes compliance with the Transport Standards. The development of guidelines for specific modes of public transport has been recommended as a way to address this issue.

Modal guidelines would provide specific direction and information on how to apply the Transport Standards to different modes of transport. This approach has the capacity to reduce uncertainty and provide authoritative advice on measures necessary to ensure compliance.

The Australian Government's response to the individual recommendations arising from the 2007 review of the Transport Standards clearly recognised SCOTI as the key policy and regulatory advisory body in relation to the Transport Standards. SCOTI must now ensure that issues surrounding the implementation of the Transport Standards are fully integrated into the national transport reform agenda.

As with other areas where nationally consistent reform is required, consideration should be given to the development of an intergovernmental agreement or similar endorsed at COAG level to provide a clear articulation of the way in which the nationally consistent approach to reform is designed to operate and to establish a single national regulator to oversee the implementation of the Transport Standards.

The intergovernmental agreement should include clear guidelines on mechanisms to enable the Federal Disability Discrimination Commissioner and Australian Human Rights Commission to have standing under the new arrangements and to ensure that state and territory discrimination authorities are consulted where appropriate.

Ensuring responsibility for the implementation of the Transport Standards is brought together under a single national umbrella would provide a more efficient and cost-effective approach to the development of integrated solutions to address the challenges arising from the implementation of the standards.

A failure to ensure implementation of the Transport Standards also has significant implications in relation to achieving the objectives of the

National Disability Strategy and fulfilling Australian obligations under the *UN Convention on the Rights of Persons with Disabilities*.

Recommendation 34

That a co-ordinated national approach to implementation of the *Disability Standards for Accessible Public Transport 2002* be adopted by the Standing Council on Transport and Infrastructure.

Recommendation 35

That an intergovernmental agreement be developed by the Standing Council on Transport and Infrastructure to progress implementation of the *Disability Standards for Accessible Public Transport 2002*, establish implementation governance structures and a national reporting framework.

Recommendation 36

That nationally consistent guidelines (including technical standards) specific to each transport mode be developed, including the clear identification of responsibility for overseeing the implementation of the standard and the delivery of accessible public transport services