



THE LAW SOCIETY
OF NEW SOUTH WALES

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3 March 2017

Mr Jonathan Smithers
Chief Executive Officer
Law Council of Australia
DX 5719 Canberra

By email: Natasha.Molt@lawcouncil.asn.au

Dear Mr Smithers,

Australian Human Rights Commission Disability Discrimination – National Consultation Paper

Thank you for the opportunity to provide input to the Law Council's submission to the Australian Human Rights Commission's (AHRC) Disability Discrimination National Consultation Paper. The Law Society's Human Rights Committee has contributed to this submission.

We note the Disability Commissioner's (the Commissioner) proposed priority areas of focus in advancing the rights of people with disability, being employment, education, housing, the criminal justice system and the implementation of the National Disability Insurance Scheme (NDIS).

We provide the following specific comments on the proposed priority areas of the Commissioner.

People with disability and the criminal justice system

The Law Society of NSW strongly supports the issue of the overrepresentation and discrimination of people with a disability in the criminal justice system as an area requiring priority action.

The overrepresentation of people with a disability in the criminal justice system has been well-documented in a number of recent reports, including the Australian Law Reform Commission's Report: *Equality, Capacity and Disability in Commonwealth Laws*, the Australian Human Rights Commission's Report: *Equal Before the Law*, and the Productivity Commission's Report: *Access to Justice Arrangements*. More recently, the Senate Community Affairs References Committee inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia made a number of recommendations aimed at ensuring that persons with a disability are fully supported to appropriately intersect with all aspects of criminal justice systems, including identifying

disability, provision of supported decision making and providing appropriate exit mechanisms.¹

In particular, the Law Society notes that the Senate inquiry highlighted the overrepresentation of Aboriginal and Torres Strait Islander people with a disability in the criminal justice system. In its recommendations, the Senate inquiry report suggested that Aboriginal and Torres Strait Islander forensic patients should have access to culturally appropriate therapeutic and support services, in order to communicate effectively with service providers, police and the judiciary.²

The Law Society strongly supports the Senate Committee's recommendations, and particularly the need for Aboriginal controlled organisations to be properly resourced to provide specialised and culturally appropriate support to Aboriginal and Torres Strait Islander peoples with cognitive and psychiatric impairments in detention and community care.³

Housing

The Law Society welcomes the Commissioner's focus on access to affordable and accessible housing for people with a disability. In addition to the Commissioner's focus on increasing supply of housing which meets a minimum standard of accessibility, the Law Society suggests that the Commissioner may also wish to include particular consideration of the needs of people with a disability in social housing and boarding houses.

The Law Society refers the Commissioner to the 2011 NSW Ombudsman's Report - *More than board and lodging: the need for boarding house reform*, which identified serious concerns about the safety, health, welfare and rights of the residents of licensed boarding houses in NSW, and the adequacy of the system that is meant to protect them. The Ombudsman's report highlighted the vulnerability and poor circumstances of people living in licensed boarding houses, many of whom have a disability and require daily supervision and support. At the time of the report, the Ombudsman found that boarding house accommodation did not afford residents adequate protection, support or rights, and that there was a pressing need for significant reform to address these ongoing issues.

Employment

The Law Society acknowledges the Commissioner's priority to drive implementation of the recommendations contained in the AHRC's *Willing to Work Inquiry Report*.⁴ In particular, the Law Society notes the Report's finding that some government programs, policies and federal laws including workers compensation, can impact negatively on the workforce participation of Australians with disability.⁵

¹ Senate Community Affairs References Committee, *Report on the inquiry into indefinite detention of people with cognitive and psychiatric impairment in Australia*, (November 2016), 174.

² *Ibid*, 177.

³ *Ibid*.

⁴ Australian Human Rights Commission, *Willing to Work, National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability*, (2016), accessed at: https://www.humanrights.gov.au/sites/default/files/document/publication/WTW_2016_Full_Report_AHRC_ac.pdf.

⁵ *Ibid*, 169.

The Law Society encourages the Commissioner to undertake further consultation regarding the impact of changes to workers compensation legislation on workers with certain types of visas who are injured and/or become eligible for disability payments as a result of such injuries.

By way of example, changes to the NSW workers compensation scheme in 2012 included a number of amendments that decreased compensation entitlements for certain workers. Specifically, where previously an injured worker was able to receive weekly compensation payments until the age of 66, the changes introduced a five year limit or sunset on weekly payments.⁶ The *Workers Compensation Act 1987* (NSW) states that if you are an injured worker, then you should be entitled to lost wages but for the accident (which must be a work related accident). The presumption is that, after five years, the injured worker would be entitled to Centrelink (disability payments) or the NDIS scheme, when introduced.

However, by shifting eligibility for compensation payments from the state-based workers compensation scheme to Commonwealth social security benefits, the changes are affecting injured and disabled workers who are not eligible for government disability benefits due to their visas status.

We refer the AHRC to the case of *Singh v TAJ* (Sydney) Pty Limited [2006] NSWCA 330. In this matter, the Court of Appeal found that the common law confirms that a worker's visa (in this case, a change in its status), has no bearing on that person's workers compensation benefits.⁷ However, due to the above changes to the NSW compensation scheme, a worker who was previously eligible for workers compensation payments for a longer period of time, but who is not a permanent resident, is not entitled to Centrelink disability payments.

The Law Society is concerned that the NSW reforms to the workers compensation scheme have unfairly impacted on the rights of disabled workers who are employed in Australia on certain types of visas and are not permanent residents. The Law Society therefore encourages the Commissioner to give further consideration to this issue, as part of the AHRC's ongoing work in advocating for the implementation of the *Willing to Work Inquiry Report* recommendations.

Implementation of the NDIS

The Law Society notes evidence received by the Senate Committee inquiry, which noted the opportunity that the NDIS could offer in providing specialist disability supports to forensic patients and the broader prison population.⁸ The Senate Committee received conflicting evidence regarding eligibility and access to supports through the NDIS for people held in prisons.

The Law Society considers that, given the significant overrepresentation of people with a disability in the criminal justice system, access to disability services for those in prison is vital for their long-term treatment and rehabilitation, and should therefore also be a focus of the AHRC's work.

⁶ Section 39, *Workers Compensation Act 1987* (NSW).

⁷ *Singh v TAJ* (Sydney) Pty Limited [2006] NSWCA 330, 58.

⁸ *Ibid*, 181.

In addition to the priority areas identified by the Commissioner, the Law Society suggests a number of other areas of disability discrimination that should be included in the AHRC's ongoing areas of work.

Disability discrimination and juror participation

The Law Society notes the recent High Court decision, which found that a deaf woman who uses Auslan (Australian Sign Language) was not discriminated against when she was denied the ability to be a member of a jury.⁹ In commenting on this case, the Commissioner acknowledged the need for better access to justice for all people with a disability. The Law Society notes the Commissioner's views, that the justice system is not designed to allow people with disability to participate in it, and that there is often a lack of awareness that people with disability are capable of functioning, with appropriate support and accommodations, in the justice system.

The Law Society encourages the AHRC's ongoing advocacy on access to justice for people with a disability. On the particular issue of blind and deaf jurors, the Law Society refers the AHRC to the NSW Law Reform Commission's (NSWLRC) 2006 *Report 114: Blind or Deaf Jurors*. The Report made a number of recommendations aimed at improving access to participation in juries for people who are profoundly deaf or have a significant hearing or sight impairment.

However, the NSWLRC's recommendation to support profoundly deaf jurors was not supported by the NSW Government.¹⁰ The response notes that, while reasonable adjustment is operationally available, the NSW Government has not approved reasonable adjustment for profoundly deaf jurors due to the issue of introducing additional unsworn individuals into the Jury Deliberation Room. The NSW Government also noted its concerns regarding the accuracy and interpretation of evidence provided.¹¹ For example, evidence in court can be presented in many forms including by playing the electronically recorded interviews with suspected persons, and telephone intercepts. A large component of this evidence is related to the tone, pace and nuances of speech, which means that these elements can be lost in transcripts alone.

The Law Society recognises the need to balance a defendant's right to a fair trial with the rights of a person with hearing loss.¹² We support the Commissioner continuing to work with states and territories to encourage deaf people to serve on juries, where it is appropriate and in the interests of justice to do so.

Disability discrimination in care and protection matters

The Law Society acknowledges reports of discrimination and limited access to appropriate support services for parents with an intellectual disability who may cross over with the care and protection jurisdiction. More specifically, there are reports that while a high proportion of families with a parent with an intellectual disability will come to the attention of child protection and support agencies due to allegations that a child has

⁹ *Lyons v State of Queensland* [2016] HCA 38.

¹⁰ Department of Justice, 'Did you know: accessibility services available to jurors', *Media Release*, (25 February 2016), accessed at: <http://www.justice.nsw.gov.au/Pages/media-news/news/2016/accessibility-services-available-to-jurors.aspx>.

¹¹ *Ibid.*

¹² See for example the comments made by Douglas J in *Re Application by Sheriff* [2014] 241 A Crim R at 8, concerning the application to determine the eligibility of Ms Lyons for jury service pursuant to the *Jury Act 1995* (Qld).

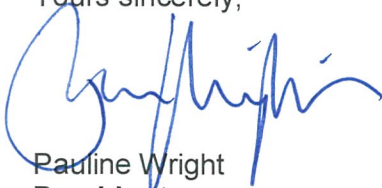
been or is at risk of abuse or neglect, prejudice and lack of understanding often contribute to these heightened rates.¹³

Studies have found that parents with intellectual disability represent a small number of parents in Australia. However, they are over-represented in child protection services and legal proceedings.¹⁴ The Law Society also notes consistent findings regarding a lack of appropriate support and services for parents in the community. We are also concerned about reports of discriminatory practices, as parents with a disability are seriously marginalised by their lack of access to information, including information they can understand, well-informed legal representation, and most importantly, support that is appropriate to their needs during the court process.¹⁵

The Law Society encourages the AHRC and the Commissioner to undertake further consultation and advocacy on the rights of persons with the disability in the care and protection system, to ensure access to appropriate legal and support services for this vulnerable group.

Thank you for the opportunity to provide comments to this inquiry. I would be grateful if questions can be directed to Anastasia Krivenkova, Principal Policy Lawyer, on 9926 0354 or anastasia.krivenkova@lawsociety.com.au.

Yours sincerely,



Pauline Wright
President

¹³ Alister Lamont and Leah Bromfield, 'Parental intellectual disability and child protection: Key issues', *National Child Protection Clearing House Issues No. 31*, (December 2009), accessed at: <https://aifs.gov.au/cfca/publications/parental-intellectual-disability-and-child-protection-key-i>.

¹⁴ *Ibid.*

¹⁵ D. McConnell, G. Llewellyn and L. Ferronato, 'Parents with a disability and the NSW Children's Court', *The Family Support & Services Project The University of Sydney*, (August 2000), accessed at: <http://sydney.edu.au/health-sciences/afdsr/docs/mcconnell-parents.pdf>.