



6 February 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

By email: disability@alrc.gov.au

Dear Executive Director,

Review of equal recognition before the law and legal capacity for people with disability

About Women's Legal Services NSW

1. Women's Legal Services NSW (WLS NSW) thanks the NSW Law Reform Commission for the opportunity to comment on the *Review of equal recognition before the law and legal capacity of people with disability*.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. This submission raises a number of systemic issues for which we have been advocating for change to improve women's access to justice and redress inequalities. The need for improvements is especially important for women with disabilities who may experience increased vulnerabilities.
4. This submission will primarily focus on issues of violence against women with disabilities, intersectional discrimination, family law and employment.

Summary of Recommendations

5. In summary, we recommend:
 - 5.1 Those affected by violence, including women with disabilities, are able to actively engage in the development and implementation of the second and future National Plan implementation plans.



- 5.2 The National Plan be adequately resourced, implemented in a timely manner and include an independent monitoring mechanism to which civil society is resourced to contribute.
- 5.3 Legislation be enacted to strengthen protection against:
 - 5.3.1 sterilisation of any children, regardless of disability, except where there is a serious threat to life or health;
 - 5.3.2 the sterilisation of adult women, regardless of whether they have a disability, in the absence of their fully informed and free consent.
 - 5.3.3 the removal of a child or adult with a disability from Australia with the intention of having a prohibited sterilisation performed.
- 5.4 Legislative protection in family law to ensure in situations of domestic and family violence that an unrepresented litigant alleged to have perpetrated violence is unable to directly cross-examine the victim.
- 5.5 Training for judicial officers, court support staff and legal practitioners in addressing the needs of women with disabilities going through the family court process.
- 5.6 A waiver should apply to all Family Court fees for people experiencing financial hardship.
- 5.7 The *Fair Work Act 2009* include an obligation on an employer to make reasonable adjustments and that the defence of inherent requirements only be available if an employee cannot perform their duties after reasonable adjustments have been made.
- 5.8 A broad definition of disability be inserted into the *Fair Work Act 2009*, consistent with the definition of disability in the *Disability Discrimination Act 1992*.
- 5.9 The complaint process be improved by creating a process that is easier to navigate for vulnerable clients and for Commissioners to take a more active role in the conciliation process.
- 5.10 Public and community based legal services be funded to provide advice and representation for victims of discrimination.
- 5.11 Staff at the Fair Work Commission, judicial officers and legal practitioners receive specific training on discrimination as well as the issues faced by persons with disability in the workplace.
- 5.12 Increase the capacity of the Fair Work Ombudsman to pursue claims on behalf of vulnerable employees.
- 5.13 The *Disability Discrimination Act 1992* be amended so that parties to a discrimination complaint before the Federal Circuit Court or Federal Court bear their own costs unless the complaint is frivolous, vexatious or is lacking in substance.
- 5.14 The AHRC (or another regulatory body) be empowered to investigate and prosecute complaints of discrimination without requiring an individual complaint.
- 5.15 Introduce provisions in anti-discrimination laws for representative complaints and complaints by groups on behalf of, or in the interests of, members.

- 5.16 The *Disability Discrimination Act 1992* be amended to provide for civil penalties for breaches of the Act, and to allow those penalties to be paid to the victim of discrimination.
- 5.17 Anti-discrimination laws be amended to provide for a reversal of the burden of proof in discrimination complaints, in line with equivalent provisions in the *Fair Work Act 2009*.
- 5.18 Replace the existing definitions of direct and indirect discrimination with a unified definition of discrimination.
- 5.19 Strengthen anti-discrimination laws to provide for intersectional discrimination and status of being a victim/survivor of domestic and family violence.

The gendered nature of domestic and family violence

6. Violence against women is one of the most widespread human rights abuses in Australia. Domestic and family violence is the number one risk factor for ill health and premature death for women aged 15-44 years.¹ It is the biggest single cause of homelessness among women and children.²
7. Women with disabilities experience high rates of violence.³ 'Compared to non-disabled women, women with disabilities are at greater risk of severe forms of intimate partner violence; they experience violence at significantly higher rates, more frequently, for longer, in more ways, and by more perpetrators; they have considerably fewer pathways to safety, and are less likely to report experiences of violence'.⁴
8. Women experiencing multiple forms of vulnerability for example, Aboriginal and Torres Strait Islander women with disabilities or CALD women with disabilities, are at greater risk of experiencing violence.
9. Violence against women comes at an enormous economic cost. Research released by the Government shows that each year, violence against women costs the nation \$13.6 billion.⁵ This figure is expected to rise to \$15.6 billion by 2021.
10. It is therefore imperative that all necessary steps are taken to eliminate violence against women and girls.

Australia's human rights obligations

11. The *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) ratified by Australia on 28 July 1983 and the *Convention on the Rights of Persons with Disabilities* (CRPD) ratified by Australia on 17 July 2008 have particular relevance in outlining Australia's human rights obligations to women and girls with disabilities.

¹ VicHealth and Department of Human Services, *The Health Costs of Violence. Measuring the Burden of Disease Caused by Intimate Partner Violence – A Summary of Findings*, 2004 at 10.

² Women, Domestic and Family Violence and Homelessness: A Synthesis Report, Commonwealth of Australia accessed on 13 December 2012 at: <http://www.fahcsia.gov.au/our-responsibilities/women/publications-articles/reducing-violence/women-domestic-and-family-violence-and-homelessness-a-synthesis-report?HTML#sum>

³ *Australian Bureau of Statistics (2005) Personal Safety Survey*, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

⁴ Women with Disabilities Australia, *WWDA Submission to the UN Analytical Study on Violence against Women and Girls with Disabilities; Summary and Key Recommendations*, June 2012 at 3.

⁵ KPMG, *The Cost of Violence against Women and their Children. Safety Taskforce*, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government, 2009.

12. Discrimination against women and girls is both a cause and consequence of violence against women and girls. *General Comment No 19* makes clear that gender-based violence is a form of discrimination within Article 1 of *CEDAW*⁶ and Article 2 of *CEDAW* obliges state parties to legislate to prohibit all discrimination against women. Such violence is a violation of the rights to life, to equality, to liberty and security of person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.⁷
13. Article 6 of CRPD acknowledges the impact of multiple discriminations caused by the intersection of gender and disability and requires Governments to take positive actions and measures to ensure that women and girls with disabilities enjoy *all* human rights and fundamental freedoms.

Due diligence obligations

14. Under international human rights, states are required to act with due diligence to prevent, punish, investigate and redress harm as a result of acts of violence.⁸ Significantly, States may be held responsible for private acts, such as domestic and family violence, if they fail to act with due diligence.
15. Domestic and family violence is rarely one off, often continuing over an extended period of time of many years; often involves a pattern or cycle of abuse; is often perpetrated by someone the victim knows; and is a means of coercion, control and dominance of the victim. In our experience of working with victims, the impact of these crimes is long lasting and the need for support and rehabilitation, including compensation, is very important.
16. While prosecuting domestic, family and sexual violence and providing victims compensation largely falls to the states and territories, it is incumbent upon the federal government to play a role to ensure the adequacy of this and takes steps to overcome the structural impediments that a federated system can present.
17. The Issues Paper, for example, acknowledges that ‘despite under-reporting people with disability are over-represented as victims of crime, especially violence ... [and] sexual assault of women’.⁹
18. In response to the Royal Commission into Institutional Responses to Child Sexual Abuse it will also be important that an adequate reparations scheme is established.

National Plan to Reduce Violence against Women and their Children

19. The National Plan to Reduce Violence against Women and their Children (National Plan), endorsed in February 2011 by state, territory and Commonwealth governments, is an important development and commitment for which governments should be commended.
20. However, concerns have been raised about the lack of consultation with civil society, including communities affected by violence, which has “resulted in inadequate attention to

6 CEDAW Committee, *General Recommendation No. 19: Violence against Women*, UN Doc A/47/38 (1992), para 7.

7 CEDAW Committee *General Comment No 19*, para 7. See also: *International Covenant on Civil and Political Rights (ICCPR)* ratified by Australia on 13 August 1980, Articles 2, 3, 7 and 26; *International Covenant on Economic, Social and Cultural Rights (ICESCR)*, ratified by Australia on 10 December 1975, Articles 3 and 10.

8 Human Rights Committee, *General Comment No. 31*, CCPR/C/74/CRP.4/Rev.6, para. 8; Committee on the Rights of the Child, *General Comment No. 5*, CRC/GC/2003/5, 27 November 2003, para. 1; Committee on Economic, Social and Cultural Rights, *General Comment No. 14*, E/C.12/2000/4 (2000), para. 33.

9 ALRC, *Equality, Capacity and Disability in Commonwealth Laws, Issues Paper*, November 2013 at 61.

the development of specific programs for marginalised groups of women”,¹⁰ including women with disabilities.

21. Attempts have been made to address gaps in the National Plan for women and girls with disabilities. For example, the Stop the Violence: Improving Service Delivery for Women and Girls with Disabilities project (STVP), funded by the Commonwealth government and co-ordinated by Women with Disabilities Australia, aims to build the evidence-base to support future reform of the service system that is more responsive to the needs of women and girls with disabilities experiencing or at risk of experiencing violence.¹¹
22. We refer to the Report of the Proceedings and Outcomes of the National Symposium on Violence against Women and Girls with Disabilities held in October 2013 which builds on the work of the STVP and outlines six key themes and two key mechanisms to progress this important work. The two key mechanisms include:
 - a) establishment and development of the virtual centre for the prevention of violence against women and girls with disabilities
 - b) establishment of a national women with disabilities expert panel on the prevention of violence against women and girls with disabilities¹²
23. We endorse the establishment of these mechanisms through the second National Plan implementation plan as women with disabilities must be included.
24. It is essential that those affected by violence, including women with disabilities, are able to actively engage in the development and implementation of the second and future National Plan implementation plans.
25. Other concerns include the adequacy of resourcing and timely implementation of these implementation plans; and the establishment of an independent monitoring mechanism of the National Plan, including the resourcing of civil society to assist in this process.¹³

Recommendations:

Those affected by violence, including women with disabilities, are able to actively engage in the development and implementation of the second and future National Plan implementation plans.

The National Plan be adequately resourced, implemented in a timely manner and include an independent monitoring mechanism to which civil society is resourced to contribute.

¹⁰ Australian Human Rights Commission, *Australian study tour report: Visit of the UN Special Rapporteur on violence against women*, (Australian study tour) 2012 at 15.

¹¹ See: Stop the Violence Improving Service Delivery for Women and Girls with Disabilities Project, accessed on 4 February 14 2014 at: <http://www.stvp.org.au/index.htm>

¹² *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia Report of the Proceedings and Outcomes National Symposium on Violence against Women and Girls with Disabilities*, Sydney, Australia 25 October 2013 at 23-25 accessed on 4 February 2014 at: <http://www.stvp.org.au/documents/STVP%20Outcomes%20Paper.docx>

¹³ Australian study tour, Note 10 at 3; *Non-government Organisations Follow Up Report to the United Nations Committee on the Elimination of Discrimination Against Women*, (NGO interim CEDAW Committee report) (2012) at 4, 6, 8, 16-17, 19-20.

Coerced sterilisation of people with disability

26. We refer to the recent Senate Inquiry into the Involuntary or Coerced Sterilisation of People with Disabilities in Australia and to our submission which recommended this issue be considered within a human rights framework and that legislation should be enacted to strengthen protection against:

- a) sterilisation of any children, regardless of disability, except where there is a serious threat to life or health;
- b) the sterilisation of adult women, regardless of whether they have a disability, in the absence of their fully informed and free consent.
- c) the removal of a child or adult with a disability from Australia with the intention of having a prohibited sterilisation performed.

27. We further note disability and other human rights advocates concerns about the recommendations made in the Senate report released in July 2013:

The Report recommends that national uniform legislation be developed to regulate sterilisation of children and adults with disability, rather than to prohibit the practice. The Report recommends that for an adult with disability who has the 'capacity' to consent, sterilisation should be banned unless undertaken with that consent. However, based on Australia's Interpretive Declaration in respect of Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), the Report also recommends that where a person with disability does not have 'capacity' for consent, substitute decision-making laws and procedures may permit the sterilisation of persons with disability. If the Australian Government accepts the recommendations of the Senate Inquiry, it will mean that the Australian Government remains of the view that it is an acceptable practice to sterilise children and adults with disabilities, provided that they 'lack capacity' and that the procedure is in their 'best interest', as determined by a third party.

By not abolishing this practice of forced and involuntary sterilisation the Australian Government, is denying women and girls with disabilities their rights of informed consent, their rights of being a mother; and it also sets many women up for long term physiological problems.¹⁴

28. We endorse these concerns.

Recommendation:

Legislation should be enacted to strengthen protection against:

- a. sterilisation of any children, regardless of disability, except where there is a serious threat to life or health;
- b. the sterilisation of adult women, regardless of whether they have a disability, in the absence of their fully informed and free consent.
- c. the removal of a child or adult with a disability from Australia with the intention of having a prohibited sterilisation performed.

¹⁴ Joint NGO Report on Australia's Human Rights Record - An update on Australia's progress towards implementing Universal Periodic Review recommendations for the United Nations Human Rights Council, 2014.

Access to justice

Vulnerable witnesses and family violence

29. We are a member of Women's Legal Services Australia, a national network of community legal centres advocating for the rights of women and endorse their comments on the issue of vulnerable witnesses in family law proceedings.
30. In family law, there are no legislative protections to prevent an alleged perpetrator of violence who is unrepresented from directly cross-examining their victim.
31. At the State level, specific laws are in place to prevent an accused person from directly cross-examining their victim in sexual offence cases and, in some States, in family violence protection order cases. In such cases an accused person must have legal representation to cross-examine the victim.
32. Many of our clients who experience domestic and family violence may develop a disability such as post-traumatic stress, depression or anxiety. The fear of the trauma of cross-examination by an alleged perpetrator of violence and the continuation of violence through such cross-examination may further impact upon their mental health.
33. For vulnerable witnesses who are unrepresented, the stress may mean they settle before trial despite the agreement being unsatisfactory or inappropriate so as to avoid the continuation of violence that would be part of the direct cross-examination.
34. Even with legal representation, without legislative protection, the legal representative may not challenge the direct cross-examination by an unrepresented alleged perpetrator of violence.

Recommendation:

Legislative protection in family law to ensure in situations of domestic and family violence that an unrepresented litigant alleged to have perpetrated violence is unable to directly cross-examine the victim.

Training

35. At WLS NSW many of our clients experience mental health issues or cognitive/intellectual disabilities. As vulnerable clients they have specific needs in dealing with the family law system.
36. Queensland Legal Aid has published *Best Practice Guidelines Framework Working with clients who have been affected by domestic violence*. These guidelines emphasise the need for work processes to be developed to best meet the needs of vulnerable clients who have experienced family violence and for additional support to be provided to such clients when navigating the family law pathways.
37. Comprehensive training is needed for judicial officers, court support staff and legal professionals to ensure that women with disabilities are not further disadvantaged by the legal process in family law matters. Education around the issues faced by women with disabilities and current research on best practice need to be part of the family law professional training.

Recommendation:

Training for judicial officers, court support staff and legal practitioners in addressing the needs of women with disabilities going through the family court process.

Court Fees

38. Court fees can be a barrier to accessing justice.
39. For example, we welcome the abolishing of the flat (court) fees for disadvantaged litigants in family law matters, which were introduced in 2011, and the re-instating of fee waivers for such litigants. We refer to comments we made in the National Association of Community Legal Centre's submission to the Attorney-General's Department about the barriers the \$60-\$80 fees would impose on disadvantaged litigants, including victims of domestic and family violence seeking to access justice who may sacrifice safety due to the cost of an initiating application.¹⁵
40. We are concerned, however, that the fee waiver does not apply to a divorce or decree of nullity. Application fees for these still apply. From 1 January 2013, the divorce application fee for disadvantaged litigants increased to \$265 for those who previously paid \$60. Decree of nullity of marriage increased to \$375.
41. The divorce application fee is more than the weekly Newstart allowance and over 75% of the weekly single parent payment and so out of the reach of many disadvantaged clients, including people with disabilities.
42. Divorce or decree of nullity of marriage can be particularly important for women who have experienced domestic and family violence when trying to end the violence. It can bring finality, and positively impact on health and emotional well-being and plays an important role in the healing and empowering process
43. Women who have experienced domestic and family violence face enhanced financial difficulties following the end of violent relationships but often seek a divorce for safety and protection. The increased fee is in a sense a "double jeopardy" for these women because they are on one hand in the greatest need of a divorce (i.e. to achieve the protection and security and move forward) but on the other hand will also face the greatest difficulty in raising the fee due to their lack of financial security following separation.
44. This is particularly the case for women with disabilities who are more likely to experience financial hardship.
45. Notably, there is no other way to obtain a divorce or decree of nullity of marriage under Australian law except through the court process.
46. Given the importance of divorce for women who have experienced violence and the deleterious effect on of the proposed fee increase for divorce on women, we call for fee waivers for financial hardship to be extended to all family law matters including applications for divorce/decree of nullity of marriage.

¹⁵ National Association of Community Legal Centre, *Submission to Attorney-General's Department of federal court fees*, July 2011 accessed on 30 October 2013 at: http://www.womenslegalnsw.asn.au/downloads/law-reform/2011NACLCLC_AGD_FederalCourtFees.pdf

47. To ensure improved access to justice to the family law system a waiver should apply to all Family Court fees for people experiencing financial hardship. While we recognise that because of timelines a person getting divorced has a longer period to raise the funds we do not think that this justifies the amount payable.

Recommendation:

A waiver should apply to all Family Court fees for people experiencing financial hardship.

Employment (Questions 6, 7 & 8)

48. Protection from discrimination in employment for persons with disability can be found within both the *Fair Work Act 2009* and the *Disability Discrimination Act 1992*. There is substantial overlap between the provisions under both pieces of legislation that relate to discrimination.
49. While there are key similarities in the protections provided by each piece of legislation, choosing the right jurisdiction is complex because there are significant differences in the protections provided to employees, obligations placed on employers and processes involved in lodging and pursuing a claim or complaint. Some of these key differences include the limitation periods for filing complaints or claims, the liability for costs orders where a claim is unsuccessful, the defences and exceptions available to employers and the burden of proof.
50. While WLS NSW acknowledges that there are benefits in having a choice of jurisdiction, choosing the right jurisdiction can be a complex and often overwhelming task for employees. While we strongly support the need to retain the protections under both the *Fair Work Act 2009* and the *Disability Discrimination Act 1992*, there is a need for consistency within these jurisdictions.

Advantages of the Fair Work Act 2009

51. In many respects the *Fair Work Act 2009* provides stronger protection for employees than the *Disability Discrimination Act 1992*. The strengths of the *Fair Work Act 2009* include: the reverse onus of proof; protections against adverse costs orders; and civil penalty provisions.
52. These factors are steps towards addressing the power imbalances between vulnerable employees and employers. These factors also significantly increase an employee's ability to participate in the complaint process and significantly increases the chances that disability discrimination in the workplace is adequately addressed.
53. The complaint process under the *Disability Discrimination Act 1992* does not afford employees these same advantages.

Areas for improvement in the Fair Work Act 2009

54. There are however gaps in the *Fair Work Act 2009* and a need for greater legislative protection or clarity in some of its provisions. WLS NSW identifies the key areas for reform include: amendment to the defence of inherent requirements; inclusion of a definition of disability; and amendments to the complaint process.

55. WLS NSW also recommends increasing assistance available to employees by the Fair Work Ombudsman.

Amendment to the defence of inherent requirements

56. Both the *Fair Work Act 2009* and the *Disability Discrimination Act 1992* include within their provisions a defence for action taken by an employer to terminate an employee if they cannot perform the inherent requirements of their position.¹⁶ However, under the *Disability Discrimination Act 1992*, this defence is counterbalanced by the obligation placed on an employer to make reasonable adjustments. The defence of inherent requirements is only available where an employee cannot perform the inherent requirements of their position after reasonable adjustments have been made.

57. Employees are not afforded this protection under the *Fair Work Act 2009*. Thus an employee has greater protection in these circumstances under the *Disability Discrimination Act 1992*. The inconsistency within the two Acts means it is difficult for employers to identify their obligations and difficult for employees to identify their rights.

58. When choosing the appropriate jurisdiction, an employee is therefore in the very difficult position of weighing up the benefits of an application made where costs are limited, there is a reverse burden of proof and the availability of civil penalties, with an alternative jurisdiction that arguably deals better with a person's needs and requirements in the workplace.

59. In order to provide the most adequate protection for persons with disability in employment, WLS NSW recommends that the *Fair Work Act 2009* include an obligation on an employer to make reasonable adjustments and that the defence of inherent requirements only be available if an employee cannot perform their duties after reasonable adjustments have been made.

60. The obligations placed on an employer should be consistent. In order to provide clarity and certainty of protection, the provisions of the *Fair Work Act 2009* regarding obligation to make reasonable adjustments should mirror those provisions in the *Disability Discrimination Act 1992*.

Recommendations:

The *Fair Work Act 2009* include an obligation on an employer to make reasonable adjustments and that the defence of inherent requirements only be available if an employee cannot perform their duties after reasonable adjustments have been made.

Definition of disability

61. Under the *Fair Work Act 2009* there is no definition of disability. This means that there is the potential for a broad definition to be applied however there is also a significant risk that this leaves the legislation vulnerable to a narrow definition.

62. This is inconsistent with the provisions of the *Disability Discrimination Act 1992* which includes a broad definition of disability.¹⁷

63. WLS NSW submits that in order to ensure that there is adequate protection for persons with disability in the workplace and clarity for both employers and employees, the *Fair Work Act 2009* should include a broad definition of disability consistent with the definition of disability in the *Disability Discrimination Act 1992*. This would also assist in providing clarity for both

¹⁶ Section 351(2)(b) *Fair Work Act 2009*; Section 21A(1)(b) *Disability Discrimination Act 1992*

¹⁷ Section 4 *Disability Discrimination Act 1992*

employers and employees in identifying their responsibilities and rights.

Recommendation:

A broad definition of disability be inserted into the *Fair Work Act 2009*, consistent with the definition of disability in the *Disability Discrimination Act 1992*.

The complaint process

64. It has been the experience of many of our clients that the general protections complaint process through the Fair Work Commission (FWC) can be difficult and intimidating to navigate on one's own. While conciliations at the FWC are less formal than subsequent court proceedings and many complaints are resolved at this stage, the feedback that we get from clients is that it is still hard for them to raise issues of concern and it is a difficult process.
65. If a matter proceeds beyond the Fair Work Commission to the Federal Circuit Court or the Federal Court our clients face even greater obstacles given the formality, complexity and expense of the proceedings.
66. These difficulties are compounded by limited funding for assistance from Legal Aid NSW or Community Legal Centres and most of our clients cannot afford a private solicitor.
67. The difficulties with the complaint process mean that many of our clients who are victims of discrimination do not pursue their complaints.
68. WLS NSW submits that the system could be improved by creating a complaint process that is easier to navigate. One area in which we believe the process could be improved is in relation to the conduct of conciliations at the Fair Work Commission (FWC). In our experience, Commissioners at the FWC are not generally as actively involved in conciliations compared to Conciliators at the Australian Human Rights Commission (AHRC). Given that many of our clients report finding it difficult to speak up for themselves in conciliations, a greater presence and more active involvement of Commissioners in this process would be an important step towards addressing the power imbalance between the employer and employee in this process.
69. Furthermore, a complainant's ability to participate in the process and assert their rights under the *Fair Work Act 2009* would be significantly increased if there was a greater availability of free legal representation for general protection applicants.
70. It would also be beneficial if staff at the FWC, judicial officers and legal practitioners received specific training on discrimination as well as the issues faced by persons with disability in the workplace.

Recommendations:

The FWC complaint process be improved by creating a process that is easier to navigate and for Commissioners to take a more active role in the conciliation process.

Public and community based legal services be funded to provide advice and representation for victims of discrimination.

Staff at the FWC, judicial officers and legal practitioners receive specific training on discrimination as well as the issues faced by persons with disability in the workplace.

Fair Work Ombudsman (FWO)

71. WLS NSW believes that assistance from a regulatory body greatly increases the chances that complainants are able to assert their rights and significantly increases the protection afforded to them in the workplace.
72. However, in our experience, while many employees are able to obtain information from the FWO, only a very limited number of complainants are able to access substantial assistance from the Ombudsman with only a small number of cases pursued on their behalf. It is our experience that that many of our clients find it extremely difficult, if not impossible, to raise a complaint on their own. Further, where a complaint is not settled, taking a matter to court takes resources that many individuals do not possess.

Recommendation:

Increase the capacity of the Fair Work Ombudsman to pursue claims on behalf of vulnerable employees.

Strengthening anti-discrimination laws (Question 6)

Costs and enforcement process

73. Our clients generally report they are satisfied with the complaint and conciliation process at the Australian Human Rights Commission (AHRC).
74. However, while the AHRC is a no costs jurisdiction, if a matter cannot be resolved during or following a conciliation at the AHRC, the complainant must make an application to have the matter heard by a federal court. Such applications are complex, time consuming and not user friendly for self represented litigants. In addition, applicants run the risk of adverse costs orders in the event they are unsuccessful.
75. The protections provided to our clients by the *Disability Discrimination Act 1992* are therefore limited due to the difficulty and expense of proceeding further if their complaint is not resolved at the conciliation stage. The expense involved in proceeding to court and the risk of a cost order are factors that deter our clients from pursuing legitimate claims at court and as such are significant barriers preventing equal recognition before the law of people with disability.

Recommendation:

The *Disability Discrimination Act 1992* be amended so that parties to a discrimination complaint before the Federal Circuit Court or Federal Court bear their own costs unless the complaint is frivolous, vexatious or is lacking in substance.

76. Furthermore, a complainant's ability to participate in the process and assert their rights under the *Disability Discrimination Act 1992* would be significantly increased if there was greater availability of free legal representation for victims of discrimination.

Individual complaint model

77. The current complaint model is one which requires an individual to identify and make a complaint of discrimination. The advantages of this include an opportunity for an employee to raise their complaint and to be heard and empowered by taking action. It may also result in a resolution of the complaint that is satisfactory to both the employee and the employer.

78. However, there are some downsides to an individualised complaint model. It relies upon an individual to have the time, emotional and financial resources to pursue a complaint. Agreements are individually based and due to the confidentiality clauses which are generally included, usually do not effect systematic change. Further, where a complaint is not settled, taking a matter to court takes resources that many individuals do not possess.

79. It is our experience that that many of our clients find it extremely difficult, if not impossible, to raise a complaint on their own. Furthermore, we suspect that the most vulnerable community members are not even aware of the protections afforded to them under the *Disability Discrimination Act 1992* and their right to make a complaint. We submit that a system that relies on individuals to raise complaints as the only form of regulation is likely to be failing those who are in the greatest need of its protection.

80. Whilst WLS NSW strongly supports the retention of an individualised complaint model, we also advocate for the introduction of a regulatory and investigatory body which can investigate and, where appropriate, prosecute breaches of anti-discrimination legislation and seek compensation on behalf of complainants.

81. The advantages of such a body include being a deterrent to those employers who repeatedly and/or deliberately breach the Act, an increase in public awareness and an opportunity to address systemic issues. It also means that there is a system that is not solely reliant upon an individual making a complaint.

82. We further submit there should be provisions for representative complaints and complaints by groups on behalf of, or in the interests of, members.

Recommendations:

The AHRC (or another regulatory body) be empowered to investigate and prosecute complaints of discrimination without requiring an individual complaint.

Introduce provisions in anti-discrimination laws for representative complaints and complaints by groups on behalf of, or in the interests of, members.

Penalties

83. There are limited remedies available for breach of the *Disability Discrimination Act 1992*. Awards of compensation are also generally quite low. WLS NSW submits that the imposition of penalties would significantly increase respondent's motivation to comply with the legislation.

Recommendation:

The *Disability Discrimination Act 1992* be amended to provide for civil penalties for breaches of the Act, and to allow those penalties to be paid to the victim of discrimination.

Burden of proof

84. The burden of proof in discrimination matters falls to the individual complaining of discrimination. This contrasts starkly with the general protections provisions under the *Fair Work Act 2009*. It is extremely difficult for a complainant to establish that there was a discriminatory reason for the respondent's behaviour as they often do not have access to the relevant evidence.
85. Reversing the burden of proof would remove the current difficulties faced by complainants in proving discriminatory conduct and provide consistency with the *Fair Work Act 2009*.

Recommendation:

Anti-discrimination laws be amended to provide for a reversal of the burden of proof in discrimination complaints, in line with equivalent provisions in the *Fair Work Act 2009*.

Definition of discrimination

86. The definitions of direct and indirect discrimination in anti-discrimination laws are complex, confusing and inconsistent. The definitions have also led to a very narrow interpretation of discrimination which would seem to be inconsistent with the intended purpose of the legislation.
87. As a way to address the complexity of anti-discrimination law, WLS NSW suggests that the existing definitions be replaced with a unified definition of discrimination which does not reduce the current protections for both direct and indirect discrimination as was proposed in the Human Rights and Anti-Discrimination Exposure Draft Legislation.

Recommendation:

Replace the existing definitions of direct and indirect discrimination in anti-discrimination laws with a unified definition of discrimination.

Additional protections

88. Women with a disability often experience intersectional discrimination, that is, discrimination on the basis of more than one protected attribute, for example, disability and sex, disability and race. Current Australian anti-discrimination laws fail to adequately recognise and address individuals' experiences of such complex discrimination. This failure means that the law is underutilised by those most in need of protection.
89. The Human Rights and Anti-Discrimination Bill Exposure Draft aimed to address this with the inclusion of intersectional discrimination. We recommend the inclusion of intersectional discrimination in anti-discrimination laws.
90. Additionally, we advocated for the inclusion of domestic and family violence as a protected attribute. As raised above, many of our clients who experience domestic and family violence may develop a disability such as post-traumatic stress, depression or anxiety. Domestic and family violence can also compound the vulnerabilities of people with existing disabilities.
91. To provide protection from discrimination on the grounds of being a victim/survivor or domestic and family violence is consistent with human rights obligations; The National Plan to Reduce Violence against Women and their Children; builds on protections through enterprise agreements and industrial awards; extends protection beyond the workplace to also include accommodation, education and goods and services; challenges negative attitudes; and plays an important role in educating and raising awareness within the wider community with the aim of eliminating violence against women.¹⁸

Recommendation:

Strengthen anti-discrimination laws to provide for intersectional discrimination and status of being a victim/survivor of domestic and family violence.

92. If you would like to discuss any aspect of this submission, please contact me on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

¹⁸ See: Women's Legal Services NSW, *Submission on the Exposure Draft Human Rights Bill*