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People with Disability Australia (PWDA)

Royal Commission into Institutional Responses to Child Sexual Abuse

Issues Paper 8: Experiences of Police and Prosecution Responses

Submission

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About People with Disability Australia

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are a national, cross-disability peak representative organisation and member of the Australian Cross-disability Alliance. We represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

Our Expertise in this Area

People with Disability Australia has extensive expertise in the area of Police and legal responses to criminal offences against people with disability, including the sexual assault of children with disability. As a national peak representative body for people with disability, we provide policy advice to numerous inquiries related to violence, including violence against children with disability. Recent examples include the Senate Inquiry into Domestic Violence,¹ the Senate Inquiry into Violence, Abuse and Neglect of People with Disability,² and the Third Action Plan for the National Framework for Protecting Australia's Children.³

We were partners in Women with Disabilities Australia's *Stop the Violence* project,⁴ which explored sexual assault and domestic violence responses to women and girls with disability. More specific to the area covered by this Issues Paper, we also made numerous strong submissions to the Australian Law Reform Commission's investigation of *Equality, Disability and Capacity* in 2014⁵, and the 2014 Report of the Disability Discrimination Commissioner, *Equality Before The Law: Towards Disability Justice Strategies*.⁶

Additionally, we have been funded as a Royal Commission Community-Based Support Service by the Department of Social Services to provide individual advocacy to people with disability who are affected by the Royal Commission.⁷ As part of this process, we have

¹ <http://www.aph.gov.au/DocumentStore.ashx?id=48f9adfc-435a-4a98-b9ac-3c08615368b4&subId=299778>

² As this inquiry is ongoing, our submission is not yet public. When it is, it will be accessible here: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect

³ <http://pwd.org.au/pwda-publications/submissions.html>

⁴ See www.stvp.org.au

⁵ See in particular the final report: Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws* ALRC 124, Australian Law Reform Commission <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>

⁶ Australian Human Rights Commission (2014) *Equal Before the Law: Towards Disability Justice Strategies*, Australian Human Rights Commission <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law>

⁷ See www.rcsupport.pwd.org.au

supported individuals in reporting violence to Police, but also in making complaints about the services they have received from Police when they have previously reported.

We also provide individual advocacy to adults and children with disability more generally, and so have a broad sense of how Police and legal systems respond to disability. The case studies used in this submission are predominantly stories taken from our individual advocacy cases, but also include a number of other examples drawn from others' work in this area.

Introduction

1. The current set of Police and prosecutorial responses to people with disability frequently become barriers to equal access to justice. These were well canvassed in the 2014 Report of the Disability Discrimination Commissioner, *Equality Before The Law: Towards Disability Justice Strategies* and the recent work by the Australian Law Reform Commission into *Equality, Disability and Capacity*. Children with disability face many of the same impediments in seeking access to justice.
2. This submission to Issues Paper 8 seeks to elaborate the difficulties faced by children with disability seeking to report child sexual abuse in an institutional setting. Many of the current studies of these issues focus on adults with disability, and we use these to inform our work in this area. This may be reflected in some of the case studies following as well.
3. We acknowledge that the experiences of children with disability reporting child sexual abuse may in some instances differ from that of adults, especially in terms of how seriously the crime may be taken. We have highlighted where we believe this to be the case. However, our experience in supporting adults who are reporting their own experience of child sexual abuse demonstrates that many of the same impediments exist as for other adults with disability reporting other crimes.
4. Australia is party to various human rights conventions which impact on the obligations on Police and prosecutions in responding to child sexual abuse, especially of children with disability. The Convention on the Rights of Persons with Disabilities (CRPD), in particular, places obligations on Australia which are relevant to this issue, especially Articles 7 – Children with Disabilities, 12 – Equal Recognition Before the Law, 13 – Access to Justice and 16 – Freedom from Exploitation, Violence and Abuse. The Committee on the CRPD made a number of recommendations in 2013 regarding the specific situation of people with disability in relation to the justice system.⁸ These included observations that Australia has failed to ensure access to justice and equality before the law, and must provide training to Police, prison staff, lawyers, the judiciary and court personnel regarding people with disability and amend legislation and policy in line with Article 13 of the CRPD.
5. Importantly, the lack of access to justice for children with disability has many, many negative outcomes for both the individual and society more broadly. For the individual, the inaccessibility of justice can have personal impacts in terms of heightening the sense that ‘no one cares’ about the violence they experienced, and may compound the sense that no one believes them. This can compound trauma impacts, but it may also put children with disability at increasing risk as they age, as their distrust of the justice system may lead them to not report further crimes.
6. The societal impacts of the failures to investigate and prosecute perpetrators of child sexual abuse are also very serious. Criminal record checks are generally less robust than the Working With Children Check, but are frequently the only check used in disability

⁸ CRPD/C/AUS/CO/1

services. Thus, the failure to convict perpetrators can allow their future perpetration against so-called 'vulnerable persons,' including adults with disability.

7. Perhaps most significantly for the Royal Commission's considerations is the impact that the failure to investigate and prosecute has on efforts to prevent future perpetration:

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.⁹

8. Further, as criminal conviction also impacts on the success of potential civil litigation proceedings, there are circumstances in which the unwillingness to investigate and prosecute has severe and ongoing impacts on the lives of people with disability.

Janet's story¹⁰

Janet is now aged in her 40s. She was sexually abused in an institutional setting at the age of 4. Her family did not support her at the time to report to Police. Since about 30 years of age, she and her sister (who also experienced abuse by the same perpetrator) have called the Police once every year to ensure that the investigation continued. Earlier this year, she received positive news that the Police are now seeking prosecution of the perpetrator. Due to complexities in the case, this will not occur until late 2015 or early 2016.

With support and assistance from support services she has been exploring options regarding civil litigation and the possibility of compensation, and has been told that she has a much better chance with a criminal conviction of the perpetrator. In the meantime, Janet lives in extreme poverty, with an unstable housing situation and a distinct lack of access to supports. She has also experienced a number of violent relationships during her adult life.

NB This case study is derived from a case presented to the Royal Commission.

9. PWDA is thus pleased to offer the following exploration of the key issues related to Police and prosecution responses to the sexual abuse of children with disability.

Reporting institutional child sexual abuse to police

10. The initial instance of reporting child sexual abuse in an institution to the police may be dramatically impeded for children with disability due to a lack of appropriate supports to do so. This may be the case for those children who reside at home, but children living in residential institutions such as specialist disability institutions or out-of-home care may

⁹ Anti-Discrimination Commissioner (Tasmania), Submission 71 to the Australian Law Reform Commission's Inquiry into Equality, Capacity and Disability Issues Paper.

¹⁰ Names have been changed

experience greater difficulties, in line with the difficulties adults with disability also experience.¹¹

11. For children in these settings even contacting police may be very difficult; they may have limited if any access to a private phone line, and may not be able to access support to physically attend a police station. Disclosing to staff may be risky due to staff interrelationships, and the potential negative consequences for the institution of a report of sexual abuse. For children with disability, this lack of support may simply mean they never reach police.¹²
12. Additional barriers exist for Aboriginal and Torres Strait Islander people with disability, who may be justifiably suspicious of Police, and reluctant to draw attention to themselves. This can impact on their reporting to police. This can also impact on adults with disability who are parents, as children are removed from parents with disability at a rate of 10 times that of other parents.¹³

Beryl's story

Beryl is an Aboriginal and Torres Strait Islander woman with disability who was removed from her parents as a member of the Stolen Generation. She was sexually abused a child in the institution she was removed to. Reporting to Police was not possible at that time, as the institution constantly told her that she was a bad girl. Beryl reports that she went into the institution as a virgin and came out with syphilis.

As an adult, she had all 7 of her 8 children removed from her care – into institutional care where one child with a disability too experienced child sexual abuse - and this increased her distrust of Police and other services, and made her reluctant to draw attention to herself or her family through reporting her own experienced. Beryl has never met with two of her children who were removed from her care.

Beryl does not trust the Police or the justice system more generally. Beryl's son with a disability has told his story to the Royal Commission and has made a Statement to the Police which is currently being investigated. All Beryl's children have at some time been incarcerated. While incarcerated, those adult children were subject to violence. Although as an adult she is now seeking to report her experiences, it is clear that this is only possible because of the availability of support services, and the fact that her children are now adults and there is no risk of them being removed from her custody.

NB This case study is derived from a case which is intended to be presented to the Royal Commission at a later date.

¹¹ Attard, M., & Price-Kelly, S. (2010) *Accommodating Violence: The experience of domestic violence of people with disability living in licensed boarding houses*, People with Disability Australia.

¹² French, P., Dardel, J., & Price-Kelly, S. (2009) *Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment*, People with Disability Australia, especially pp. 16-23

¹³ Australian Cross Disability Alliance, *Submission 142* to the Senate Inquiry into Domestic Violence. See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence

13. In the process of reporting, children with disability may face other difficulties. Although the process of taking statements from children is now subject to rigorous police training and legislative requirements regarding vulnerable witnesses in many jurisdictions in Australia, this intersects haphazardly with police training in taking statements from people with disability. This can mean that children with disability are not facilitated in their communication with Police.¹⁴

Rose's story

An eight year old girl, Rose, who has limited mobility and poor communication skills, suffered a broken hip at Out of School Care (OOSH).

When her mother collected her from the care of this centre, the staff didn't acknowledge that Rose had suffered an injury, but rather that she had been throwing a tantrum. Staff stated that Rose had been refusing to walk, so they'd left her on the floor in the hallway to think about her behaviour.

Rose's mother felt that Rose's lower body was limp, and took her immediately to the hospital. While at the hospital, Rose underwent an x-ray to determine the extent of the damage. Rose underwent emergency surgery to re-join her hip with a plate and a five screws. She spent a week in hospital, and returned home in a wheelchair.

Rose strongly indicated to her mother that her injury was not the result of an accident. She was very scared to talk about the incident, and was afraid she would get in trouble. She is fearful whenever the Out of School Care facility is mentioned. Rose has been in a wheelchair for three years.

Due to the huge gaps in this case, whereby DOCS and the Department of Education both claimed that the other had jurisdiction, the case fell to the police to investigate.

[REDACTED]

[REDACTED]

¹⁴ Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond Doubt: The Experiences of People with Disabilities Reporting Crime – Research Report*, Victorian Equal Opportunity and Human Rights Commission, Chapters 5 and 6.



14. In some jurisdictions, children with disability may be able to be provided with support to give their statement to police. However, this does not mean that supports will in fact be provided; and where and if they are, they may not be appropriate, and may even have a conflict of interest. Individual advocates – who are independent of any service provider – or Victoria’s Independent Third Parties, should be called in all instances where a person with disability is seeking to report violence they have experienced, as they can ensure adequate engagement from Police, and connect the individual with services.

Olivia’s story

Olivia, a middle-aged woman with intellectual disability, is currently living with her family [REDACTED]. Olivia’s mother recently became very worried about her daughter, as Olivia was wetting the bed and constantly washing herself. Her mother found this behaviour problematic, and looked for reasons to explain why it was happening. In her investigating, Olivia’s mother found condoms in Olivia’s bag. Olivia then disclosed to her mother that she had been sexually assaulted by a support worker.

Olivia’s mother took her straight to the police station. Once there, police officers interviewed Olivia immediately. This interview lasted a total of three hours, and was video recorded.

Olivia endured two hours of interviewing before the police allowed a support worker to assist her. However, the support worker who was chosen to assist Olivia was a colleague of the perpetrator. This led to Olivia immediately shutting down and not telling the police any more information. Nonetheless, the police seemed confident about the likelihood of making charges at this stage.

The perpetrator of sexual assault then disappeared from work, and the police were unable to find him for an extended period of time. This drew out the process for Olivia and her mother, causing them immense amounts of stress and trauma.

When the perpetrator eventually returned to work, the police reignited their investigation. [REDACTED]

Olivia’s mother is in the process of applying for the police video of Olivia’s interview under the Freedom of Information Act. She wants to understand more about why the police decided that Olivia was not a reliable witness.

15. It is unclear how widespread the refusal to take a report is in relation to the sexual abuse of children with disability. However, it is well documented that police often refuse to take reports from adults with disability in relation to a range of crimes including sexual and physical violence, for a variety of reasons including what they believe the

‘best interests’ of the person to be. These constitute justifications for a further form of systemic abuse - legal abuse, denying children with disability access to their legal rights.¹⁵

How police responded to the report

16. In many cases of people with disability reporting violence, Police often do not respond adequately. In some instances, necessary evidence collection such as rape kits may not be completed, on the basis of Police assessment that the case will not reach prosecution or conviction. In other instances, investigation of the case may be deprioritised, again because of the belief that a case will not reach prosecution.

Angela’s story

Angela is a woman with intellectual disability who was raped by multiple perpetrators. On reporting this to Police, a rape kit was proposed to be done and she was transferred to the forensic section at the Emergency Department. However, on arrival the medical team refused to perform the kit, on the grounds that the woman had an intellectual disability.

She was not under guardianship, but the medical team assumed that she was unable to consent to this procedure. As a result, vital time was lost seeking someone else to consent. By the time it was clarified that no one else was required for consent to this, it was too late to capture the physical evidence.

As told to Women with Disabilities Australia.

17. There exists a perception by Police and prosecutors that people with disability are too easily influenced, and thus their story may not be believed. This may be exacerbated in the case of children with disability, as children may be thought more likely to ‘make things up’. Depending on the age of the client, myths regarding the sexuality of people with disability may come into place, specifically that people with disability are asexual, or that they are “oversexed”. This can impact on police responses, especially in terms of believing the victim.¹⁶

The police investigation process

18. A number of impacts on the police investigation process exist for children and adults with disability. Police perceptions that cases involving witnesses with disability are unlikely to reach trial, or result in conviction, can impact commitment to investigations. There can also be a perception that because the testimony is provided by a victim with disability, there is a greater weight placed on other sources of evidence. The time spent

¹⁵ *Beyond Doubt*, Chapter 4.

¹⁶ S Murray & A Powell (2008) Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response, *ACSSA Issues 9*, Australian Centre for the Study of Sexual Assault, Australian Institute of Family Studies.

seeking these other sources of evidence may be perceived to be disproportionate for a single case.¹⁷

19. During and following investigation, Police are constantly making assessments as to the likelihood of success of a conviction, and weighing these against the resources put into an investigation. It is only if they believe a case to be likely to result in conviction that it is submitted for prosecutorial consideration. This can also impact on how the reports themselves are treated; some individual advocacy clients that we support have discovered that their reports have been illegally destroyed by Police and other responsible authorities.

Melinda's story

Melinda is in her 20s now, and was sexually abused by a person responsible for her transport to and from school for a period of 2 years around the ages of 10 and 11. As she grew older and learned that what she had experienced was a criminal offence, she reported to a staff member her School, whose initial response was inadequate.

After a couple of months, the staff member supported her to report to Police. The staff member acted as an interpreter. It is not clear whether Melinda was offered an alternative, as may have been more appropriate to avoid conflicts of interest. There was inadequate support for her at this time, and she felt very unsupported after making her report.



NB This case study is derived from a case which is intended to be presented to the Royal Commission at a later date.

Boarding house

In a boarding house for people with intellectual disability, three women made complaints against a male co-resident. These women shared the use of a bathroom with this man, and stated that he had been touching them inappropriately and making sexual comments towards them.

When the police visited the boarding house to investigate the incidents, PWDA's individual advocate supported the three women in the police interviews. While they were polite and provided the women with referrals for counselling, the police indicated that it would come down to their word against his, and that the disability of the perpetrator would reduce the likelihood of him being found culpable for the offences.

¹⁷ *Beyond Doubt*, Chapter 7

The boarding house removed the perpetrator and moved him to a 'more suitable' facility. The police did not pursue their investigation as it was deemed there was no likelihood of successful conviction.

Celia

Celia is a client of PWDA who has intellectual disability, and a history of severe abuse and neglect. A couple of years ago, Celia was living in supported accommodation run by a not-for-profit organisation. At this group home, Celia was sexually assaulted by a staff member. The police were notified and involved.

They interviewed Celia, and stated that they believed her story. However, they felt they couldn't obtain a conviction, as Celia's testimony was not deemed to be reliable enough to hold up in court. Consequently, they didn't pursue the investigation. Celia's mother knows that the man who assaulted Celia is still working for the same organisation, albeit at a different facility.

Interacting with prosecutors, if charges were laid

20. In many jurisdictions, legislation governing the admissibility of evidence can exclude evidence given via interpreter, using assistive communication devices, with a support person, or using Boards. This can mean that prosecutors – or Police, if the case does not make it to a prosecutor – may decide that without evidence given by the victim, a trial is unlikely to be successful. They may refuse to continue with the case under these circumstances.
21. Additionally, the prosecutor may decide that a victim will appear unreliable as a witness in court, for a variety of reasons, and this may also impact their decision to proceed with a case. Some of these include the myths about children and adults with disability which exist in our society, which may be thought to impact on a jury and/or judge or magistrate. Although these assessments may be accurate in some circumstances, it also precludes individual cases from consideration, and can thus become something of a self-fulfilling prophecy.

Preparation for court

22. Support to prepare for court depends on the state or territory the victim resides in, and on the accessibility of those support services. In many cases, adequate supports for people with disability are not easily available. Individual advocacy is a key element in this preparation for court, especially in ensuring that people with disability have the time and support to understand how the system will work.

The trial and any sentencing or appeal processes

23. Some barriers arise at the level of the physical and attitudinal access to the court. *Beyond Doubt* elaborates a number of different forms of inaccessibility, many of which arise from court officers' lack of understanding of disability.¹⁸ Excluding assistance dogs

¹⁸ *Beyond Doubt*, Chapter 8.

has been reported. However, more generally, as observed by the Judicial Commission of NSW,

People with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability and credibility because judicial officers and juries may have preconceived views regarding a person with an intellectual disability. For example, they may fail to attach adequate weight to the evidence provided because they doubt that the person with intellectual disability fully understands their obligation to tell the truth. In addition, people with an intellectual disability are vulnerable to having their evidence discredited in court because of behavioural and communication issues associated with their disability.¹⁹

24. This can severely impact on the likelihood of conviction.
25. Additionally, trials may be particularly difficult for children with disability to participate in. Most jurisdictions have some protections in place for at least some people with disability, although these may only cover children and people with cognitive impairments, excluding adults with other kinds of impairments, including psychosocial disability arising from trauma impacts, from access to these protections. In some cases, access to these protocols or protections may also be subject to Police recognition of disability, or defence argument against it.²⁰
26. Additionally, some protocols may enable protections such as the admissibility of evidence by CCTV, but do not always extend to the supports that children with disability may require, including a support person. Without this support person, children with disability may struggle to provide testimony, overwhelmed by the formal setting, trauma, and the need to respond formally to questions.
27. As noted above, some legislation governing the admissibility of evidence can exclude evidence given via interpreter, using Augmentative and Alternative Communication, with a support person or with other supports. Even where evidence may be given by “any appropriate means,” as in the NSW and Victorian Acts governing admissibility, the lack of guidance provided by the Act results in the limited knowledge of court officers determining what can and cannot be included.²¹
28. However, perhaps one of the biggest impediments faced by people with disability is the current understandings of ‘capacity’ in Australian law. The Australian Law Reform Commission’s exploration of in *Equality, Capacity and Disability in Commonwealth Laws*, released in November 2014, critiques the reliance on concepts of capacity, and proposes an alternate framework designed to maximise the equality before the law and access to justice for people with disability.²² It holds that the Convention on the Rights of Persons

¹⁹ ‘Equality before the Law Bench Book’ (Judicial Commission of New South Wales, 2006) [5.3.1].

²⁰ *Beyond Doubt*, p. 84

²¹ *Beyond Doubt*, pp. 82-83

²² Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws*, Australian Law Reform Commission Report 124. See Chapter 7, Access to Justice, in particular.

with Disabilities, to which Australia is a Party, obliges changes to ensure access to justice for people with disability, including children.²³

29. PWDA's response to the key issues canvassed in the ALRC's inquiry focussed particularly on ensuring adequate access to decision-making support, and specifically detailed a revised version of a National Framework for Equality before the Law designed to support this. This decision-making support has relevance across a wide range of settings, which include the interaction of an adult or child with disability with Police, with prosecutors and with the criminal and civil justice systems more broadly. The submission made by PWDA with the Australian Human Rights Centre and the Australian Centre for Disability Law, and another by PWDA with the National Association of Community Legal Centres Inc (NACLC) are attached to this submission to support the Royal Commission in its consideration of these matters. We commend the recommendations made there to the Royal Commission.

Conclusion and Recommendations

This submission has canvassed many of the issues that children and adults with disability may face in seeking to report to Police and/or participate in the criminal justice system. There are six key areas for reform and improvement which are addressed in the following recommendations:

- All service providers who provide services to children with disability to be trained in how to respond to disclosures of child sexual abuse of children with disability, and specifically regarding the myths about the impact of disability on the experience of violence, and on the veracity of evidence. This training should include substantial consideration of the current issues related to systemic or legal abuse in the denial of access to justice for children with disability.
- Substantial education and training of all court officials and officers, Police and prosecutors, specifically focused on disability, the myths about the impact of disability on the veracity of evidence, and the needs of adults and children with disability, be made compulsory. Such training should also involve consideration of trauma impacts on those who have experienced violence, and discussion of the importance of individual advocacy as support.
- All legislation governing the admissibility of evidence should be amended to provide guidance to court officers and others regarding appropriate evidence-giving supports for people with disability.
- Adequate decision-making support, in line with PWDA's recommendations to the Australian Law Reform Commission, should be made available to all of people with disability in contact with the criminal justice system, including when making reports to Police.
- Individual advocacy services be adequately funded to ensure that they can provide support to people with disability seeking to report to Police or participate in the criminal

²³ *Beyond Doubt*, p. 193

justice system, ensuring that those disclosing do not need to rely on staff from services who may have a conflict of interest.

- Primary prevention strategies must include adequate investigation and prosecution of allegations, as the current failure to do so places children, and children with disability especially at higher risk of violence.

We thank the Royal Commission for the opportunity to make this submission.

Submission to Australian Law Reform
Commission

Equality, Capacity and Disability: Discussion Paper

Access to Justice

July 2014



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Introduction

This submission has been prepared by the National Association of Community Legal Centres Inc (NACLC) and People with Disability Australia (PWDA).

NACLC is the peak national body of Australia's community legal centres. NACLC's members are the eight State and Territory Associations of Community Legal Centres. PWDA is a non-profit, non-government organisation and is a leading disability rights, advocacy and representative organisation of and for all people with disability. PWDA is the only national, cross-disability organisation, representing the interests of people with all kinds of disability.

This submission is made in response to Chapter 7 (Access to Justice) of the Australian Law Reform Commission's Discussion Paper, *Equality, Capacity and Disability*, released on 22 May 2014. Both NACLC and PWDA have made separate submissions on the other issues in the Discussion Paper.

NACLC and PWDA welcome the opportunity to respond to Chapter 7 of the Discussion Paper. At a broad level, NACLC and PWDA welcome the Australian Law Reform Commission's (ALRC) approach in the chapter. The ALRC's work represents an important contribution to discussion about the rights of people with disability in accessing justice in Australia, against the backdrop of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). However, NACLC and PWDA make a number of comments and suggestions in relation to the issues raised in the submission below.

NACLC and PWDA would be pleased to participate in a consultation or provide any further information on the matters in this submission should the ALRC require.

Access to Justice

As recognised by the ALRC, people with disability experience a range of difficulties in engaging with the justice system in Australia. These have been outlined in numerous reports, including most recently by the Australian Human Rights Commission, in its Report, *Equal Before the Law: Towards Disability Justice Strategies* and were discussed in NACLC's initial submission to this Inquiry.¹

In this submission, NACLC and PWDA confine their discussion to the issues raised and proposals made in the Discussion Paper. The focus of Chapter 7 is on issues concerning decision-making that have implications for access to justice. However, we are concerned that the chapter limits itself to consideration of court processes. The need for appropriate decision-making support arises in other contexts, including in engagements with police, correctional authorities and others, and as a result we suggest consideration of these broader access to justice issues.

¹ NACLC, Submission 78.

As both NACLC and PWDA have noted in their individual submissions, there is a specific need for the ALRC to highlight that Commonwealth, state and territory governments owe an obligation to provide supports to people with disability to assist them in decision-making where it is required.² In some instances the ALRC proposes consideration of supports in determining, for example, unfitness to stand trial. However, the ALRC's focus is on assessing the capability of the person with disability. NACLC and PWDA suggest that instead, the focus of any test should be on the adequacy of supports available to the individual to enable them to express their will and preference and, as a result, participate in the legal process. This shifts the emphasis to an assessment of the supports that are available to a person, rather than an assessment of the person.

In light of this, the need for adequate funding for appropriate services and supports is vital to ensuring equal access to the justice system for people with disability and the proper implementation of the ALRC's proposals.

Further, NACLC and PWDA emphasise that the need for training, education and the development of additional guidance are also central to ensuring equal access to justice for people with disability. The UNCRPD has expressed its concern about the lack of such training or guidance and recommended that standard and compulsory modules on working with people with disability be incorporated into training programmes for police officers, prison staff, lawyers, the judiciary and court personnel.³ NACLC and PWDA suggest that the ALRC should make an overarching recommendation about the need for such education, training and development of guidance material to complement the other proposals made in Chapter 7.

Finally, while the focus of the ALRC's Inquiry is on Commonwealth laws and legal frameworks, modelling in Commonwealth laws serves as a useful blueprint for reform in states and territories, as most criminal prosecutions in Australia fall within the responsibilities of the states and territories, and most federal offenders are tried in state and territory courts. Accordingly, NACLC and PWDA encourage state and territory governments to consider the ALRC's proposals for reform, to ensure the consistent implementation of reform across Australian jurisdictions.

Unfitness to Stand Trial

The existing rules relating to unfitness to stand trial have in some cases led to very concerning adverse outcomes for people with disability. For example, situations where as a result of being diverted away from the criminal justice system, a person is then detained for a period longer than any term of incarceration for the crime with which they were charged in a prison, hospital or other institution of detention.

² See, eg, Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GV/1 (19 May 2014), [16].

³ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session (2-13 September 2013)' (United Nations, 4 October 2013), [28].

The ALRC should also be mindful of the consequences of a determination of unfitness to plead on the exercise of legal capacity in other areas of that person's life. Frequently, when a finding of limited legal capacity is made in a criminal context, the person becomes subject to regimes which can potentially violate their rights in other areas. For example, the use of restrictive practices, restrictions on liberty, and forced treatment.

Reform of the test

While NACLC and PWD recognise that a person must be able to understand the proceedings by understanding information relevant to the decisions that he or she will have to make, retaining and weighing information, and communicating his or her decision, we suggest that Proposals 7–1 and 7–2 should be combined and revised.

Proposal 7–2 is that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial. NACLC and PWDA suggest that rather than being taken into account in determining unfitness to stand trial, the focus of any test should be on the adequacy of the supports available to the individual to facilitate their participation in the proceedings. If the necessary supports are provided, but still do not enable a person to be able to express their will and preferences, and to make decisions, then it follows that they will not be able to comprehend the proceedings sufficiently to participate, and they may be deemed unfit to stand trial for the particular criminal proceedings.

As a result, we recommend that the ALRC propose that the *Crimes Act 1914* (Cth) be amended to provide that a person should not be permitted to stand trial in a particular criminal proceeding if they cannot be supported to: understand the information relevant to the decisions that they will have to make in the course of the proceedings; retain that information to the extent necessary to make decisions in the course of the proceedings; use or weigh that information as part of the process of making decisions; and communicate decisions in some way.

As noted earlier, in some circumstances the supports available may not be sufficient for the person who requires support to be deemed fit to stand trial. This may be due to funding or related decisions or the existence of other limitations. In order to avoid these circumstances as far as possible, we strongly recommend that the ALRC reiterate the Australian Government's obligation to ensure effective access to justice for people with disability on an equal basis with others, including by: 'providing procedural and age-appropriate accommodations to facilitate their role as direct and indirect participants, including as witnesses, in all legal proceedings'.⁴

In line with this approach, NACLC and PWDA suggest that the ALRC further examine the provisions under the *Crimes Act* relating to unfitness to stand trial to ensure that they are consistent with the National Decision-Making Principles and focus on supports. For example, ss 20BB and 20BC of the *Crimes Act*, which relate to circumstances in which a court determines that a person who was unfit to be tried will or will not become fit to be tried

⁴ *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 13(1).

within 12 months, could be amended to incorporate reference to whether an alternative regime of supports may be provided which would facilitate the person's participation at a later date.

Further, consistent with the ALRC's focus on ensuring that statutory language is appropriate, NACLCLC and PWDA suggest that the term fitness or unfitness to stand trial is inappropriate and should be amended to reflect the focus on assessment of supports, rather than the 'fitness' of an individual.

Limits on detention

NACLCLC and PWDA share the UNCRPD's concern that people with disability who are deemed unfit to stand trial can be 'detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence'.⁵

There is significant inconsistency across Australian jurisdictions with respect to statutory limits on the period of detention for people found unfit to stand trial.

NACLCLC and PWDA strongly support Proposal 7–3 that state and territory laws should provide for limits on the period of detention of a person who has been found unfit to stand trial, and for regular periodic review of detention orders. We suggest that s 20BD of the *Crimes Act*, which requires review at least once every six months provides a useful starting point, but given that the availability and adequacy of support provision can fluctuate, we suggest that more frequent reviews would be preferable. We also support regular periodic review of detention orders.

Conducting Civil Litigation

Litigation representatives

Litigation representatives play an important role in providing people who may require decision-making support, with the support necessary to enable them to bring or defend legal proceedings, facilitating their access to the justice system on an equal basis with others.

However, there are a number of broader difficulties in relation to litigation representatives. These relate to the cost and availability of litigation representatives and the potential costs implications for those acting as litigation representatives, which have a deterrent effect on the willingness of individuals and organisations to act as a litigation guardian.⁶ While a

⁵ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session (2-13 September 2013)' (United Nations, 4 October 2013), [31].

⁶ See, eg, Federation of Community Legal Centres (Victoria), '*Review of Guardianship Law*', Submission to Victorian Law Reform Commission Guardianship Inquiry, June 2011; Federation of Community Legal Centres (Victoria), *Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, Submission to Parliament of Victoria Law Reform Committee Inquiry, September 2011, 9-10.

litigation representative should be personally liable for the costs of litigation if they do not act within the scope of their powers, or conduct the litigation appropriately, it is not otherwise in the interests of justice for litigation representatives to bear personal liability in this way.

As the ALRC acknowledges, the terminology and test included under existing court rules are inappropriate and inconsistent with the CPRD, particularly to the extent that they reflect a status-based approach to disability.

As with Proposal 7–1 and 7–2, NACLC and PWDA suggest that Proposals 7–4 and 7–5 should be combined and revised to focus on the supports available to the individual to facilitate their participation in the proceedings without the need for a litigation representative. We suggest that rather than supports simply being taken into account in determining whether a person needs a litigation representative, the focus of any test should be on the adequacy of supports available to the individual to support them to act without a litigation representative.

The role of litigation representatives

Where litigation representatives act for people with disability it is important to ensure that their will, preferences and rights must direct all decisions made by the litigation representative. This is not currently the case. Accordingly, NACLC and PWDA support Proposal 7–6, which applies the ALRC’s broader approach in encouraging supported decision-making and a shift from the ‘best interests’ test to will, preferences and rights, in the context of litigation representatives.

NACLC and PWDA strongly support Proposal 7–7 and highlight the need for courts to issue practice notes or other guidance material to explain the role and duties of litigation representatives, including clarifying the duties owed to any client and to the court. Such guidance material could include information on the role of litigation guardians and the activities a litigation representative might undertake, for example contact with third parties and service providers.

Solicitors' duties

The issue of whether the Australian Solicitors' Conduct Rules and state and territory legal professional rules should be amended to provide a new exception to solicitors' duties of confidentiality in the circumstances outlined in Question 7–2, is an important issue.⁷

Where a lawyer has concerns about the decision-making ability of a client and is unable to resolve those concerns, they face potential conflict between their duty of confidentiality, prohibiting them from revealing their concerns to any third party without their client's consent, and their duty to act in the client's best interests. Current guidance suggests that in such a situation a lawyer should cease to act for the client. Clearly, this raises significant concerns about the ability of people with disability to access legal representation and access justice on an equal basis with others.

We would also be concerned if such an exception were to be relied upon by lawyers to simply seek to make an application for the appointment of a litigation guardian, guardian or administrator, rather than attempting to provide the client with the support they may require to enable them to provide instructions.

In light of the importance and complexity of this issue, NACLC and PWDA suggest that further consultation and consideration of any such proposal occur prior to the ALRC making a recommendation of this type. We also note that additional education, training and guidance material for legal practitioners on this issue would be required to complement any such change to the Rules.

Witnesses

In the experience of our members and members' clients, allegations made by people with disability are not always investigated, or criminal charges pursued, in part due to perceptions of people with disability not being competent to give evidence as a witness to criminal proceedings, or not being considered to be a credible witness.⁸

Competency

NACLC and PWDA suggest that Proposal 7–8 should be revised to focus on the adequacy of supports available to an individual to facilitate their giving of sworn evidence. We suggest that rather than supports being taken into account in determining whether a person is competent to give evidence under s 13 of the *Evidence Act 1995* (Cth), the focus of any test should be on the adequacy of supports available to the individual to support them to give sworn evidence. This would assist in giving effect to s 13(3), the wording of which implies

⁷ Note, NACLC has made submissions in a number of contexts in relation to the Australian Solicitors' Conduct Rules. See, eg, NACLC, *Comments on Australian Solicitors' Conduct Rules and Commentary*, Law Council of Australia Information Paper, April 2013, at: www.nacalc.org.au/resources/NACLC%20response%20to%20LCA%20120413.pdf

⁸ See, eg, NACLC, Submission 78.

that a person's lack of capacity may be overcome by forms of support or assistance being provided to them in giving evidence.

This is important to ensure that people with disability are able, to the greatest extent possible, to give sworn evidence, recognising that the probative value of an unsworn statement will be assessed and may not be admitted where it is unfairly prejudicial to a party, misleading or confusing, or may result in undue delays.⁹

Assistance in giving evidence

NACLC and PWDA strongly support Proposals 7–9 and 7–10 which would amend the *Crimes Act* to provide that witnesses who need support are entitled to give evidence in any appropriate way, and to have a support person present while giving evidence. This proposal is consistent with the CRPD, and with ensuring that people with disability are able to participate in proceedings as witnesses on an equal basis with others.

The ALRC acknowledged in the Discussion Paper that these proposals do nothing to ensure that support is actually available. As a result, as outlined above, NACLC and PWDA urge the ALRC to make a recommendation emphasising the obligation of the Commonwealth, state and territory governments to provide supports.

Guidance for judicial officers

NACLC and PWDA strongly support Proposal 7–11. In addition to the development of bench books to provide judicial officers with guidance about how courts may help to assist and support people with disability in giving evidence, other education and training of judicial officers, developed in consultation with people with disability and their representatives as well as other relevant stakeholders should complement this proposal.

Jury Service

NACLC and PWDA are of the view that ensuring people with disability are able to serve on juries is of fundamental importance to ensuring their equality before the law and basic citizenship and human rights.

Qualification to serve on a jury

NACLC and PWDA have significant concerns about existing provisions under Commonwealth, state and territory law that have the effect of excluding people with disability from serving on a jury and support amendments which would ensure that people with disability are not automatically or inappropriately excluded from serving on a jury.

NACLC and PWDA support the intent of Proposals 7–12 and 7–13 but suggest that they should be combined and revised. We suggest that the focus of any test should be on the adequacy of supports available to an individual to assist them to discharge their role as a juror. The proposal could, for people who require support to serve on a jury, propose for

⁹ *Evidence Act 1995* (Cth) s 135.

example that the *Federal Court of Australia Act 1976* (Cth) provide that a person is qualified to serve on a jury where the necessary supports are provided to enable them to understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations; retain that information to the extent necessary to make these decisions; use or weigh that information as part of the jury's decision-making; and communicate decisions to other members of the jury and to the court.

Assistance for jurors

NACLC and PWDA strongly support Proposal 7–14. Providing that a judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations is a significant and important amendment. It recognises the centrality of supports in ensuring that people with disability who require such support are able to serve as a juror. We suggest that the ALRC provide further detail on the potential support a 'communication assistant' may provide to a person with disability who is a juror to understand the proceedings and jury deliberations and the appropriate definition of the term to be included in the *Federal Court of Australia Act 1976*.

Jury secrecy

NACLC and PWDA also strongly support Proposal 7–15. While NACLC and PWDA acknowledge potential concerns about maintaining the secrecy of the jury room if allowing a thirteenth person (that is, a communication assistant) to be present, we agree with the ALRC's conclusion that these concerns can be addressed. With respect to the wording of the proposal, we suggest paragraph (a) should be amended to provide that a communication assistant may swear an oath or make an affirmation.





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NGO in Special Consultative Status with the
Economic and Social Council of the United Nations

**People with Disability Australia (PWDA)
The Australian Centre for Disability Law (ACDL)
The Australian Human Rights Centre (AHRCentre)**

**Australian Law Reform Commission (ALRC):
Equality, Capacity and Disability in Commonwealth Laws
Discussion Paper May 2014**

**Submission
July 2014**

About Us

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

The Australian Centre for Disability Law (ACDL) is a community legal centre which specialises in disability discrimination and human rights law and policy. We provide legal advice and representation to persons with disability and their associates. ACDL campaigns to change and improve the law for a society where people with disability will be able to participate in all aspects of life. We undertake law reform, continuing legal education, and community legal education activities.

The Australian Human Rights Centre (AHRCentre) aims to promote public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications. The Centre brings together practitioners, research fellows and student interns from Australia and internationally to research, teach, and debate contemporary human rights issues.

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1. PWDA, ACDL and the AHRCentre warmly welcome the ALRC Discussion Paper Equality, Capacity and Disability in Commonwealth Laws, and its thorough consideration of the views submitted by the myriad stakeholders who have an interest in this Inquiry. Our organisations have substantial expertise in this area of the law, and a long history of advocating for the recognition of legal capacity for people with disability in Australia and internationally. PWDA and ACDL were at the forefront of civil society's involvement in the negotiation of the UN Convention on the Rights of Persons with Disabilities (CRPD), and see this review as a once in a generation opportunity to significantly progress the implementation of Article 12 into Australian law and practice. For more information on our international engagement on the CRPD, including Article 12,

please see the website of the Australian Civil Society Parallel Report Group to the CRPD <http://www.disabilityrightsnow.org.au/> and the UN Ad Hoc Committee pages of the PWDA website <http://www.pwd.org.au/issues/un-ad-hoc-committee-meetings.html>

2. This submission should be read with reference to our previous [submission to the ALRC Issues Paper regarding Equality before the Law in January 2014](#), and our [submission to the UN CRPD Committee regarding the Draft General Comment on Article 12 of the CRPD](#).

Introduction

3. The Discussion Paper puts forward proposals for National Decision Making (NDM) Principles and a Commonwealth Supported Decision Making (CSDM) model, then goes on to consider how the application of these principles and model may affect Commonwealth law.
4. The authors of this submission agree that a national framework must be created, but disagree with the development of an “ability test”, Discussion Paper Proposal 3-7, which a person has to pass in order to be considered capable of decision making and thus to have their capacity to act (legal agency) recognised. Commonwealth laws should not be amended to include such a test. This formulation would not realise equality before the law for people with disability, and would not go far enough in establishing and implementing the regimes of support necessary to adequately support people with disability to exercise their legal agency.
5. The “ability test” runs counter to the principles and human rights premises that the Paper puts forward as arguments for the tests development. The inclusion of any kind of functional test of capacity would be a continuity of a binary model whereby some people have ability and some do not. Application of the “ability test” would merely provide an overarching exception to the right to equal capacity before the law, and embed discrimination against people with disability further into Commonwealth laws.
6. What is required is a regime that recognises that all people have legal agency, but that some people may require support in order to exercise it. When this premise is genuinely accepted, the question shifts to how to create a mechanism through which a person can express their will and preferences, and have those expressions of legal agency recognised as decisions before the law. The authors suggest that the answer is to create a mechanism of support provision which fulfils the requirements of any person who needs it in order to exercise their legal agency.

7. In doing this, the test as to whether the will, preference or decision of a person should be recognised by the law, turns on the integrity of the support process that was used to express and communicate that decision. It follows that it is supports that must be tested on their functional ability to meet the requirements of a person to make and/or communicate a decision to a third party.
8. The remainder of this submission outlines the mechanisms that need to be created to develop a regime of supports that would: be responsive to the needs of any person who required them to exercise their legal agency; test the integrity of supports used to exercise legal agency; create certainty in the application of the law; and apply uniformly to all people, in all situations, and across all areas of the law.

A National Framework for Equality before the Law

9. This submission outlines an alternative version of Principles, the National Framework for Equality before the Law. These Principles are in harmony with Article 12 of the UN Convention on the Rights of Persons with Disabilities (CRPD), and can also coherently be applied to Commonwealth laws in order to fulfil the realisation of other civil and political rights that are dependent on Article 12. For example, access to justice, the right to political participation, the right to bodily integrity, and the right to live in the community.¹
10. The interpretation of CRPD Article 12 underlying the formulation of the proposed National Framework outlined below is that:
 - Every person has the right to equal recognition before the law. This includes the capacity to have rights and the capacity to act on those rights (to exercise legal agency) as well as to have those acts recognised by the law.
 - This is a non-derogable civil and political right requiring immediate implementation.²
 - Legal agency is exercised when will and preference is expressed.
 - Every person has the right to support to express their will and preference if required. For some people this may include decision making support.
 - The State is obliged to provide the support necessary for a person to express their will and preference. As equality before the law is a civil and political right there is no limit to the level of support that must be provided to achieve this.
 - Failure to provide adequate support, including the inadequate resourcing of support options, may constitute discrimination.
 - Where there is no formulation of support that can determine will and preferences then legal agency is not being exercised. In this circumstance a

¹ Articles, 13, 29, 17, 19 CRPD respectively.

² By virtue of Article 5 and 12 of the CRPD.

representative may be appointed to make decisions based on the previously expressed will and preference of the person and/or their human rights as applicable to the situation.

11. To summarise, the onus is on the support to facilitate the expression of a person's will and preference and hence their legal agency. Any test of a person's ability to exercise their legal agency is actually a test of whether the supports provided to the person are adequate and appropriate to the task in hand. If not they should be altered until will and preference can be expressed, or it becomes apparent that this is not possible. The CRPD does not provide for a circumstance whereby a person is tested on their ability or impairment type.

Underlying premises of the proposed National Framework for Equality before the Law

In formulating the National Framework for Equality Before the Law (the National Framework), the following premises have been applied:

- i. The National Framework should be applied nationally and in all areas of Commonwealth and State and Territory law.
- ii. The National Framework should be the basis from which State and Territory guardianship law and practices are reformed.
- iii. Commonwealth laws should be amended only to the extent that is required to permit the application of the National Framework, to remove references to tests of mental capacity, legal capacity, unsound mind, ability, competence or any other discretionary exclusions based on actual or perceived disability, and to remove the role of third parties such as medical practitioners and courts from making decisions about a person's legal capacity.
- iv. The language of the National Framework should be disability neutral, albeit disability responsive. This would acknowledge that all people have equal recognition before the law, all people utilise supported decision making to some degree, and that any person may experience impairment that means they require support to exercise their legal agency at some point in their life.
- v. The National Framework should be a mainstream instrument outlining the principles and processes relevant to the entire spectrum of ways to exercise legal agency. These are:
 - Independent exercise of legal agency
 - Exercise of legal agency with support, including decision making support
 - Exercise of legal agency through an agent, such as power of attorney or advance directive
 - Representation

A person may exercise their legal agency using a combination of these methods at any one time.

- vi.** The National Framework should be inclusive of all support types required to exercise legal agency. Supported decision making is only one of those options; other examples include interpretation services, assistive and communication technology, or physical modifications of the environment.
 - vii.** The National Framework should recognise the role of formal and informal supports.
 - viii.** An independent body, the National Legal Capacity Support Agency, should be established to regulate and administer the support arrangements made under National Framework.
 - ix.** The National Legal Capacity Support Agency should utilise transparent, flexible and person centred approaches; provide clarity and instil the confidence of stakeholders; and raise awareness and understanding of the role of support for the exercise of legal capacity.
12. These premises provide further guidance as to what the aim of this Inquiry really should be: to create a universally applicable mechanism through which people can express their will and preferences, and to have that will and those preferences recognised as decisions under the law. Thus the Inquiry and proposed framework are not directly concerned with people with disability per se, but on how our laws and policies should operate to enable the realisation of fundamental rights in a fair, accessible, and non-discriminatory way.
13. Goals such as maximising the autonomy and independence of people with disability, promoting ability, valuing contribution, and enabling social and economic participation are all necessary to ensure that people with disability are included in our communities. However, what people with disability need as a result of this Inquiry is a mechanism through which to exercise legal capacity as is their right.
14. It is true that history has marginalised people with disability, but focusing on the above goals still places the person with disability as the focus of 'improvement', when it is the environments in which they live which are the disabling factors. These goals can be considered in parallel, but should not be emphasised at the expense of a clear focus on how the provision of supports to exercise legal capacity must be improved.
15. Changing laws and implementing new policies regarding legal capacity is only the first step in realising the right to equal recognition before the law for people with disability. Prejudicial community attitudes need to be addressed; awareness of support for exercising legal capacity has to be raised; the capacity of communities to provide support for legal capacity has to be developed; and the

countless other barriers to inclusion for people with disability need to be dismantled. There is no escaping the reality that realising the right to equal recognition before the law for all people in our community requires resourcing from the grassroots up, as well as the top down.

16. As a prerequisite this resourcing must include the allocation of resources to support services to increase the quality and availability of all types of support. For example, Auslan interpreters, supported decision making organisations, accessible buildings, and information in accessible formats. The greater the investment in these services, the simpler the application of the National Framework and consequently the application of Commonwealth laws for people who require support to exercise their legal capacity.

A new National Legal Capacity Support Agency

17. Moreover, a new Commonwealth Structure is required, the proposed new National Legal Capacity Support Agency (the National Agency), to:

- provide expertise on the adequacy and appropriateness of supports;
- regulate support providers and representatives; and
- act as a complaints body and mediator between people, their supports and third parties.

18. A central regulating body is required to create consistency in the provision of support arrangements and uniformly assess the adequacy of supports. This would remove the role of doctors, courts, tribunals or other agencies to make decisions about whether a person is or is not able to exercise legal agency. The consideration of whether a person's supports are or are not adequate is between the person, their support or supporter, and the National Agency. Third parties may wish to raise concerns as to the adequacy of support, or provide information as to the legal context in which support may be required, but they do not have the expertise to be making decisions about support arrangements.

19. For example, the National Disability Insurance Scheme Agency may believe that a person requires decision making support to manage their disability support package. In this case they should contact the National Agency who will investigate further. It would not be in their remit to appoint a nominee to make decisions on the persons behalf based on their own assessment of the persons support needs or their 'best interests'. This option merely removes legal agency from the person and does nothing to address their support needs.

20. The National Framework should provide the basis for reform of State and Territory guardianship laws, with the proposed National Agency fulfilling a central role in this revised system. A new structure is required to implement a national and universal approach and to adequately address the magnitude of the shift from 'best interest' substitute decision making by guardians to representative decisions based on a balancing of human rights. This latter task requires an expertise and understanding of human rights that people who are currently eligible to be guardians do not necessarily have.

21. The proposed National Agency should also be responsible for the guidance and training of potential informal and formal support people, providing information about support options for the general public, public services and mainstream services, awareness raising about the regime, capacity building of disability support organisations, and training of government agencies in the facilitation of supported decision making. This would also assist in consolidating the move away from the medical approach to legal capacity and towards the social model of supporting the exercise of legal capacity.

Proposed National Framework for Equality before the Law

22. This framework is an amended and combined version of the proposed National Decision Making Model and the Commonwealth Supported Decision Making Model as outlined in the Discussion Paper.

Principle 1 – The Right to Make Decisions

1. Every adult has the right to exercise their legal capacity. This includes the right to make decisions that affect their life and to have those decisions respected.

23. This principle is of universal application to all people, and reflects the right to legal capacity in both the International Covenant on Civil and Political Rights (ICCPR) as well as the CRPD. It also introduces the notion that decision making is a fundamental element of exercising legal capacity.

Principle 2 – The Right to Support³

2. Every person who may require support to exercise their legal capacity must be provided with the support required to express their will and preferences. This includes support necessary for them to make, communicate, and participate in decisions that affect their lives.

24. This principle is also of universal application. It creates a right for a person to receive support and introduces the notion that the expression of will and preference is the pivot on which the integrity of support is judged. It then sets out the elements of the decision making process that can be supported.

25. This approach would be inclusive of any person with an impairment. For example, people who require information in alternative formats; people who require augmentative communication devices to communicate, people who need accessible environments in order to participate in decisions about their life; and people with cognitive impairment who may require supported decision making.

³ National Decision Making Principle 2 (Proposal 3-3) is reflected in 2(a). There is no need for support guidelines (proposal 3-4) as these are merely a reiteration of principle 2 (a). Appointment and Recognition of Supporters (Proposal 4-3) is now integrated into Principle 2(b). Aspects of Potential Roles of a Supporter (Proposal 4-4) are integrated into Principle 2(c). Aspects of Supporter Duties (Proposal 4-5) are implicit through Principle 2.

- 2 (a) A person who requires support should be able to appoint a supporter or supporters at any time:**
- where a supporter is appointed, ultimate decision making authority remains with the supported person;
 - any decision made with the assistance of a supporter should be recognised as the decision of the supported person; and
 - a person should be able to revoke the appointment of a supporter at any time, for any reason.
- 2 (b) Support may include:**
- support to obtain, receive or understand information relevant to a decision and the effect of a decision;
 - support to retain information necessary to the extent necessary to make a decision;
 - support to use or weigh information as part of the process of making a decision;
 - support to communicate a decision to third parties;
- 2 (c) Support persons may also:**
- provide advice;
 - handle the relevant personal information of the person;
 - endeavour to ensure the decisions of the person are given effect; and
 - assist the person to develop their use of decision making supports.
- 2 (d) In addition to formal support providers, the role of families, carers, and other significant persons in supporting persons to exercise their legal capacity should be acknowledged and respected.**

26. These principles outline the appointment of a supporter, what roles support may fulfil, what other roles support persons may fill, and acknowledges the role of families and carers. 2(c) provides additional tasks that a support person or support organisation may undertake and 2(d) recognises that informal and formal support arrangements can exist.

27. All of these principles have universal application. For example, a person with a hearing impairment may appoint a support person in the form of an Auslan interpreter to communicate information about a decision to a third party. A person with episodic psychosocial disability may appoint a support person to assist them in using information to make a decision about where to live, and then to use their personal information in order to make this happen.

28.2(b) reverses the “ability test” put forward in the Representative Decision Making Guidelines (Proposal 3-7) and creates a functional assessment of support as opposed to a functional assessment of a person. If a person needs support to express will and preference and adequate support is provided then they are exercising legal agency and their decisions must be recognised before the law. If supports are not available or if they are inadequate to facilitate this expression then the decisions do not have to be recognised before the law as the integrity of the support process is lacking. This reflects a failure of support provision, as opposed to an inability of the person.

Principle 3 – Implementing Will and Preference⁴

3 The will, preferences and rights of persons who may require support to exercise their legal capacity must direct decisions that affect their lives. This includes people who use decision making supports.

3 (a) Safeguards to ensure respect for will, preferences and rights include:

- that support persons are free from conflict of interest and undue influence;
- that the National Legal Capacity Support Agency acts as regulator, arbitrator, investigator and complaints body regarding the integrity of decision making support arrangements.

3 (b) A person may appoint an independent Agent to implement their will and preferences on their behalf. This may include:

- the implementation of advance directives; and
- the power of attorney to carry out specific acts according to pre agreed instructions.

29. These Principles reiterate the centrality of will and preference as the essential elements around which support to exercise legal capacity is utilised. It also reaffirms the supported person as the decision maker as established in 2(a), and in doing so implies that safeguards are required in order to secure this.

30.3(a) introduces safeguards to protect the integrity of the support process, including reference to a central body, the National Legal Capacity Support Agency, to resolve conflict between support persons, people who are being supported, and third parties.

31. This would primarily apply to decision making support arrangements. For example, resolving a conflict in which a support person has acted improperly or outside of their role, or otherwise misrepresented the will and preference of the person they are supporting. This is significant because the supported person is legally responsible for the consequences of the decisions they are making. Therefore, an authoritative body is required through which disputes can be

⁴ National Decision Making Principle 3 (Proposal 3-5) is reflected in 3(a).

resolved, especially if they have had adverse consequences for the supported person and their relationship with a third party.

32.3(b) introduces the concept of an Agent into the spectrum of support types for the exercise of legal agency. It is important that this is included so that advance directive and power of attorney regimes fall under the same rubric and safeguards as other decision making regimes.

Principle 4 – Representation of Rights, Will and Preferences⁵

4 Where the will and preferences of a person cannot be determined through the provision of support, an independent representative may be appointed:

- **the representative must give effect to what the person would likely want, based on all the information available, including consulting with supporters.**
- **if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person’s human rights and act in the way least restrictive of those rights.**

33. Representative decision making is not supported decision making, or ‘fully supported’ decision making as it is described in the Discussion Paper. This is because the person is not directly involved in the decision making process, albeit that their previous will and preferences are being taken into account. Representative decision making is decision making by an independent person which applies only when support cannot facilitate an expression of will and preference.

34. Principle 4 contains the “test for representation” and it is a high threshold. It can only be reached in circumstances where current will and preference cannot be determined despite all efforts being made to provide adequate supports - where there is no functional support that can meet the requirements of the person. Any circumstance that does not meet this threshold should not result in the appointment of a representative decision maker.

35. There is no justifiable or logical reason why a person who receives adequate support to exercise legal agency should require the voluntary appointment of a representative. The only situation whereby a person is able to voluntarily hand over decision making about their lives to another person is when they act through an Agent as per Principle 3(b). Advance Directives and Powers of Attorney are mechanisms that already exist for people who want others to make decisions on their behalf. Under the proposed National Framework people would be entitled to support in making those arrangements if required.

⁵ Will, Preferences and Right Guidelines (Proposal 3-6) are reflected in 4(a) and (b) as far as they remain relevant without duplication or amendment. National Decision Making Principle 4 (Proposal 3-8) is no longer necessary as it is implicit in 4(b). Safeguards Guidelines (Proposal 3-9) is reflected in 4(d). Potential Roles of a Representative (Proposal 4-7) and Representative Duties (Proposal 4-8) are irrelevant.

36. Moreover, there is no justifiable or logical reason why an agency should be permitted to appoint a representative for another person. If any agency or other third party believes that a person may benefit from support, including supported decision making, they should refer them to the proposed new National Agency for information on how this can be obtained and/or provide advice to the Agency on the kinds of decisions that the person is required to make.

4 (a) The opportunity to determine the will and preferences of a person may evolve or fluctuate over time.

4 (b) The appointment of a representative decision maker must be limited in scope, be proportional and tailored to the person's circumstances, and apply for the minimum time possible.

4 (c) Decisions and interventions made by representatives must be:

- **the least restrictive of the person's human rights;**
- **subject to appeal; and**
- **subject to automatic regular, independent and impartial monitoring and review.**

4 (d) Representatives are accountable to the National Legal Capacity Support Agency for their conduct.

37.4(a) is an inverse application of the principle that a person's capacity may fluctuate over time. The 4(a) formulation puts the onus on the performance of supports in the determination of whether will and preferences are being expressed. Coupled with 4(b) it also strengthens the obligation to continually reassess the opportunity for support to assist a person to exercise their legal agency. 4(b)(c) and (d) are all safeguards to regulate the performance of representatives.

Examples of application to Commonwealth law

The NDIS

38. The National Disability Insurance Scheme (NDIS) Act 2014 should be amended to remove the nominee provisions. If a person requires support, including decision making support to engage with the NDIS, to manage the financial aspects of their support package, or to receive supports then this should be arranged with reference to the National Framework Principles. If a person cannot be supported to exercise legal agency then a representative should be appointed by the National Agency.

39. The Commonwealth should fund and build the capacity of Disabled Persons Organisations (DPOs) and independent advocacy organisations to provide decision making support to participants and potential participants of the NDIS. This would raise awareness of supported decision making as an option, increase the supply of support, and reduce situations whereby representatives may be appointed due to a lack of adequate support. The NDIS should also fund supports that enable people to exercise their legal capacity as core elements of their support packages where appropriate, such as providing communication aids and equipment for a person to understand information and communicate decisions.

Election Matters

40. The Commonwealth Electoral Act (CEA) 1918 should be amended to remove the 'unsound mind' provisions in Section 93(8)(a). All Australian citizens of voting age are required to vote and must be permitted to exercise that right with support where required. Supports in this context may require the provision of information and ballot papers in alternative formats, accessible voting procedures, or support to mark, fold and deposit a ballot paper for example.

41. A person who does not vote is liable for a fine by virtue of section 245 of the CEA. A lack of support to vote should be considered a "valid and sufficient reason for failing to vote" as provided by section 245(4). This would cover instances where a person was too ill to vote, their intended support service failed them, or where supports were not able to facilitate an expression of will and preference. None of these options necessitate a person's removal from the electoral role, and all retain the recognition of the person's legal capacity to make a decision about electoral matters.

We thank the ALRC for the opportunity to contribute to this Inquiry, and we would be happy to participate in further consultation on any of the matters raised in this submission.

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