

Equality, Capacity and Disability in Commonwealth Laws

Feedback on Discussion Paper

30 June 2014

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1. Introduction

KinCare Health Services (KinCare) supports the actions taken by the Australian Law Reform Commission (ALRC) to ensure that all Commonwealth laws and legal frameworks are fair and reasonable in their address of the needs of people with disability.

16% of KinCare's clients are aged less than 65 years, with the majority of these receiving disability services. We are uniquely positioned to have care interactions with people with disability across the lifespan as many of our aged care clients also experiencing disability.

We have more than 20 years of experience in managing large Government aged care contracts. Last financial year, we delivered \$77.1 million of services under Government contracts and \$19.3 million to other providers on a commercial basis, as well as a variety of other training and after hours support services. KinCare employs best practice management systems across our business to ensure high quality outcomes for our clients. We are active participants in sector reform and leaders in the use of technology to provide services.

KinCare is continuing to develop expertise in delivering innovative services and industry development across the lifespan of all Australians, including people with disabilities. In the disability services sector, provision of quality care and support to people with disabilities as they age is uncommon. We are committed to partnering with Governments through innovation and service delivery, and working with people with disabilities and their local communities to influence improved social inclusion and resilience outcomes.

This submission provides KinCare's feedback on the ALRC's *Equality, Capacity and Disability in Commonwealth Laws Discussion Paper*, drawing on industry knowledge and experience, and detailed review of other legislative frameworks, regulations and conventions at times referred to throughout the discussion paper. Feedback is provided for each of the 10 proposal/question areas:

1. Conceptual landscape
2. National decision-making principles
3. Supported decision-making in Commonwealth laws
4. The National Disability Insurance Scheme
5. Supporters and representatives in Other areas of Commonwealth Law
6. Access to justice
7. Restrictive practices
8. Electoral matters
9. Review of State and Territory legislation
10. Other issues

2. Conceptual landscape

Acknowledging the empowered identity of each Australian with disability, we appreciate that with the rights and recognition enabled through the *UN Convention on the Rights of Persons with Disability*, comes responsibilities. As such, we support Article 12's assertion that "States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life".

It must be noted however, that KinCare endorses the ALRC's view (**Proposal 2.1**) to avoid calling out people with disability as equal to all others – as this should be a given. Stating such may in theory cause some to consider otherwise, or justify failure to adopt the required 'paradigm shift'.

3. National decision-making principles

Supporting people with disability across the lifespan, across the country, and through specialist, non-specialist, government subsidized and privately funded arrangements, KinCare has a strong view that people with disability are individuals with the same basic human rights afforded people without disability, not least the right to inform their own destiny.

This is most certainly best achieved where each individual is empowered with the right to make decisions about all matters and experiences that affect their lives. Individuals with disability requiring some assistance to come to or represent their own decisions should therefore have access to reasonable support – be that formal or informal.

As such, KinCare supports **Proposals 3.1 – 3.9**, namely the establishment of the 'National Decision-Making Principles'. We are particularly supportive of efforts made by the ALRC to acknowledge the role and effectiveness of supported decision making, based on genuine preferences – though perhaps executed by an appropriate informal or formal party.

4. Supported decision making in Commonwealth laws

Following from comments made in relation to proposed 'National Decision-Making Principles', KinCare supports the ALRC's endeavours to establish the 'Commonwealth Decision-Making Model' through **Proposals 4.2 – 4.9**. However, we recommend the term 'Supporter' identified in **Question 4.2** not be used to identify individuals or organisations with formal support relationships; as exclusively informal networks have long been identified as 'support' groups, and to attach this term to formal partnerships may bring about confusion.

In response to **Question 4.2**, KinCare recommend that the proposed Commonwealth Decision-Making Model be adopted by State Governments and authorities in their developments of physical health services, including community based health.

Partly in response to **Question 4.6**, it must be noted that a Commonwealth Decision-Making Model may be cumbersome where interactions between all Commonwealth and State level supporters and representatives.

5. The National Disability Insurance Scheme

With an interest in delivering supports to people with disability as part of the National Disability Insurance Scheme, we support the ALRC's **Proposals 5.1 – 5.3**; where the notion of 'supporters' and 'representatives' are agreed to – and established in such a fashion that does not take away from the long-standing understanding that support networks are almost always informal; and thus distinct from any support, service, intervention, assistance or product that is in some way paid for.

6. Supporters and Representatives in other areas of Commonwealth Law

As in response to Proposals 5.1 – 5.3, KinCare endorses the ALRC's recommended plan to incorporate the proposed 'Commonwealth Decision-Making Model' into all facets of Commonwealth law and associated instruments (**Proposals 6.1 – 6.5**) – however again, assert that the 'supporter' be changed in line with industry and consumer recommendations. A solution may be to recognise the role of formal advocacy throughout Commonwealth – and State – law, by recognising informal 'supporters', and formal 'advocates'.

7. Access to justice

We support Article 13 of the *UN Convention on the Rights of Persons with Disability* – “States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages” – as a fundamental realisation of equality across society irrespective of the presence of permanent, temporary or no disability.

With experience supporting people with diverse and dynamic communication needs and capabilities, we would recommend that **Proposal 7.1 (d)** provide mechanisms to determine inability to communicate; as in its present form, **Proposal 7.1** suggests that an inability to communicate decisions may also mean an inability to communicate guilt or innocence. We support the suggestion made by the ALRC in **Question 7.1**; that unfitness be determined through assessment of mental (cognitive) impairment.

In response to **Question 7.3**, we recommend caution establishing blanket approval for forensic samples from people deemed “incapable of giving consent” – even where the avoidance of delay would serve justice to the same individuals. We suggest that integrating the proposed 'Commonwealth Decision-Making Model' into the justice system will be better enabled if people deemed (through clinical assessment) incapable of providing consent have this identified on their e-Health record or through other means accessible to federal courts.

8. Restrictive practices

We endorse the ALRC's proposal to streamline regulation of restrictive practices. As a national organisation with an interest in supporting people with disability across the country, we can attest that differences in view and regulation between jurisdictions confuse industry practices. We welcome the expected reduction in costs of implementing varied approaches to restrictive practices.

9. Electoral matters

We support **Proposal 9.1**, where absence of 'decision-making capability' is determined through clinical assessment, and as such recommend that **Proposal 9.2** be implemented where **Proposal 9.2 (a) – (d)** are determined through the same clinical assessment.

Furthermore, we agree with **Proposals 9.3 – 9.6**. We recommend that the 'guidance' to be developed (**Proposal 9.7**) to guide the Australian Electoral Commission's Divisional Returning Officers in determining absence of 'decision-making capability' be reconsidered. Decision-making capacity is a complex matter and we would not recommend a person without appropriate clinical knowledge make such assessments of individuals.

10. Review of State and Territory legislation

We endorse the ALRC's **Proposal 10.1**; that State and Territory governments review their legal framework to ensure that people with disability are no less accommodated by State and Territory law than they are to be under Commonwealth law.

In this review of equality, capacity and disability in Commonwealth law, we recommend that the ALRC inspire the endorsement of 1 single definition of disability across all Australian law. We are of the view that a consistent use of the term and meaning of 'disability' is justified; given the establishment of the National Disability Insurance Scheme and calls for State and Territory governments to review their legislative frameworks in line with this Commonwealth review. Furthermore, the relationship between disability and mental illness must be addressed – and distinctions made clear to improve market processes and service designs and experience.

11. Other issues

In response to **Question 11.1**, we support the notion that all interactions with people with disability should take place under conditions where the customer's decision-making capability is assured – however recognise that embedding this practice in private and small business environments will be costly and potentially increase the sense of regulation in an open market. Perhaps the enactment of the *UN Convention on the Rights of Persons with Disability* would be better achieved through the development of recommended standard contract clauses or improved availability of accessible communication tools.

12. Conclusion

In principle, KinCare supports the ALRC's efforts to ensure that all Commonwealth laws and legal frameworks are fair and reasonable in their address of the needs of people with disability. We see this as an important step in Australia's demonstrable enactment of the *UN Convention on the Rights of Persons with Disability*, following ratification of the same over 5 years ago.

We welcome the opportunity to discuss these comments further, and/or to provide feedback on future legislation, forums and discussion papers.

13. Contact Details

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