



4<sup>th</sup> of July, 2014

The Executive Director  
Australian Law Reform Commission  
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Via email: [disability@alrc.gov.au](mailto:disability@alrc.gov.au)

**Submission – Equality, Capacity and Disability in Commonwealth Law – Discussion Paper**

The Illawarra Forum is the peak body working for community services and organisations in the Illawarra and the Shoalhaven. We support community organisations, promote expertise and innovation in community development, foster industry development and advocate for social justice.

For more than twenty years, the Illawarra Forum has taken a leadership role in the local community services sector, which is a major employment sector in the region, and currently consists of more than 300 organisations in the Illawarra and Shoalhaven areas of New South Wales.

The Illawarra Forum works closely with numerous organisations which provide support to vulnerable people across the region including:

- Home and community care services;
- People with disability;
- Individuals and families with multiple layers of social and financial disadvantage;
- Victims of domestic violence and sexual assault ;
- Youth work programs;
- Social housing and homelessness services;
- Community health services, including mental health and drug/alcohol services;
- Community legal centre services; and
- Community development and community capacity building programs.

**General Comments**

The Illawarra Forum was pleased to find that the proposals outlined in the discussion paper are focused on the person with disability and their right to fully participate with choice, control and self-determination. We are pleased to note that a number of our recommendations were considered in the development of the proposals.

The five Framing Principles of Dignity, Equality, Autonomy, Inclusion and Participation, and Accountability are well defined and reflective of current practice and the United Nations Convention on the Rights of People with Disability (UN CRPD). Although in our submission on the Issues Paper (4<sup>th</sup> December 2013), the Illawarra Forum recommended the inclusion of a further two principles of liberty and security, we feel confident that the concepts of liberty and security are covered in the five framing principles.

### **National Decision-Making Principles**

The Illawarra Forum is in agreement with all of the proposals contained in this section, and believe, in particular, that the move towards supported decision making is very positive. We welcome the proposals' human rights focus that allows people to make decisions that affect their lives in a supported manner. We also agree that people's capacity can fluctuate over time and capacity should be based on the ability to make the decision not the outcomes of the decision.

### **Supported Decision-Making in Commonwealth Laws**

We are in agreement with all of the proposals in this section but would like to acknowledge in particular Proposals 4-3, 4-4, 4-5 and 4-8 for their consideration of the person not the disability and for retaining people's ultimate right to make a decision affecting their lives. We would also like to acknowledge 4-12 for consideration of regular, ongoing and consistent training for public service employees who engage with supporters and representatives.

### **National Disability Insurance Scheme**

We support the proposals to amend the *NDIS Act 2013* to ensure consistency with the National Decision-Making Principles, and to include supporter and representative provisions consistent with the Commonwealth decision-making model.

### **Supporters and Representatives in Other Areas of Commonwealth Law**

We agree with the amendments under proposals 6-1 to 6-4 and are especially supportive of the development of guidelines reflecting the National Decision-Making Principles by the Australian Bankers' Association to encourage banks to recognise supported decision-making.

### **Access to Justice**

Proposal 7-3 states that State and Territory Laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on a period of detention and regular periodic review of detention orders. The Illawarra Forum however, believes that if a person is determined unfit to stand trial, they should not be incarcerated at all without due process.

In relation to question 7-2 the Illawarra Forum would be reluctant to agree to amend the legal professional rules around confidentiality as this could be open to interpretation and possible abuse and seems in conflict with the National Decision-Making Principles.

We strongly support the recommended changes to the *Evidence Act 1995* and the *Crimes Act 1914*, as contained in Proposals 7-8 to 7-11. These changes will allow people with disability to fully participate in giving evidence in a manner that best suits the individual and allows a support person to assist. The changes acknowledge the ability of a person with disability in being able to provide accurate and valuable evidence.

We are especially supportive of Proposal 7-15 which allows communication assistants to assist a juror during proceedings and deliberations. We believe that this, again, acknowledges the ability of a person with disability to participate fully in a trial in a valued and dignified manner.

### **Restrictive Practices**

We support Proposal 8-1 with regard to supported decision-making and restrictive practices, particularly in relation to consent to use restrictive practices. This allows a person with disability to make informed decisions about use of restrictive practices and to have the decision/s respected taking into account the Safeguards as outlined in Proposal 3-9.

### **Electoral Matters**

We are supportive of all of the Proposals in this section, particularly Proposal 9-1 – where it is recommended to amend the current wording to apply the decision-making ability to the relevant election. Consistency of assessing capacity to vote in an election with National Decision-Making Principles is very positive, as is the ability to vote with assistance as outlined in 9-6.

Question 9-1 – we would support the recommendation to amend the *Commonwealth Electoral Act 1918* to only remove a person from the electoral roll with supporting information from a range of qualified persons.

Question 9-2 - There may be a requirement for some guidelines to be developed to outline the role of assistant or supporter when voting.

### **Review of State and Territory Legislation**

It is imperative that State and Territory Laws are amended to be consistent with Commonwealth Laws in terms of language and intent. The National Decision-Making Principles must be considered and reflected in State and Territory Laws.

### **Other Issues**

Question 11-1 – Yes we believe that businesses should have obligations to ensure that consumer contracts are suitable and that they make reasonable inquiries to ensure the consumer understands the contract.

Question 11-2 – we would agree that the National Decision-Making Principles are applied to determine capacity to give ‘real consent’ to marriage under the Marriage Act 1961, rather than assessing ‘mental capacity’.

### **Particular Disability Communities**

The Illawarra Forum would like to reiterate the multiple barriers faced by people with disability in the special needs groups. We would urge that in all areas of this reform process there is continued recognition of the barriers to accessing legal rights for people with disability who are also from special needs groups: Children, Aboriginal and Torres Strait Islanders, People from CALD Backgrounds and LGBTI communities.

Thank you for the opportunity to comment on the discussion paper.

For further information about this submission, please contact me at [nicky@illawarraforum.org.au](mailto:nicky@illawarraforum.org.au) or by phone on 02 4256 4333



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