

**Submission to the Australian Law Reform
Commission's Discussion Paper:
Equality, Capacity and Disability in Commonwealth
Laws**

People With Disabilities, Western Australia (PWd WA)



**and the Centre for Human Rights Education at
Curtin University**



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Summary of Key Recommendations

- The WA State Government should accelerate implementation of supported decision making to prepare for ALRC recommendations.
- Consider State Administrative Tribunal hearings being held in private, and / or decisions not published online.
- Address the disproportionate representation of Aboriginal people in prison as a result of being unfit to stand trial.
- Consider community based alternatives to detention as far as possible for people found unfit to stand trial.
- Consider the final recommendations in relation to families and to look at any recommendations primarily from the perspective of people with disability and the realisation of their rights under the UN Convention.
- Review the interpretation of Article 12 and recommend full implementation of the rights to work and employment under Article 27 including employment of people with disability in the public sector and promotion of employment of people with disability in the private sector by measures such as affirmative action.
- Include Foetal Alcohol Spectrum Disorder in Commonwealth and State level definitions of disability associated with funding, supports and services.
- Ensure access to justice for people with disability in rural and remote Australia.

About us

PWd WA is a disability advocacy organisation, providing information, individual advocacy and systemic advocacy for people with disability in WA. The Centre for Human Rights Education (CHRE) provides a focal point for research, teaching and scholarly activity in the area of human rights education.

The CHRE also seeks to bridge the gap between scholarship and practice. PWd WA and CHRE have come together to draft this submission of mutual interest regarding the human rights of people with disability.

Issues:

1. Supported and Substituted Decision-making

PWd WA and the CHRE welcome the Discussion Paper and many of the proposals it contains. These include the presumption of ability to make decisions (proposal 3-7), and encouragement for supported decision making (proposal 4-1). It is PWd's experience that Western Australia still has some way to go in implementing supported decision making for people with disability.

Recommendation: the WA State Government should accelerate implementation of supported decision making to prepare for ALRC recommendations.

An additional issue that PWd WA and CHRE would like to raise is the fact that hearings of the State Administrative Tribunal (SAT), where guardianship cases are heard, are public and decisions are published on the SAT website. Family Court disputes are similar in nature but decisions are not made public in this way. It is PWd WA's experience that the person with a disability cannot request that the hearing be held in private and that people feel compelled to attend and to prove that they have capacity to make decisions.

Whilst full names are not published on the SAT website, many people can be identified by the information provided. We see these issues as undermining the inherent dignity of the person with a disability, (Article 3(1) UN Convention on the Rights of Persons with Disabilities - UNCRPD).

Case example

An online decision on the WA State Administrative Tribunal website¹ describes a guardianship case for a woman who was an involuntary patient detained in hospital for treatment of a mental illness. The information publically available online includes:

- the fact that the woman is likely to have been the victim of sexual assault by another patient;
- information that could identify the woman, including her age and ethnic background ('Asian descent'); and
- information that could identify the alleged attacker ("aggressive indigenous man with a mild intellectual impairment and brain damage").

Recommendation: consider SAT hearings being held in private, and / or decisions not published online.

2. Restrictive Practices

PWd WA and the CHRE welcome the ALRC's proposal for national or nationally consistent regulation of restrictive practices. Although the Western Australian *Voluntary Code of Practice for the Elimination of Restrictive Practices*² 2012 was a step forward, it is a voluntary code, so not all service providers will implement it, and it is difficult to establish how effective it has been. As such, we welcome regulation, rather than voluntary codes in this area.

¹ State Administrative Tribunal, Case Number: GAA:1657/2014. Available [here](#).

² Disability Services Commission WA, *Voluntary Code of Practice for the Elimination of Restrictive Practices*. (2012). Available [here](#).

3. Unfitness to Stand Trial

PWd WA and the CHRE welcome the ALRC's consideration of the issue of unfitness to stand trial. As recent well publicised media cases such as those of Marlon Noble have shown, the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* means that people found unfit to plead in Western Australia are currently held in prison, indefinitely, without trial (Article 14 UNCRPD, liberty and security of the person). It appears that significant numbers of Aboriginal people with cognitive impairment are indefinitely incarcerated in prisons in some Australian states, including WA.³ Data provided to PWd WA on those currently being held in WA indicates that the vast majority are Indigenous.⁴

Recommendation: the disproportionate representation of Aboriginal people in prison as a result of being unfit to stand trial needs to be addressed.

As such, the introduction of the *Declared Places (Mentally Impaired Accused) Bill 2013* was to be welcomed as it provides for the establishment of "declared places" other than prison where people found unfit to plead can be detained. PWd WA and others in consultations on the draft bill have expressed concern that the bill's focus on safety and security impinges on the human rights of the person with a disability, that there is a lack of safeguards, and that there should be more focus on "rehabilitation" to enable the person to return to the community.

PWd WA and the CHRE welcome the proposal that "State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.", (Proposal 7–3). However, we also suggest that community based alternatives to detention should be considered as far as possible. This was also recommended in the recent Office of the Inspector of Custodial Services report *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*.⁵

Recommendation: community based alternatives to detention should be considered as far as possible for people found unfit to stand trial.

4. Role of the Family

We welcome Question 5 in the discussion paper which poses the question: "How should the role of family members, carers and others in supporting people with disability to exercise legal capacity be recognised by Commonwealth laws and legal frameworks?"

PWd WA works with people with disability and supports them in their decisions. PWd WA often find themselves helping people with disability to manage family conflict. We recognise the significant role played by families and carers but it is important to note that parents, for example, can sometimes have very different preferences and choices from their adult child with a disability. In some cases, they may prevent their adult child from making their own decisions and exercising choice and control. Usually this will be with what the parent believes to be in the best interests of their child but PWd has also come across cases of

³ People With Disability Australia, *Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment*, (Aboriginal Disability Justice Campaign; 2008). Available [here](#).

⁴ Information provided by WA Disability Services Commission as part of consultations on the Declared Places Bill and associated disability justice centres.

⁵ Government of Western Australia, Office of the Inspector of Custodial Services, *Mentally impaired accused on 'custody orders': Not guilty, but incarcerated indefinitely*, (2014). Available [here](#).

neglect and occasionally physical and emotional abuse perpetrated on people with disabilities by family members.

Recent media coverage of the alleged suicides of a couple who in 2001 had killed their son who had a disability, has sparked debate about fundamental rights that most people take for granted.⁶ These include the right to life of people with disability (Article 10, UNCRPD), the inherent dignity of the person with a disability (Article 1,3 UNCRPD), and the fact that others should not decide the value of someone's life or their quality of life.

Although the UN Convention preamble refers to the protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities, in fact no substantive rights in the convention relate to family members, they are solely concerned with the person with disability. The possibility of tension between the rights of the family and those of the person with disability is implied in Article 8(1)(a) "To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities".

Recommendation: the ALRC should carefully consider the final recommendations in relation to families and to look at any recommendations primarily from the perspective of people with disability and the realisation of their rights under the UNCRPD.

5. Employment

Lack of employment opportunities for people with disability is a serious issue and one which has a negative impact on many other areas of their lives. As such, PWd WA and the CHRE welcome the discussion of employment in the ALRC discussion paper. Although we note that many of the employment related topics were considered to be outside the scope of the current review, this may be contrary to general comment No. 1 (2014) of the UN Committee on the Rights of Persons with Disabilities. General comment No.1 provides interpretation of Article 12: Equal recognition before the law. The general comment states that equality before the law is a basic principle of human rights protection, indispensable for the exercise of other human rights and that Article 12 does not set out additional rights for people with disabilities but aims to ensure the right to equality on an equal basis with others. (Para. 1). The general comment also explains that:

"Legal capacity is indispensable for the exercise of civil, political, economic, social and cultural rights. It acquires a special significance for persons with disabilities when they have to make fundamental decisions regarding their health, education and work."

(Para. 8)

"... the Committee urges States parties to ensure that persons with disabilities have the opportunity to make meaningful choices in their lives and develop their personalities, to support the exercise of their legal capacity. This includes, but is not limited to, opportunities to build social networks; opportunities to work and earn a living on an equal basis with others; multiple choices for place of residence in the community; and inclusion in education at all levels."

(Para. 52).

Therefore, we feel the ALRC's interpretation of Article 12 in relation to employment has been too narrow. Given that Australia has among the lowest rates of employment of people with

⁶ 'Margaret and Raymond Sutton, Sydney couple in mercy killing of disabled son, found dead themselves'. *The Australian* (Sydney). June 14, 2014. Available [here](#).

disability in the OECD, serious action on employment is needed. PWd WA and CHRE urge the ALRC to recommend that the Australian government give full effect to the following employment provisions in the Convention:

- g. Employ persons with disabilities in the public sector;
 - h. Promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- (Article 27 - Work and employment)

Recommendation: the ALRC should review its interpretation of Article 12 and recommend full implementation of the rights to work and employment under Article 27 including employment of people with disability in the public sector and promotion of employment of people with disability in the private sector by measures such as affirmative action.

6. Particular Disability Communities

Aboriginal peoples

Issues of overrepresentation of Aboriginal people among those found unfit to stand trial have been discussed above.

In addition, it is recognised that Foetal Alcohol Spectrum Disorder (FASD) is a particular challenge for some Aboriginal communities and that Commonwealth and State level definitions of disability associated with funding, supports and services do not always include FASD. It is also the case that there are people in the criminal justice system with FASD or cognitive impairments who have not been identified as such.

The Legislative Assembly Parliament of Western Australia's Education and Health Standing Committee's report on Foetal Alcohol Spectrum Disorder (FASD) raised a number of issues in relation to the criminal justice system.⁷ It identified that people affected by FASD experience higher rates of offending, are more likely to be refused bail, be unresponsive to authority, be undeterred from reoffending through punishment, and be convicted. It also identified that they likely to do their time 'harder' than other prisoners because of high levels of suggestibility, memory deficits, possible hearing deficits, difficulty in understanding sarcasm, idiom or metaphor; and lack of apparent empathy.

Recommendation: Commonwealth and State level definitions of disability associated with funding, supports and services should include Foetal Alcohol Spectrum Disorder

Rural and remote

People with disability in rural and remote disability face unique challenges, including a general lack of access to disability services. For example, in terms of access to justice, PWd is aware that there is just one 0.5 FTE advocate for the entire Broome and Kimberley region.

Recommendation: ensure access to justice for people with disability in rural and remote Australia.

Ends

⁷ Legislative Assembly Parliament of Western Australia's Education and Health Standing Committee *Foetal Alcohol Spectrum Disorder (FASD)*, (2012).

Contact details

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