

Submission to Australian Law Reform
Commission

Equality, Capacity and Disability: Discussion Paper

Access to Justice

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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.

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

¹ NACLC, Submission 78.

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].

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.

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

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].

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 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, NACLC 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

NACLC 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.

NACLC 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

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).

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].

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 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.

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.

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 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

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.naccl.org.au/resources/NACLC%20response%20to%20LCA%20120413.pdf

⁸ See, eg, NACLC, Submission 78.

⁹ *Evidence Act 1995* (Cth) s 135.

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 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.

