



4<sup>th</sup> December, 2013

The Executive Director  
Australian Law Reform Commission  
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Sydney NSW 2001

Via email: [disability@alrc.gov.au](mailto:disability@alrc.gov.au)

### **Submission – Equality, Capacity and Disability in Commonwealth Law**

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.

The Illawarra Forum consulted with members and service providers to develop this response.

### **General Comments**

While the Illawarra Forum appreciates the opportunity to comment on this Issues Paper, we had some concerns about the consultation process.

The Easy English version was not a true reflection of the Paper as it didn't have any background, context or discussion but merely asked general questions which didn't directly relate to the paper.

The paper was not accessible on the website in alternative languages or formats i.e. braille, audio etc.

The format and terminology used in the Issues Paper was a barrier to genuine consultation with the people who are best placed to comment i.e. people with disability, their families or people who work in the disability sector.

There were additional barriers to genuine consultation in that the Paper was extraordinarily time consuming both to read and to do the necessary follow up on referenced legislation. There were also further constraints as the Paper was issued before the holiday period with little time in which to comment.

### **Recommendations**

- Hold workshops to analyse and discuss the contents of the Paper. This will improve the consultation process and optimise stakeholder feedback.
- Develop one Issues Paper which is accessible in various languages and formats and is written in plain English rather than using legal jargon
- Avoid busy holiday periods for future consultations

### **Q 1. United Nations Convention on the Rights of Persons with Disabilities**

Definitions of Disability need to be consistent on an Interstate basis and in Commonwealth Law as per the U.N. Convention

### **Q 2. National Disability Strategy**

The Illawarra Forum recommends the implementation of a monitoring and evaluation framework within the National Disability Strategy

### **Q 3. Framing Principles**

We support the recommended framing principles of dignity; equality; autonomy; inclusion and participation; and accountability. We further recommend that the principles of liberty and security of the person also be considered. We commend the principle of liberty in the broadest sense, whereby liberty does not solely mean physical liberty but includes the right to make decisions about one's own body i.e. the right to refuse medical treatment, and the right to be free from state-imposed psychological stress.

The Issues Paper states: *"Whilst a person might have an impairment, their disability comes from the way society treats them, or fails to support them"*. The Illawarra Forum believe that this is a pivotal statement and should guide the development of all legislation

Progress towards treating people with disability equally could be facilitated by informing and capacity building in individuals, so that they know and realise the consequences of their decisions.

#### **Q. 4. Capacity and Decision Making**

A consistent approach to defining capacity and assessing the person's ability to exercise their legal capacity must be established. The most appropriate mechanism is a standardised set of tools e.g. NSW Capacity Toolkit. We do not support substituted decision making and strongly recommend every effort should be made to support people to make informed decisions and choices.

#### **Q. 9 Administrative Law**

The Administrative Appeals Tribunal must be accessible to people with disability and people need to be resourced and supported to engage effectively in an appeals process

#### **Q.10 Competition and Consumer Law**

The Illawarra Forum recommends the launch of an intensive awareness campaign about the Competition and Consumer Act 2010. The deregulation of the NDIS pricing will make this even more important as service providers may not be fully aware of the Act and people with disability may be vulnerable to price fixing.

### **Specific Legislative Areas**

#### **Citizenship rights, Public Service and Board Participation**

*Q. 16 Electoral Matters* - We recommend a review of the Act to ensure non-discriminatory terminology. We further recommend the automatic inclusion of all citizens on the Electoral Roll at the age of 18, on the assumption of capacity unless proven otherwise as per Capacity Toolkit.

*Q. 20 Jury Service* - All people should be considered eligible to participate unless capacity is assessed otherwise. Questionnaires to assess eligibility for Jury Service should be available in various languages and formats. To facilitate people with disability participating in Jury Service, an interpreter should be available where required. Interpreters should not be considered as a 13<sup>th</sup> person in the jury room.

*Q. 21 Board Participation* - All people should be considered eligible to participate on Boards unless capacity is assessed otherwise. Terminology must be reviewed to reflect a clear distinction between intellectual disability and mental capacity.

#### **Access to Justice, evidence and federal offences**

*Q.23 Communication* - Language in legislation should be changed to plain English to be accessible to everyone, and legal information should be available in a range of languages and formats.

*Q. 24 & Q.25 Evidence and Federal Offences* – The language in the Evidence Act 1995 and the Criminal Code Act is discriminatory in a number of areas and should be reviewed to reflect current

terminology and anti-discrimination laws.

### **Social security, financial services and superannuation**

*Q. 27 Nominees* – The Social Security (Administration) Act 1999 should include a provision allowing the principal (person with disability) to request a cancellation of a nominee. If a correspondence nominee fails to comply with requirements, the principal should not be penalised.

### **Health Care and Aged Care**

*Q. 34 Health Care* – We do not support substituted decision making in health care and every effort should be made to support people to make informed decisions and choices, including the right to refuse medical treatment.

*Q. 35 Aged Care* – The Aged Care Act should be amended so that risk management strategies do not require older people with dementia to be ‘locked up’ but enable them to live in inclusive safe communities.

### **Marriage, Intimate Relationships, Parenthood and Family law**

*Q.38 Marriage* – Terminology must be reviewed to reflect a clear distinction between intellectual disability and mental capacity. The Marriage Act needs to be amended, so that the marriage celebrant does not have the right or responsibility to ascertain “mental capacity”. In all jurisdictions, guardians should not be requested to give an opinion. People with disability should be assessed on their mental capacity as opposed to their disability.

*Q.39 Intimate relationships* - People above the age of consent with the mental capacity should be entitled to decide whether to engage in intimate relationships, and the nature of those relationships.

*Q. 40 Parenting & Family Law* – People with disability should be assessed on their mental capacity as opposed to their disability, and decision making should be on the supported rather than the substituted model. People with disabilities should be supported appropriately through a family law process.

### **Q. 41 Particular Disability Communities**

The Illawarra Forum welcomes the recognition of the particular disability communities and we hope that legislation would also reflect that many people face multiple barriers to accessing their legal rights. This is compounded when the person is a member of a number of these particular disability communities.

#### *Children*

The Illawarra Forum supports the development of a National Policy for Children which includes the rights of children with disability. Currently the rights of children with disability are not being recognised and this makes them vulnerable to abuse and discrimination, particularly in the Criminal

Justice System.

A National Policy needs to be developed to support a systematic approach to moving young people out of aged care facilities. We strongly believe that this does not solely apply to children and young people but also to anyone with a disability who do not fit the criteria for an aged care facility.

*Aboriginal and Torres Strait Islanders*

Legislation must be developed in line with the UN Convention on the Rights of People with Disability. The 'Unfit to Plead' clause needs to be removed as it discriminates against people with disability and results in a high proportion of people with intellectual disability being incarcerated without due process.

*People from CALD Backgrounds*

As mentioned above, people with disability from CALD backgrounds must have access to a government funded interpreter to assist them with any interaction with government processes and services.

*LGBTI*

Legislation allowing same sex couples to marry would address medical decision-making in line with supported decision making. It would also address their right to engage in intimate relationships especially entering residential care.

Legislation must ensure that the rights of people with disability to engage in sexual relationships are upheld and is based on capacity. Religious exemptions would need to be removed from Anti-Discrimination legislation as many services are provided by religious organisations.

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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