 January 2014

**Response to the issues paper: Equality, Capacity and Disability in Commonwealth Laws**

NDS is pleased to provide the following comments to the Australian Law Reform Commission (the Commission) on its review of laws and legal frameworks that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity.

**Target the scope of the review**

**National Disability Strategy 2010–2020**

Question 2. What changes, if any, should be made to the National Disability Strategy 2010–2020 to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

All aspects of the National Disability Strategy have an important role in protecting and realising the rights of people with disability. However, the full breadth of the Strategy seems beyond the scope of the review. While an exploration of all law and policy in Australia that impacts on the rights of people with disability, as instigated by the issues paper, provides useful context, NDS encourages the commission to substantively focus on issues related to law that may directly constrain or diminish the exercise of legal capacity. These issues are significant and tricky and the Commission’s undivided attention to them could greatly benefit people with disability.

There is a risk that the review might miss the opportunity to address critical issues related to legal capacity if it is overwhelmed by every disability-related barrier to full enjoyment of rights. Furthermore, there are other policy vehicles and institutions focused on addressing the broader issues. NDS has targeted its input on the matters we believe the Commission should bring to the core of the review.

**United Nations Convention on the Rights of Persons with Disabilities**

Question 1. Australia has an Interpretative Declaration in relation to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. What impact does this have in Australia on:

(a) provision for supported or substitute decision-making arrangements; and

(b) the recognition of people with disability before the law and their ability to exercise legal capacity?

NDS suggests that an overarching goal of this review should be to ensure a nationally consistent approach to how legal capacity is understood, assessed and enabled for people with disability alongside increased clarity and awareness about how Australian laws and practice are consistent with the UN Disability Convention. Over time, achieving this goal would remove the need for an interpretative declaration about Article 12. This is desirable as when read on its own, the declaration does not convey the full meaning, or the paradigm shift, that is implicit in Article 12.

NDS understands that the UN Disability Convention does not create new rights but rather clarifies what existing human rights mean for people with disability. At the heart of this endeavour is that all people with disability must be recognised as legal persons with all the rights that ensue from this fact.

The need for the Disability Convention reflects the reality that the rights of people with disability have not always been understood or protected by governments. The crux of the issue is seen in historic legal frameworks that place constraints on the exercise of legal capacity based solely on disability status. Furthermore, as Article 12 of the Convention signals, full enjoyment of a right to legal capacity sometimes requires the provision of support for decision making. There is a spectrum of support that people may require at different times in their lives, and around different types of decisions. The spectrum ranges from informal advice from friends, through communication support and reasonable adjustments, to more formally organised support arrangements, including pre-emptive arrangements and the appointment of substitute decision-makers. This spectrum of support contrasts with the notion of a stark and inflexible divide between those deemed to have legal capacity and those who lack it.

It is generally accepted, and endorsed by the Convention, that there is a need for law that allows, provides for and protects support for decision-making for some people with disability. The shift that the Convention promotes with this law is first of all to presume capacity (and not make assumptions based on diagnosis alone). Then, where it is established that support is required, safeguards must ensure that people who provide decision support respect the will and preferences of the person alongside other considerations such as safety. This contrasts to some historic practices where ‘best interests’ are seen as paramount.

**Enabling legal capacity and supported decision making**

**A uniform approach to legal capacity?**

Question 4. Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person’s ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?

It is desirable to adopt nationally consistent definitions, processes and safeguards around legal capacity assessment and decision support. Otherwise, people with disability and their families can experience inconsistent and additional administrative hurdles across different jurisdictions or areas of their lives. These hurdles can be more than just a logistical burden. The lack of recognition of a supported decision-making arrangement across a jurisdictional boundary has the potential to undermine key relationships, support networks and the autonomy of people with disability.

Our members report both inconvenience and more serious disruption as a result of inconsistent approaches to the appointment of guardians, administrators, nominees or the recognition of enduring powers of attorney or guardianship and related monitoring and safeguards. All of these important legal functions must be respected and understood across borders and across areas of an individual’s life.

NDS does not have a strong view on how best to achieve a uniform approach to assessing and supporting legal capacity, and we will be interested in the proposals in the April 2014 discussion paper. NDS is of a clear view that the approach adopted must be consistent with the UN Disability Convention. It therefore should presume capacity, focus on assessment of decision-making ability rather than on decisions, allow or provide for support and reasonable adjustments, ensure the measures are proportionate, and respect the will and privacy of people with disability.

These key principles could be usefully applied through a systematic review of all legislation wherever there are constraints placed around the exercise of legal capacity. This process may result in technical amendments that simply update language, or more significant changes that remove an automatic presumption of incapacity on the basis of disability status. In the main we envisage that this is not a broad consultative exercise but rather a technical modernising of legislation to bring it up to date, once the key principles are agreed.

This process should apply to all legislation mentioned in the issues paper; e.g. electoral, social security, criminal and consumer law, and much more. However, we suggest that the scope of this review is narrower than envisaged in many parts of the issues paper. If a nationally consistent, non-discriminatory and enabling approach to legal capacity is achieved in all law, this will be a very significant achievement for the Commission and will go a long way towards supporting the aspirations of people with disability and the UN Disability Convention.

**The role of family, carers and supporters**

Question 5. 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?

People with disability have a right to equal treatment and opportunity in relation to the role that family and carers play in their decision-making. This is complex because what is normal (or equal) varies at different ages and stages of life, and according to culture and particular circumstances. However, all people experience some informal support for decision-making from families and friends around small and major decisions, and legal frameworks must respect this. Many people may also receive more formal support from family, friends and carers when it is bound within legal frameworks such as professional ethics or guardianship, and nominee arrangements. The ethical issues around all this support, whether formal or informal, centre on managing conflicts of interest and enhancing autonomy. Related safeguards need to apply equally for people with disability as they do for other people, while also being sensitive to and respectful of the support role that many families play in the lives of people with disability.

The individualised funding for support that people with profound and severe disability will receive under the National Disability Insurance Scheme (NDIS) will provide them with an opportunity to be assisted more independently from family and friends. This will provide scope for some people with disability to make and act on decisions that their families do not agree with; where this also involves formal decision supports, there is potential for a litigious debate to ensue, which is in no one’s interests. To mitigate this risk there should be broad education and awareness-raising about legal capacity and the role of supported decision-making.

**Privacy**

Question 11. What issues arise in relation to privacy that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to privacy to address these issues?

The issues paper rightly identifies privacy issues as an overarching concern for people with disability. The key challenge is often to transfer sufficient personal information (such as medication requirements or worker safety issues) that will enable the provision of high quality, tailored and safe support, while also protecting the right to privacy. This balance needs to be managed in any legal framework addressing legal capacity alongside the requirements in work health and safety legislation, and adequate recognition of informal care arrangements.

To strengthen the focus of this review the wide range of privacy issues related to service delivery should be beyond the scope of the review.

**The National Disability Insurance Scheme**

Question 12. What changes, if any, should be made to the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules, or disability services, to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 13. What changes, if any, should be made to the nominee or child’s representative provisions under the National Disability Insurance Scheme Act 2013 (Cth) or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 14. What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

(a) the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules;

(b) social security legislation; and

(c) state and territory systems for guardians and administrators?

The NDIS Act 2013 will have a direct impact on the exercise of legal capacity for some people with disability. However, this Act is new and the considerable scrutiny that goes alongside the drafting of new legislation is still fresh. Exactly how effective the nominee provisions are in practice, and how well they work alongside other legislation, is yet to be tested. It would be more useful to review how the Act impacts on legal capacity after there is evidence available from the launch sites and related evaluation. There will be an opportunity to do this as part of the required review two years after commencement.

Collection of good evidence about implementation of the NDIS Act will be important and needs to include information about the impact on people’s right to exercise legal capacity. For example, the Act provides scope for the CEO to appoint or cancel a nominee without direction from the participant; it could be useful to review how and when this provision is used.

Other aspects of the operation of the scheme that need careful attention include:

* How effectively the National Disability Insurance Agency (NDIA) Planners and Local Area Coordinators interface with nominees or guardians?
* How funding for support for decision-making is achieved, both within individualised NDIA packages and separately? And is it adequate and appropriately independent? NDS supports the recommendation of the Productivity Commission to fund advocacy support separately from the NDIS. However, we note that not all decision support is advocacy and some people will require some decision support and related communication support as part of their individualised funding plan.
* How tension between the wishes of family and participants are managed?

It is also timely to develop and provide education material to NDIA staff, families, guardians and participants about the principles of supported decision-making and the law around legal capacity.

**Restrictive practices**

Question 36. In what ways, if any, should the proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector be improved?

Question 37. What is the most appropriate approach to the regulation, reduction and elimination of restrictive practices used on people with disability at a national or nationally consistent level? What are the key elements any such approach should include?

The proposed national framework for reducing the use of restrictive practices outlines laudable goals for national consistency; however, it does not provide a mechanism for achieving this. NDS strongly encourages the Commission to make proposals that will rectify this limitation. The various approaches to restrictive practices across Australia are reflected in the registration requirements under the NDIS which has adopted state-level standards and safeguards –the resulting variance in practice will be hard to justify. It is important because where there are laws that regulate restrictive practices, they potentially enhance or diminish an individual’s ability to exercise legal capacity. And where restrictive practices take place without any oversight, there is a higher risk that an individual’s rights are infringed with inadequate justification, or where alternative strategies could have been used.

NDS supports the core principles of using the ‘least restrictive’ approach, only as a last resort, and ensuring safeguards operate when the law is used to limit an individual’s right to exercise legal capacity. The key challenge for this regulation is to promote strategies that reduce the circumstances where restrictive practices occur, including in formal and informal support situations, while also regulating the circumstances where it may occur.

Some disability services have developed considerable expertise in positive behaviour supports that reduce or eliminate the need for restrictive practices. This expertise must be called upon in situations where restrictive practices are considered.

**Access to justice, evidence and federal offences**

* Question 23. What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?
* Question 24. What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?
* Question 25. What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?

In December 2013, the Australian Human Rights Commission released a paper on access to justice for people with disability, which comprehensively outlines concerns with legal arrangements that may directly impact on people’s ability to exercise legal capacity. Our members report that in particular people with intellectual disability and/or communication support needs experience difficulties in getting their evidence taken seriously, both as witnesses and as defendants.

Some difficulties are with the law itself, and some with the interpretation of the law by officials. NDS encourages the Commission to explore and propose solutions that ensure legal capacity is understood and supported in a criminal justice context. This should include a consistent approach to identifying the presence of disability and related barriers, the assessment of capacity to understand and make decisions, as well as the availability of support and adjustments that accommodate disability within a ‘legal evidence’ context.

The design of appropriate adjustments within justice settings needs to draw on expertise that understands barriers experienced by people with disability, including:

* issues with recall of information and interviewing techniques that address this;
* Issues with communication and required assistive technology and expertise;
* propensity for some people to be led by authorities;
* lack of clarity around the role of support people for detainees;
* reduced social networks and fear of retribution if experiencing carer abuse; and
* many more barriers that are canvassed in a number of relatively recent state and federal-level reviews about access to justice.

**Particular disability communities**

Question 41. How do Commonwealth laws and legal frameworks relating to equal recognition before the law and capacity affect people with disability who are:

a) children; b) women; c) Aboriginal and Torres Strait Islander; d) from culturally and linguistically diverse backgrounds; e) older; f) lesbian, g) gay, h) bisexual, i) transgender or intersex; or j) living in rural, remote and regional areas?

**Children with disability**

Unlike with adults, when guardians are appointed for children with disability they are required to take the ‘best interests’ of the child into account, ahead of preferences. Also, decision-making ability for children evolves, and the need for guardians or parental consent will change depending on the age and stage of life and type of decision. These extra complications require special attention from the Commission to not only ensure equal treatment of children with disability with other children and young adults, but also to ensure legal frameworks and related decisions do not inadvertently jeopardise natural support networks.

Tensions between the will of a child/young adult and that of parents or guardians could be difficult to resolve in the context of the NDIS, which aims to fund support options that maximise choice and control for participants. The manner in which the NDIS manages these tensions will require careful monitoring and consideration. The NDIA needs to both honour the rights of self-determination on an equal basis with other children, and to build and maintain resilient natural support from families.

Another area of complication for children is the interface between child protection systems and disability support. A particularly challenging area is the protection of the rights of very young children with developmental issues, who can benefit from early intervention but whose parents are not willing or not able to facilitate this. The issue of how to best honour the personhood/legal capacity of a very young child does not just arise in the disability context, but the challenges related to ensuring appropriate early intervention need to draw on disability sector knowledge, which is not always well understood in the child protection system.

**Promoting broad citizenship, rights and equality**

**Anti-discrimination law**

Question 6. What issues arise in relation to Commonwealth anti-discrimination law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to the Disability Discrimination Act 1992 (Cth) to address these issues?

Anti-discrimination law provides important overarching review and safeguard mechanisms that protect the capacity for people with disability to enjoy all of their rights. However, this area of law has only recently undergone an extensive review promoting a more consolidated approach to anti-discrimination laws. The Commission should draw on the findings of this review, but it would be a mistake to re-litigate all the concerns related to this area of law at the expense of work focusing on the law that may directly constrain or diminish the exercise of legal capacity.

**Citizenship rights**

As noted in the section on achieving a uniform approach to legal capacity, NDS believes there needs to be a systematic review of all legislation to ensure it is consistent with a set of pre-agreed principles about legal capacity. This process may result in technical amendments that update language, or more significant changes that remove an automatic presumption of incapacity on the basis of disability, ensure proportionate measures and respect privacy. This process should apply to all the following areas of legislation discussed in the issues paper:

* General protections provisions under the Fair Work Act 2009 and employment law
* Administrative law
* Competition and consumer law
* Law related to citizenship, public office/service and board participation such as the Commonwealth Electoral Act 1918, Referendum (Machinery Provision) Act 1984, Federal Court of Australia Act 1976, Corporation Act 2001 and more
* Law related to social security, financial services and superannuation law such as the Social Security (Administration) Act 1999
* Laws that regulate health and aged care services
* Law related to marriage, intimate relationships, parenthood and family law.

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**About National Disability Services**

**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 900 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.