



Response to the Australian Law Reform
Commission: Equality, Capacity and
Disability in Commonwealth Laws
Issues Paper

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About Queenslanders with Disability Network (QDN)

QDN has been established, as a network of, for, and with people with disability, for eleven years. The network regularly brings members together to campaign on issues that impact upon their lives. From such gatherings, and through input from Local Area Networks, the members determine the focus of the network and activities undertaken.

QDN has over 700 members across Queensland. All of QDN's members are people with disability.

Value Statement on People with Disability

Since its inception, QDN has spent considerable energies clarifying the values that underpin its way of working and interacting with other agencies. The following statements articulate the values of QDN, in relation to the place of people with disability in an inclusive, Australian society.

QDN believes that:

- All people with disability have a right to a place in the community and contributions to make to community. This is as empowered, free citizens who are as valued, present, participating and welcomed as members of any dynamic and diverse society.
- The place of people with disability in the community is not just about people with disability having a house in the community. The crux of the issue is that they are welcomed in the community as ordinary citizens where they are genuinely given opportunities to contribute and actively participate. People with disability need to be in communities where their individuality, their talents, and their lived experiences of disability are recognised and acknowledged.
- Culturally and historically, people with disability are not afforded the same value, opportunities or access to community life.
- Any inclusion in community for people with disability is conditional and vulnerable to withdrawal.
An example of this is "forced co-tenancy", where people with disability are forced to share public housing and supports with other people with disability or risk having both housing and supports withdrawn.
- Many people with disability in Queensland are excluded from the most basic experiences of ordinary lives.
- Current exclusionary practices are unacceptable and must be challenged.
- These issues affect not only people with disability but the whole community.
- The responsibility is shared. It lies within government (federal, state and local) and the community at large, to ensure that people with disability have a place and are resourced to belong in community.

Introduction

QDN welcomes the inquiry into Legal Barriers for People with Disability. This has been an area of great concern to many people with disability, and QDN is delighted that such a broad inquiry into the how the legal system works (and doesn't work) for

people with disability has been undertaken. Public consultation on complex issues such as these, is critical in improving outcomes for people with disability.

QDN has consulted with its members regarding the questions presented in the Issues Paper. The responses to the selected questions below, reflect the diversity of issues that our membership have raised.

QDN also thanks the Australian Law Reform Commission for the opportunity to meet to discuss these issues on November 6, 2013.

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?

With the National Disability Insurance Scheme (NDIS) providing individualised supports for people with disability in a unified approach, now is the time for a national approach to be taken in defining legal capacity. This will prevent potential issues as there will surely be confusion in the appointment of nominees with regard to disability supports for the NDIS. The appointment of nominees may not correlate with existing guardianship arrangements at a state level. The NDIS should be used as a catalyst for systemic change in this area.

One of the great advantages of the NDIS will be that it will allow people with disability more freedom to move interstate, without having to be concerned with different support systems across jurisdictions. It would be a terrible shame for such significant reforms to be undermined by other inter-jurisdictional hurdles such as legal capacity definitions.

A key element to a successful mechanism to achieve a nationally consistent approach includes legislation that is based on principles rather than a checklist. It is critical that a diagnosis alone never informs an assessment of legal capacity, and that everyone is offered support to interpret information and express opinions or make decisions. The first principle must be an assumption of capacity.

Another key element is that assessments of capacity must be decision and time-specific. This will avoid current issues where the capacity of a person changes, but their guardianship circumstances remain the same, and are consequently not indicative of the individual's capacity.

For any changes to be effective, accessible information and services must be provided, and free access to additional supports (advocacy, translation and interpretation) must be available. It is also critical that if systemic changes are made, these must be communicated to all stakeholders including people with disability.

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?

Currently, the potential cost to a person with disability in pursuing a case that goes beyond conciliation is a significant deterrent. Many people with disability have limited financial resources and any risk is often seen to be too great.

QDN sees that elements of the Disability Discrimination Act 1992 (Cth) that are regulated (e.g. Transport Standards) require inspectors / investigators as per the Workplace Health and Safety regime. After the reporting of a problem, the regulator investigates and fines may result. RailCorp's defending in the Federal Court discourages further complainants by a demonstration of dogged determination to confront and wear people down in court.

Question 9.

What issues arise in relation to review of government decisions 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 administrative law to address these issues?

People with disability face daily challenges as they progress through life. The prospect of a long, arduous, and potentially expensive review process is enough to dissuade many from appealing a decision.

The Administrative Appeals Tribunal (AAT) has been given clear directives to make the appeals process for the NDIS as least legalistic as possible. The AAT have also been instructed to make the process as quick as is reasonably possible, in consideration of the time that people have waited for adequate supports to be delivered in Australia.

The AAT has also undergone significant disability awareness training in preparation for their new jurisdiction. QDN believes that all Tribunals across all levels of governance should receive similar training and guiding principles. Many obstacles that are encountered by people embarking on an appeals process are only present due to a lack of understanding of the nature of different types of disability, and to some extent, these could be prevented or overcome by disability awareness training.

Question 10.

What issues arise in relation to competition and consumer 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 competition and consumer law to address these issues?

One area that is of great concern is in people with disability signing contracts that they don't fully understand. Mobile phone contracts are a good example. Many people with disability lack the literacy skills to comprehend the fine print of contracts such as these. This can lead to people with disability in financial hardship with no practical solution. Perhaps the NDIS could make appropriate referrals to a funded advice phone line to assist people in this area.

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?

QDN sees a potential problem existing where the nominees for the NDIS and guardianship arrangements at a state level are inconsistent, leading to confusion on many levels. This may result in service providers having to consult with a number of stakeholders for each individual in their care, dependent upon the nature of the issue.

The capacity of an individual to manage their own funds is a potentially contentious issue under the NDIS. An individual with a disability may wish to manage their own supports, but the CEO may deem the person incapable of discharging this responsibility. These decisions may not be consistent with guardianship decisions made at a state level, and consequently the potential for appeal is high.

Nominees who take on the responsibility of self-managing packages of support will have to be closely audited. There is the potential for a person with a disability to be used as a commodity by a family in the most extreme of examples. Regular acquittals (more often than quarterly) may be necessary if the National Disability Insurance Agency (NDIA) is concerned about the potential for fraud or misuse of funds.

Question 16.

What changes, if any, should be made to the Commonwealth Electoral Act 1918 (Cth) or the Referendum (Machinery Provision) Act 1984 (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?

QDN supports the UNCRPD recommendation stated in the Issues Paper (Paragraph 167). In practice, changes could include on-line voting and the provision of Easy English versions of relevant election material. The Australian Electoral Commission should be actively recruiting people with disabilities, as an identified cohort that may require specific intervention to register on the electoral roll. People with disability living in institutional settings should have visits from the electoral commission to facilitate their participation in the democratic process.

The introduction of the eCensus in 2011 was a positive step towards improving accessibility as participants in the community. The progress that has been made should be embraced and advanced to include online voting to optimise access for people with disability.

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 change, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?

QDN has recently delivered disability awareness training for the Administrative Appeals Tribunal, in preparation for their new National Disability Insurance Scheme jurisdiction. The need for broad, disability awareness training is evident at all levels of the judicial system. This type of training would be beneficial for all staff in the legal framework, as every interaction is critical for a person with a disability. Many people with a disability will face any legal entity with great trepidation, and it is vital that these people are not discouraged from the outset by an avoidable error due to a lack of awareness by any staff member throughout the process.

The costs, potential costs, or fear of costs are a major barrier for people with disability engaging with the justice system. As many people with disability are under financial stress, the prospect of taking on any financial risk is enough to reduce their access to justice.

People with disability are often dissuaded from engaging in the legal system because of the paperwork involved with working with legal aid.

The use of Augmentative Communication must be facilitated in the legal system. The use of Augmentative Communication will become more widespread in the future, and

therefore members of the judicial system must be educated about different types of communication systems.

QDN has feedback from members indicating that people with intellectual impairment are often ignored in the current system. Again, disability awareness training is critical at all levels of the legal system to maximally include people with all forms of disability.

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?

QDN is aware of instances where people with disability have been unwilling to press charges due to the stress and trauma associated with being a witness. While this may also be true of the general population, the prospect of having one's legal capacity attacked in public is particularly daunting for people with disability.

The use of augmentative communication devices in evidence is set to increase as the number of people with disability using technology to assist their communication increases. Specific training in this area provided by specialists in the field to members of the legal system should be rolled out on a broad scale.

Question 29.

In what ways, if any, do Commonwealth laws or legal frameworks relating to insurance deny or diminish the equal recognition of people with disability before the law and their ability to exercise legal capacity?

WorkCover insurance claims are often lengthy and stressful. It is often difficult for people with disability to maintain the fight that is required to pursue a claim through a long legal process. Feedback from QDN members would indicate that the process works reasonably well when people are able to return to work, but the system is particularly problematic when an injury results in an inability to return to work.

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 launch of the National Disability Insurance Scheme should be the catalyst for national reform with regard to restrictive practices. This time presents an opportunity for best practice to be established across the states, and a uniform approach be taken in alignment with a national funding model.

Question 39.

What issues arise in relation to people with disability and intimate relationships that may affect their equal recognition before the law or ability to exercise legal capacity? What changes, if any, should be made to Commonwealth law and legal frameworks to address these issues?

The issue of intimate relationships for people with disability has long been a contentious and complicated one.

“The CRPD has changed things Federally but the states are not keeping up to speed. It is illegal (14 years jail) to have sex with me even if it is consensual, for example, as I am head injured therefore neurologically impaired (I’m classed under intellectual impairment) but that is in Queensland if I go over the border into NSW it is legal – go figure! I had a guy (complete stranger) say to me in a bar that having sex with me (and I wasn’t even looking for a stray to take home!) was not worth going to jail for 14 years – you get less for manslaughter! Married couples who come to the Head Injury Unit at the PA Hospital are encouraged to get divorced so the uninjured party can get on with their life, now I can see it would have been illegal for them to carry on as a married couple so it was easier to get a divorce!! That is why there is 99% relationship breakdown with Head Injury! “

QDN member

This direct quote is an illustration of the complexities that exist in this part of life for people with disability.

Another area of difficulty is in gaining access to sex workers. People with disability wanting to access sex workers in their own home, are often subjected to the attitudes of their support workers in the process. The policies of service providers may indeed make this process very difficult, if not impossible.

QDN has been told by a member that they were not hoisted onto their bed in preparation for a visit from a sex worker, even though the same task was undertaken

every night for him to go to bed. These external influences on people with disability's rights are insidious and need to be addressed.

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?

QDN sees issues arising in the future where the wishes of a child will conflict with those of their parents. As more choice and control is afforded to people with disability under a National Disability Insurance Scheme, children transitioning into adulthood will have more options, which may give rise to conflicts in ideals.

QDN sees this as an area of great interest as the NDIS rolls out. At what point do the wishes of the person with disability outweigh the wishes of the family providing care for people with disability? At some point, this question may have to be answered by the Administrative Appeals Tribunal.