

**A submission to the Australian Law Reform Commission
on the**

Inquiry into Equality, Capacity and Disability in Commonwealth Laws

Contact:

Dr Louise Roufeil, FAPS
Executive Manager Professional Practice (Policy)
l.roufeil@psychology.org.au

January 2014

This submission was prepared with the assistance of the
APS College of Forensic Psychologists.

Level 11, 257 Collins Street
Melbourne VIC 3000
PO Box 38
Flinders Lane VIC 8009
T: (03) 8662 3300
F: (03) 9663 6177
www.psychology.org.au

Introduction

The Australian Psychological Society (APS) welcomes the opportunity to provide feedback to the Australian Law Reform Commission (ALRC) Inquiry into Equality, Capacity and Disability in Commonwealth Laws. The APS is the largest professional association for psychologists in Australia, representing more than 21,000 members.

The APS College of Forensic Psychologists represent the specialist area of forensic psychology. Forensic psychologists apply psychological theory and skills to the understanding and functioning of the legal and criminal justice system. They often work in criminal, civil and family legal contexts and provide services for perpetrators, victims and justice personnel. Forensic psychology encompasses issues such as: the causes, prevention and treatment of criminal behaviour; the psychology of police, the courts and the correctional system; and the contributions of psychological evidence to legal proceedings.

In response to the comprehensive issues paper provided by the ALRC, the APS has responded specifically to questions relevant to psychology. These responses are below:

Uniform approach

Q4: Should there be a nationally consistent approach to assessing capacity?

There needs to be a nationally consistent approach to assessing capacity. With different states having different legal tests and thresholds for capacity, several disadvantages face people with a disability. A nationally consistent approach needs to consider the many issues relating to capacity such as financial issues, criminal issues, property disputes, and contracts. These particularly affect those on the fringes of capacity, who may have capacity for some issues on some days or under some conditions.

Q5: How should those supporting people with a disability to exercise capacity be recognised?

There is a need to ensure that those offering support to people with a disability to exercise capacity have their role formally recognised. Reasons for this include:

- The need to ensure that the resulting day to day decisions are accepted

-
- The need to ensure that those assisting in this respect follow a code of conduct, so that people with a disability are protected.
 - In order that decisions can be reviewed in exceptional circumstances

Administrative Law

Q9: 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?

By and large, the experience of our members on this issue has been that the level of complexity involved in understanding review processes is very high. People with a disability and those providing care often lack information about what decisions are reviewable, and what the process is. Review processes are typically courts or tribunals, which are fundamentally intimidating environments that make it difficult for individuals with a disability or their supporters to provide their best responses.

The APS recommends in order to address these issues reviews could be held in less formal settings, held locally and held by individuals who have an understanding of how to effectively engage with individuals with a disability.

Citizenship

Question 17. What issues arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

Question 18. How does the language used in Commonwealth laws and legal frameworks affect the equal recognition of people with disability before the law or their ability to exercise legal capacity?

The Australian electoral system is complex, involving concepts and issues (e.g. preferential voting) that many people from the normal range of cognitive functioning do not properly understand. A simplified voting paper would assist people with disability, with the ability to limit the numbers of choices required by the voter.

The language used throughout Commonwealth laws and frameworks makes it very difficult to grasp for those requiring assistance with understanding. The APS suggests that easy read versions of all legislation, which have been

piloted with individuals with impaired capacity, be developed. In addition to easy to read versions, laws and frameworks should also be available as an audio recording (in simple language) and with versions that include pictures and prompts.

Access to justice and evidence

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?

There are many barriers confronting individuals with diminished capacity in terms of access to the criminal justice system. These barriers exist for those who are victims, those who are alleged perpetrators and those who have been convicted of a crime.

For victims, the process of being questioned by the police as a witness is stressful and involves the use of concepts (such as time) that are often problematic for them to understand. Interviews take a long time, and the questions are asked in such a way as to involve multiple and sequential concepts. Additionally, the presence of multiple people in an interview is unhelpful, and the presence of people in uniforms can be intimidating.

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?

Regulation, reduction and elimination (where appropriate) needs to start with a national approach to defining restrictive practices. Differences exist

both within and between states, such that different states regulate the same practices in different ways. Some states include different practices as restrictive when compared to others, and in Queensland there are differences between the definitions used in different Acts (e.g the Mental Health Act and the Disability Services Act).

There is also a need for a national approach to data collection, such that benchmarking between similar services can be undertaken and monitored. An information technology system that allows this to be managed in a straightforward and cheap manner for an under resourced sector is preferable.

The process of reduction should be focussed on the provision of nationally agreed targets. Information on the use of restrictive practices for each service approved for their use should be published nationally on the internet (as in the case in many jurisdictions in the United States).

The APS provided feedback on the National Framework in April and June 2013 (included with this submission). At that time, the APS recommended the following in regards to the overall framework:

1. *Address where the National Framework will sit within existing structures:* In order for the National Framework to work effectively, the interface between the framework and National Disability Insurance Scheme, disability legislation, mental health legislation, the justice system, and restrictive practices must be considered.
2. *Refocus objectives towards increasing functionality:* There is too narrow a focus on regulating (reducing) restrictive practices, with insufficient attention to addressing deficient environments and increasing functionally equivalent behaviours that enable people to exercise choice and self-determination in their daily lives, nurture their social networks, and support participation in the community.
3. *Utilisation of psychologists or other experienced clinicians to facilitate multi-disciplinary interventions:* It is vital to have appropriately qualified and experienced clinicians to facilitate expert multi-disciplinary intervention. In the case of clients with complex and high risk behaviours (harm to self or others), it is pertinent that appropriately qualified practitioners, such as psychologists, are involved. The current over-reliance on untrained or vocational education and training (VET) sector-trained staff in these situations is placing people with disability, their families and direct support staff at unacceptable risk.