



people with disability

ABN 98 879 981 198

People with Disability Australia Incorporated

Postal Address: PO Box 666
Strawberry Hills NSW 2012
Street Address: Ground Floor, 52 Pitt Street
Redfern NSW 2016

Phone: 02 9370 3100
Toll Free: 1800 422 015
Fax: 02 9318 1372
TTY: 02 9318 2138
Toll Free TTY: 1800 422 016
Email: pwd@pwd.org.au
TIS: 13 14 50 **NRS:** 1800 555 677

NGO in Special Consultative Status with the
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**People with Disability Australia (PWDA)
The Australian Centre for Disability Law (ACDL)
The Australian Human Rights Centre (AHRCentre)**

**Australian Law Reform Commission (ALRC):
Review of equal recognition before the law
and legal capacity for people with disability**

**Submission
January 2014**

About Us

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

The Australian Centre for Disability Law (ACDL) is a community legal centre which specialises in disability discrimination and human rights law and policy. We provide legal advice and representation to persons with disability and their associates. ACDL campaigns to change and improve the law for a society where people with disability will be able to participate in all aspects of life. We undertake law reform, continuing legal education, and community legal education activities.

The Australian Human Rights Centre (AHRCentre) aims to promote public awareness and academic scholarship about domestic and international human rights standards, laws and procedures through research projects, education programs and publications. The Centre brings together practitioners, research fellows and student interns from Australia and internationally to research, teach, and debate contemporary human rights issues.

Introduction

1. PWDA, ACDL and the AHRCentre warmly welcome the ALRC's review of equal recognition before the law and legal capacity for people with disability. Our organisations have substantial expertise in this area of the law, and a long history of advocating for the recognition of legal capacity for people with disability in Australia and internationally. PWDA and ACDL were at the forefront of civil society's involvement in the negotiation of the UN Convention on the Rights of Persons with Disabilities (CRPD), and see this review as a once in a generation opportunity to significantly progress the implementation of Article 12 into Australian law and practice. For more information on our international engagement on the CRPD, including Article 12, please see the website of the Australian Civil Society Parallel Report Group to the CRPD <http://www.disabilityrightsnow.org.au/> and the UN Ad Hoc Committee pages of the PWDA website <http://www.pwd.org.au/issues/un-ad-hoc-committee-meetings.html>
2. The present Issues Paper outlines areas of Commonwealth legislation, including specific provisions, which fail to uphold the right to equal recognition before the law of people with disability. In doing so it examines some of the reasons why the legal capacity of people with disability is denied or diminished by the law, the mechanisms through which the agency of people with disability to make decisions is

removed, and some of the circumstances which lead the choices made by people with disability to be brought into question.

3. This is a useful exercise, and illustrates the extent to which the legal capacity of people with disability to be recognised as persons before the law and/or to have their choices and actions recognised before the law is denied or diminished. However, there are three issues which are commonly conflated in discussions of equal recognition before the law and legal capacity: the difference between legal standing and legal agency, the difference between legal capacity and mental capacity, and the difference between respecting human rights and acting in best interests. Our understanding of these concepts and the implications of their correct use on the development of a uniform approach to legal capacity is examined in this submission.
4. The discussion about the 'relevant standard of capacity' and how to 'assess capacity' related to Question 4 of the Issues Paper (paragraphs 90 to 107), does not adequately address these issues, or make these differences clear. Mental capacity is an individual cognitive ability, whereas legal capacity is a universally accorded right. They are two distinct concepts. The existence of a cognitive impairment does not lead to a limitation of legal agency. It merely indicates the potential requirement for support in the exercise of legal agency. Therefore, any mechanism to assess capacity should not be a test of the person; it should be a test of the supports they require to exercise their legal agency.

Legal standing and legal agency

5. Legal capacity is an inherent right accorded to all people including persons with disability. It consists of two strands. The first is the legal standing to *have* rights, to be recognised as a legal person before the law. This component is commonly recognised in Australia. For example, every Australian with disability can have a birth certificate, seek medical assistance, register to be on the electoral role, apply for a passport, and potentially apply for funding from the National Disability Insurance Scheme (NDIS).
6. The second is the legal agency to *act* on those rights, and to have those actions recognised by the law. It is this component that is frequently denied or diminished for people with disability in Australia. For example, the law recognises that people with disability can own property, but it does not always respect the actions of people with disability in terms of buying or selling property.
7. Legal capacity means that all people, including people with disability, have legal standing and legal agency simply by virtue of being human. Therefore, *both* these strands of legal capacity must be recognised for the right to legal capacity for people with disability to be fulfilled; they cannot be separated. For example, the opportunity to register on the electoral role does not fulfil the right to legal capacity per se. The right is fulfilled if it is acknowledged that the person can register, and they are also permitted to act through the opportunity to cast a vote.
8. It is essential to remember that it is the legal agency of a person, their right to *act* and to have those actions recognised by the law that is the operational strand of legal capacity, and the component that gives effect to whatever related right is being engaged at the time.

Legal capacity v mental capacity

9. All too often, as the Issues Paper illustrates, current laws establish that a person has legal standing, but then seeks to remove or limit their legal agency to exercise their rights. Frequently, this is due to a conflated understanding of legal capacity with mental capacity. For example, provisions which make exception for people with 'unsound mind', 'disability', 'mental incapacity' or 'incompetence' are expressing the view that the existence of a cognitive impairment permits a limitation on the exercise of legal agency and thus recognition of legal capacity as a whole.
10. The Issues Paper also conflates these concepts, and in discussing 'capacity standards' and 'assessment of capacity' also premises the review on the assumption that legal capacity is a concept that can be limited by reference to cognitive impairment.
11. However, unlike mental capacity which is measurable by way of cognitive assessment, legal capacity, as outlined above, is absolute and beyond limitation through assessment.
12. Any proposal for a uniform approach to legal capacity must clearly distinguish between legal capacity and mental capacity. It must remove any notion that the assessment of mental capacity is also an assessment of legal capacity, that assessing mental capacity is a mechanism through which to limit legal capacity, and that the existence of a cognitive impairment creates a limit to the exercise of legal agency. Concerns with the provisions in, and operation of, legislation identified as problematic by the Issues Paper cannot be ameliorated or rectified without an acceptance of this premise.

What the CRPD provides

13. Equality before the law is an absolute right and hence legal capacity is inherent to all persons with or without disability, and the CRPD does not provide for limits to the recognition of legal capacity. Article 12 of CRPD reaffirms that persons with disabilities have the right to recognition everywhere as persons before the law and hence enjoy legal capacity on an equal basis with others in all aspects of life.
14. Article 12(3) requires that people with disability receive the supports they may require in order to exercise their legal capacity, i.e. their legal agency. For some people this may include the provision of assistive communication technology to enable them to express their views, or specific equipment to help them to access information, attend appointments, or participate in discussions about their wishes.
15. Many people may require support in considering what they want (their preferences), and in making choices (determining their will), and they are entitled to decision making supports in order to assist them i.e. the provision of independent legal or financial advice. In the same way that the existence of vision impairment may signify the potential need for support by way of a screen reader or magnifying glass in order for that person to exercise their legal agency to enter into a written contract, the existence of a cognitive impairment may merely signify the potential need for supported decision making.
16. Therefore, the type of impairment a person may have has no bearing on their right to exercise legal agency. The right remains absolute and non-derogable. Their ability to exercise legal agency is dependent on the integrity, quality and appropriateness of support available.

The test of support for legal agency

17. It follows that any doubt about the capability of a person to exercise their legal capacity is in fact doubt about the integrity, quality and appropriateness of their support.

18. Any assessment of legal capacity should be a test of the supports that are available to a person so that they can exercise their rights, will and preferences and not a test of a person's mental capacity.
19. The type(s) of support that a person may require will be unique to their individual needs. Therefore, there is not an exhaustive list of supports that can be approved or disallowed; each individual is entitled to what they need in order to exercise their legal capacity subject to the safeguards outlined in Article 12(4).
20. A 'test for legal capacity' or more accurately a test of support for legal agency, consists of the five step check for safeguards in application of Article 12(4): Does the individual's support arrangements respect the rights, will and preferences of the person; are the support arrangements free of conflict of interest and undue influence; are they proportional and tailored to the person's circumstances; do they apply for the shortest time possible; and are they subject to regular review by a competent; independent and impartial authority or judicial body?
21. For example, a person with intellectual disability may require decision making support to help them choose what time of day they receive home care services, or a person who is deaf may require a sign language interpreter so that they can participate in negotiations about selling their house. If the supports available to them are not appropriate or do not respect their rights and enable them to convey their wishes and preferences then the exercise of legal capacity fails. In the examples above this may be because the person providing decision making support has a conflict of interest as they also work for the service provider, or because the interpreter signs in Auslan when the person requires South African sign.
22. Fundamentally this is a non-interventionist model. The test of a person's supports only comes in to play where doubts are raised, by the individual or a third party, as to whether their support meets the requirements of the safeguards outlined in Article 12(4).
23. Operationally, the burden of proof would lie with whoever is making a challenge to show that the support in question does or does not pass the test in Article 12(4). It could be the person with disability themselves, a support provider, or a third party. In some cases the support in question may be a new or controversial piece of communication technology, in others it may be a person such as a family member or friend. If the support does not meet the criteria then alternative interim or permanent arrangements would have to be made in order for that person to be effectively supported in the exercise of their legal capacity.
24. Similarly, in a situation where a provider of goods or services refused to recognise the legal capacity of a person with disability engaging with them, the burden of proof would be on the provider of those goods or services to demonstrate that the supports being used did not respect the rights, will and preferences of the person, were subject to a conflict of interest or undue influence, or did not otherwise pass the test in Article 12(4).

Rights, will and preferences v best interests

25. Safeguards to prevent abuse in the exercise of supports must be proportionate, and should not result in limiting the exercise of a person's legal agency. For instance, measures designed to protect a person with disability from making mistakes by removing their right to make choices.
26. Safeguards to prevent abuse should result in rejecting the exercise of supports which do not respect the rights, will and preferences of the person. For example, substituted decision making models which

permit a person to make decisions in another's 'best interest', must be replaced with supports which reflect the rights, will and preferences of the person with disability.

27. Any uniform approach to legal capacity must reflect this fundamental change from limiting the exercise of legal capacity based on perceptions of 'best interest', to respect for the rights, will and preferences of people with disability.

Facilitated decision making

28. In circumstances whereby it is not possible to support a person to ascertain their will and preferences, the default position should be to act in accordance with the relevant human rights standard as applicable.
29. In effect this is a facilitated form of decision making based on the balancing of conflicting rights relevant to that person's situation. This balancing act should be limited and issue specific, apply for the shortest time possible, and be governed by the principles of proportionality.
30. For example, if a person is not in a position to express their will, preference, or consent to lifesaving treatment i.e. they are unconscious, then the standard in Article 10 applies: people with disability have the right to life on an equal basis as others. The person with disability should receive the same medical attention to the same standard as a person without a disability in that situation. Not to do so would be a violation of Article 10 and discriminatory in both domestic and international law.
31. Similarly, if a person with disability is unable to formulate an opinion about where they want to live, the default applicable standard contained in Article 19 would require that they are supported to live in the community with supports as opposed to being institutionalised.
32. This model cannot be called supported decision making because the will and preference of the person cannot be ascertained. However, it differs from common forms of substitute decision making because it is based on facilitating access to the enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest.

Independent oversight

33. This model requires the existence of a competent, independent, impartial authority to administer cases of facilitated decision making, and other cases where there is any doubt raised as to the veracity of legal capacity supports being provided. Any uniform approach to legal capacity must nominate or establish a corresponding national mechanism with the expertise to make these determinations.
34. Independent assessment of and/or intervention in a person's support arrangements must be proportional to the type of support being used, and the exercise of legal agency that it is supporting.

Summary

35. In summary, it is essential that any uniform approach to legal capacity acknowledges that the right to legal capacity is absolute, it cannot be limited.
36. Second, an assessment of mental capacity, or the existence of a cognitive impairment, may indicate that a person may require support to exercise their legal agency, but it has no direct bearing on the recognition of their legal capacity as a whole.

37. Third, people with disability must be provided with the specific supports they need to enable the exercise of their legal agency. It is not the person, but the person's supports that may need to be tested for conformity with the requirements of Article 12(4).
38. Fourth, any uniform approach to legal capacity must be premised on a model of support provision which respects the rights, will and preferences of a person, as opposed to models which allow for substituted decision making based on perceptions of best interest.
39. In conclusion, there is no basis for a nationally consistent test for measuring mental capacity for the purpose of limiting legal agency. What is required is a nationally consistent test for supports to legal agency, and an independent mechanism to administer the safeguards to these supports.
40. Implementation of this approach would support the social model of disability, and remove the emphasis on a person's impairment(s) by focusing on their abilities and supporting their participation and inclusion. Fundamentally, it would enshrine rights, will and preference as the core legal standards by which any intervention in the exercise of a person's legal capacity must be measured. Moreover, it could apply across jurisdictions and all areas of law, thus ensuring equality in the accordance of the right to equality before the law for all people with disability.
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Thank you for the opportunity to make this submission.

Contact:

Ngila Bevan ngilab@pwd.org.au

