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Submission

# Australian Law Reform Commission

## *Equality, capacity and disability in Commonwealth Laws*

## Issues Paper November 2013

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**Centre for Disability Research and Policy**

The Centre for Disability Research and Policy will make a significant contribution to national and regional efforts to redress the profound disadvantages faced by people

with disabilities.

Our aim is to enable people with disabilities to have an

equal opportunity to realise their potential and participate productively in society.

Our emphasis is on research and real-world analysis

of the problems faced by people with disabilities, and

on providing practical policy solutions to governments,

service providers and policymakers.

Introduction

1. The Centre for Disability Research and Policy (the Centre) welcomes the opportunity to meet with Professor Rosalind Croucher, President, and members of the Australian Law Reform Commission staff. This document primarily speaks to the invitation to discuss issues pertinent to parents with disabilities and their families. Some preliminary comments frame the material about people with disabilities in their partnering and parenting roles
2. The Centre affirms the position expressed in the joint submission by People with Disability Australia (PWDA), The Australian Centre for Disability Law (ACDL) and The Australian Human Rights Centre (AHRCentre), Submission No 66 <http://www.alrc.gov.au/inquiries/disability/submissions>
3. For specificity, the Centre strongly endorses the arguments in the above submission that legal capacity is an inherent right accorded to all people including persons with disability consisting of two strands as also argued in *Equality, capacity and disability in Commonwealth laws. Issues Paper (Issues Paper).* The first strand is legal standing to have rights, the second strand is the legal agency to act on these rights.
4. For specificity, the Centre finds that the *Issues Paper* devotes much discussion to determining what is/ is not the capacity to act on or give effect to legal rights. This is understandable from a historical perspective. The notion of having mental capacity is firmly embedded in legal thinking from a nineteenth century view of certain ‘groups’ of people being limited in mental capacity typically children, people with mental illness and people (at that time) called idiots, subnormal or mentally retarded. This view led to codification of mental capacity to act in legislation and legislative frameworks so that decisions could be made and arguments put in relation to an individual’s mental capacity.
5. This view is no longer current in understanding of disability for example in international legislation such as the UN Convention on Rights of Persons with Disabilities (the Convention) or regional frameworks that give effect to the Convention such as the Incheon Strategy *Make the Right Real for Persons with Disabilities*, <http://www.unescap.org/publications/detail.asp?id=1523>. Australia is a signatory to both.
6. Disability is now understood as “a dynamic interaction between health conditions and contextual factors, both personal and envi­ronmental ….. Disability is the umbrella term for impairments, activity limitations and par­ticipation restrictions, referring to the negative aspects of the interaction between an indi­vidual (with a health condition) and that indi­vidual’s contextual factors (environmental and personal factors)” *World Report on Disability* (WHO and World Bank, 2011, p.4).
7. The Purpose of the Convention, para 2 affirms this: “Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (p.4).
8. Two points require differentiating. First, defining disability as an interaction means that “disabil­ity” is *not an attribute of the person*. This is critical to understanding the incorrect confusion about mental capacity (or lack thereof) as an inherent part of being a person with long-term physical, mental, intellectual or sensory impairments.
9. The *Issues Paper* discusses capacity standards and assessment of capacity which suggests an assumption that legal capacity is a concept that (i) can be limited by reference to cognitive impairment and (ii) needs to be determined. The type of impairment that a person may have has no meaning on their legal standing (as all persons have legal rights) or on their right to exercise their legal agency, that is act on their rights. Impairment *may* indicate that the person require support of some kind to exercise their legal agency.
10. However and second, note that the requirement in defining disability in the Convention as ‘which in interaction with various barriers may hinder….” makes clear that *not all persons* with physical, mental, intellectual or sensory impairments will experience disability. This is logically evident in the diverse outcomes for persons with impairments in Australian society. Factors such as gender, age, rurality, cultural background, and socio-economic circumstances are increasingly understood as social determinants of the outcomes experienced by persons with disabilities (see Emerson et al., 2011[[1]](#footnote-1) ).
11. That said, the societal barriers for all persons with impairments in Australia have created overall a situation of great disadvantage as noted in the *Issues Paper* and elsewhere at <http://sydney.edu.au/health-sciences/cdrp/>. Our work monitoring the social inclusion of young Australians demonstrates that between 2001 and 2011 the gap between the inclusion of disabled and non-disabled young Australians has **widened markedly** in 13 critical areas: Employment; Long-term unemployment; Living in a jobless household; Economic resources; Being fully engaged in work or education; Volunteering; Mental illness; Subjective well-being; Having a voice in the community; Support from family/friends in time of crisis; Feeling safe; Multiple disadvantage; and Entrenched multiple disadvantage.

Parents with disabilities

1. As previously indicated in correspondence, parents with disabilities and particularly those with intellectual impairment experience discrimination and disadvantage in many aspects of their lives in Australia and elsewhere (see IASSIDD Position Paper[[2]](#footnote-2)).
2. Full analysis of their position under Australian Commonwealth Law has not been completed to the best of my knowledge. There have been detailed investigations into their position under state and territory child protection legislation and the prevalence of child removal (see for example McConnell et al., 2000 [[3]](#footnote-3) and multiple publications emanating from this report).
3. Following a presentation to the Australian Human Rights Council last March by Dr Margaret Spencer and myself, the Council issued a communique which in part noted:

“Finally, having regard to evidence:

1. that parents with disability are significantly overrepresented in child protection systems in Australia despite having the same capacity to be effective parents;
2. that there is a lack of systematic data collection and analysis;
3. that there is a lack of appropriate supports to potential and actual parents with disability;

ACHRA calls for better data collection and better research into negative presumptions being made about people with disabilities being able to effectively parent. ACHRA calls for better support for these parents to fulfil their parenting roles and has identified that this as a priority given the discriminatory impact of negative presumptions”.

1. Of note the two primary negative presumptions that surround parents with disabilities and particularly those with intellectual disability are that (i) intellectual disability equals and is the same as lacking mental capacity and (ii) mental capacity equals and is the same as being determined fit to be a parent. Both of these presumptions have been shown to be incorrect. Both of these presumptions have led to the evidence noted by the Australian Human Rights Council in their communique quoted in point 14 above.
2. The WHO Classification, the *International Classification of Functioning, Disability and Health (ICF)[[4]](#footnote-4)* determines that (i) disability is a result of an interaction between a person (with a health condition) and that person's contextual factors (environmental factors and personal factors) and that (ii) disability covers a spectrum of various levels of functioning at body level, person level and societal level. Disability denotes all of the following: (a) impairments in body functions and structures; (b) limitations in activity; and (c) restriction in participation. There is in addition a serious body of evidence that demonstrates that intelligence quotient is not a determinant of functional behaviour.
3. Intellectual disability is classified in Australia by the Australian Bureau of Statistics as “having difficulty learning or understanding things”[[5]](#footnote-5). Note also that the ABS provides an information paper on how disability is understood and data collected on disability in Australia.[[6]](#footnote-6)
4. A recent report by the Public Advocate Victoria *Whatever happened to the village? Removal of children from parents with a disability*. Report 1 (December, 2013)[[7]](#footnote-7) analyses the situation of these parents in relation to family law in Australia. An analysis of the situation of parents with disabilities in relation to care and protection legislation is currently underway.
5. A recent report by the National Council on Disability *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and Their Children* (2012)[[8]](#footnote-8) analysed the legislative situation at Federal and State level in the US and across child welfare, family, adoption, assisted reproductive technologies and other areas of law. A similar comprehensive analysis of legislation and the legislative framework and consequent policies is long over-due in Australia. One outcome of this report is recent introduction of a bill to the Washington State Legislature *Concerning parents with intellectual or developmental disabilities involved in dependency proceedings*  (see at <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=2616&year=2014>).
6. Both reports argue strongly that the widespread (and erroneous) negative presumption that disability equals and is the same as incompetence (or lacking capacity and particularly mental capacity) underpins the discrimination and disadvantage that persons with disabilities experience in all aspects of their lives as parents.
7. To rebut that negative assumption over 15 years ago work was done within a review of care and protection legislation in NSW to include a section related to disability. Experience following the insertion of this clause suggests strongly that very careful consideration needs to be given to ensuring that recommendations for legislative change in relation to equal recognition before the law for persons with disabilities can only be founded in the Articles of the Convention, and specifically, as noted in point 3 above. The relevant section 71 (2) altered since to remove the word “alone” reads thus:

2) The Children’s Court cannot conclude that the basic needs of a child or young person are likely not to be met only because of:

(a) a parent’s or primary care-giver’s **disability**, or

(b) poverty.

1. In the intervening period, experience suggests that rather than 71, s2 (a) acting as a deterrent to discrimination against parents with disabilities, it may have acted as motivation for the child protection authority not to include information about a parent’s disability in care proceedings. Clearly this is an unintended consequence not envisaged by ourselves and others as drivers of insertion of this section.

Women with disabilities and electoral mechanisms

1. Research on women with disabilities in the National Breast Screening program funded by the National Breast Cancer Foundation 2005-2007[[9]](#footnote-9), clearly demonstrated that women with disabilities were denied the opportunity for breast screening for several reasons, one of which was they were not included on the electoral role. This is because the National Breast Screening Service uses the electoral role for recruitment of women in the designated age range. The decision to not enrol women with disabilities on the electoral role was typically taken by family members often in consultation with medical advisors or the woman with disability was actively discouraged from enrolling herself. Further, when women with disabilities enquired of their medical advisors about enrolling in the program many were told that they would be either ineligible or that the facilities would be inaccessible and therefore they should desist. Similar findings of discriminatory practices on the part of medical advisors and family members towards women with disabilities with denial of their right to publicly funded health care services in many countries (see for example [[10]](#footnote-10)
2. This finding confirms that legislation and legislative frameworks which allow, as it were, an “out” and in the case of the *Commonwealth Electoral Act 1918 (Cth)* this is by reason of ‘unsound mind’, fail to uphold the right to equal recognition of persons with disability before the law. While ever the presumption remains that there are persons in the community unable to exercise their legal rights, mechanisms will be found or designed to ‘assess’ or ‘measure’ whatever ‘capacity’ is understood or determined to be, and mechanisms devised to determine a ‘cut-off’ point for capacity/ incapacity.

Summary

1. The Purpose of the Convention requires signatories “to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity”. Article 12 (3) of the Convention requires that people with disability receive the supports they may require to exercise their legal capacity.
2. Taken together this requires an understanding that persons with disabilities are equal before the law and acknowledges that some persons with disabilities may need support to exercise their legal rights. In contrast the history of presuming that disability equals a lack of capacity has driven the denial or dimunition of equal recognition before the law for persons with disabilities.
3. Determining a model for nationally consistent support mechanisms and a monitoring system of these mechanisms which reflect the rights, will and preferences of the person with disability in line with Article 12(4) would appear to be of the highest priority.
4. Australia was an early signatory to and ratifer of the Convention; other countries such as Japan took a different view primarily based on the requirement to review national legislation to ensure compliance with the Convention prior to signing. This resulted in several years public discussion and debate prior to Japan ratifying the Convention on 20th January 2014. There is much work to be done to ensure Australian legislation is in line with Article 12 (and other Articles) of the Convention, in particular the right to equal recognition before the law and to the supports required (if any) to exercise legal agency.

Thank you for the opportunity to prepare this paper and meet with Professor Rosemary Croucher and members of the Australian Legal Reform Commission.

Gwynnyth Llewellyn, 17th February 2014

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2. Parents labelled with intellectual disability: Position of the IASSID SIRG on Parents and Parenting with Intellectual Disabilities(2008) *Journal of Applied Research in Intellectual Disabilities, 21*, 296-307. DOI 10.111/j.1468-3148.2008.00435.x [↑](#footnote-ref-2)
3. McConnell, D., Llewellyn, G., & Ferronato, L. (2000). *Parents with a disability and the NSW Children's Court.* The Law Foundation of NSW and the University of Sydney. ISBN 1 86487 323 X [↑](#footnote-ref-3)
4. <http://www.who.int/classifications/icf/en/> [↑](#footnote-ref-4)
5. Australian Institute of Health and (2008) *Disability in Australia: intellectual disability*. Available at: http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442452891 (retrieved 22 August 2013). [↑](#footnote-ref-5)
6. Australian Bureau of Statistics (2010) *Information paper: ABS sources of disability information, Australia 2003-2008*. ABS cat. no. 4431.0.55.002. Australian Bureau of Statistics, Canberra. Available at: http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/69F4AB340D15511ACA25778900119EC6/$File/attqvre7.pdf (retrieved 18 March 2013). [↑](#footnote-ref-6)
7. Office of the Public Advocate (December, 2013). *Whatever happened to the village? The removal of children form parents with a disability. Report 1: Family law- the hidden issues.* Office of the Public Advocate: Victoria. [↑](#footnote-ref-7)
8. National Council on Disability (2012). *Rocking the Cradle: Ensuring the Rights of Parents with Disabilities and their Children*. National Council on Disability: Washington DC [↑](#footnote-ref-8)
9. See for example [↑](#footnote-ref-9)
10. Legg J. Clement D. White K. Are women with self-reported cognitive limitation at risk for underutilisation of mammography? *Journal of Health Care for the Poor and Underserved*. 2004;15:688-702, and Schootman M. Jeffe D. Identifying factors associated with disability-related differences in breast cancer screening (United States). *Cancer causes and control*, 2003;14:97-107 [↑](#footnote-ref-10)