

1. Introduction

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The Inquiry

1.1 This Inquiry focuses on legal capacity for people with disability. It reflects the commitment expressed in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD), to which Australia is a signatory, signalling

the movement from viewing persons with disabilities as ‘objects’ of charity, medical treatment and social protection towards viewing persons with disabilities as ‘subjects’ with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.¹

1.2 The Inquiry commenced in July 2013, the same month in which a pilot of the National Disability Insurance Scheme (NDIS) in Australia was initiated, representing ‘a new way of providing community linking and individualised support for people with permanent and significant disability, their families and carers’.² The focus of the scheme is to provide greater choice and control over the disability services support received by persons with disability.

1.3 In considering what changes, if any, should be made to Commonwealth laws, the Terms of Reference for this Inquiry require the Australian Law Reform Commission (ALRC) to consider ‘how maximising individual autonomy and independence can be modelled in Commonwealth laws and legal frameworks’.³

1 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

2 Department of Families, Housing, Community Services and Indigenous Affairs, *One Big Difference to Lots of Lives: An Introduction to DisabilityCare Australia* (2013) 3.

3 The full Terms of Reference are available on the ALRC website: <www.alrc.gov.au>.

1.4 In this Discussion Paper the ALRC proposes a model that includes high level principles in relation to decision-making—the National Decision-Making Principles—to provide a conceptual overlay and framework for reform of Commonwealth laws and a basis for review of relevant state and territory laws. The model also includes provision for supported decision-making in a formal way in key areas of Commonwealth laws—the Commonwealth decision-making model. The remaining chapters focus on particular areas identified in the Terms of Reference, demonstrating the application of the Principles in a range of Commonwealth laws.

1.5 The Discussion Paper commences the second stage in the consultation processes in this Inquiry. The first stage included the release of the Issues Paper, *Equality, Capacity and Disability in Commonwealth Laws* (IP 44), generating 84 public and 12 confidential submissions.⁴ Both the Issues Paper and this Discussion Paper may be downloaded free of charge from the ALRC website. Hard copies may be obtained on request by contacting the ALRC on (02) 8238 6333.

1.6 In releasing this Discussion Paper, the ALRC again calls for submissions to build on the evidence base so far established and to inform the final stage of the deliberations leading up to the Final Report, which is to be provided to the Attorney-General by the end of August 2014.

How to make a submission

1.7 With the release of this Discussion Paper, the ALRC invites individuals and organisations to make submissions in response to the specific proposals and questions, or to any of the background material and analysis.

1.8 There is no specified format for submissions, although the questions and proposals may provide guidance. Submissions may be made in writing, by email or using the online submission form. Submissions made using the online submission form are preferred.

1.9 Generally, submissions will be published on the ALRC website, unless marked confidential. Confidential submissions may still be the subject of a request for access under the *Freedom of Information Act 1982* (Cth). In the absence of a clear indication that a submission is intended to be confidential, the ALRC will treat the submission as public. The ALRC does not publish anonymous submissions.

Submissions using the ALRC's online submission form can be made at:
<<http://www.alrc.gov.au/content/disability-dp81-make-submission>>.

To ensure consideration for use in the Final Report, submissions must reach the ALRC by **Monday 30 June 2014**.

4 The 84 public submissions are available on the ALRC website: <www.alrc.gov.au>.

Framing principles

1.10 The Issues Paper identified five principles for guiding the recommendations for reform in this Inquiry: dignity; equality; autonomy; inclusion and participation; and accountability. There was wide support by stakeholders for these principles, which are reflected in the model that is developed in this Discussion Paper.

Dignity

1.11 The theme of ‘dignity’ emerges clearly in recent literature regarding people with disability. Importantly, it is seen as a ‘relational concept’ as it comes into play in transactions between individuals and between individuals and the State.⁵ In the international context, dignity is one of the guiding principles of the CRPD.⁶ The first paragraph in the Preamble recalls ‘the principles proclaimed in the Charter of the United Nations which recognize the inherent dignity and worth ... of all members of the human family’.⁷ Dignity is also recognised in a number of other international human rights instruments.⁸ In the domestic context, the National Disability Strategy (NDS) prioritises the concept of dignity in its principles.⁹ Similarly, the Productivity Commission identified human dignity as ‘an inherent right’ of persons with disability and suggested that dignity as a human being is linked to self-determination, decision-making and choice.¹⁰

Equality

1.12 The United Nations Committee on the Rights of Persons with Disabilities (UNCRPD), the treaty-monitoring body of the CRPD, commenced its General Comment on art 12 of the CRPD by saying that ‘[e]quality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights’.¹¹ Similarly, art 5 prohibits all discrimination on the basis of disability and requires States to promote equality;¹² and arts 6 and 7 emphasise equality for women and children. The NDS principles emphasise equality of opportunity;¹³ and

5 Lee Ann Bassler, ‘Human Dignity’ in Marcia Rioux, Lee Ann Bassler and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2010) 21.

6 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 3(a).

7 *UN Convention on the Rights of Persons with Disabilities*, opened for Signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

8 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

9 Australian Government, *National Disability Strategy 2010–2020*, 22.

10 Productivity Commission, ‘Review of the *Disability Discrimination Act 1992* (Cth)’ (30 Vol 1, 2004) 182.

11 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [1].

12 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

13 Australian Government, *National Disability Strategy 2010–2020*, 22.

a range of Commonwealth laws also protect the equality of people and proscribe discrimination on the basis of disability—for example, the *Disability Discrimination Act 1992* (Cth). The concept of equality is also considered in the discussion of equal recognition before the law in Chapter 2.

Autonomy

1.13 Autonomy is a significant principle underlying the ability of persons with disability to exercise legal capacity. The principle of autonomy is enshrined in the general principles of the CRPD¹⁴ and is a key principle of the NDS.¹⁵ The objects and principles of the NDIS also reflect the notion of autonomy.¹⁶

1.14 Autonomy can be understood in a number of distinct senses. While a focus on the individual emphasises ideas of self-agency, contemporary theorists argue that autonomy needs to be conceptualised as ‘empowerment’; and more than ‘non-interference’.¹⁷ This involves seeing an individual in relation to others, in a ‘relational’ or ‘social’ sense:

‘Relational autonomy’ is the label that has been given to an alternative conception of what it means to be a free, self-governing agent who is also socially constituted and who possibly defines her basic value commitments in terms of inter-personal relations and mutual dependencies.¹⁸

1.15 This understanding of autonomy connects to respect for the family as the ‘natural and fundamental group unit of society’ that is entitled to protection by States Parties.¹⁹ Such a view sits comfortably with a shift in emphasis towards supported decision-making, which ‘acknowledges that individuals rely to a greater or lesser extent on others to help them make and give effect to decisions’.²⁰

1.16 Autonomy viewed in this sense can be seen in submissions which emphasised self-determination and the assistance required to exercise it.²¹ The ALRC considers that the ideal of supported decision-making, which is central to the CRPD—as discussed in Chapter 2—draws upon this approach.

14 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

15 Australian Government, *National Disability Strategy 2010–2020*, 22.

16 *National Disability Insurance Scheme Act 2013* (Cth) ss 3, 4.

17 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 269–272. Donnelly draws, for example, on the work of Joseph Raz, eg Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986). See her discussion particularly in ch 1, ‘Autonomy: Variations on a Principle’.

18 John Christman, ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves’ (2004) 117 *Philosophical Studies* 143, 143.

19 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) art 23(1); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) rule 9.

20 Piers Gooding, ‘Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law’ (2013) 20 *Psychiatry, Psychology and Law* 431, 435.

21 AFDS, *Submission 47*; Mental Health Coordinating Council, *Submission 07*.

1.17 At times, tensions may arise between the position of the family in providing support to people with disability to build their capacity for autonomy and their often protective role, which may limit the individual autonomy of a person with disability. The Law Council of Australia noted that ‘legal recognition of supported decision-making is likely to necessitate an accompanying regime which is intended to promote autonomy and accountability’.²² The ALRC considers that the principle of ‘accountability’ is a key counterbalance in developing the reform proposals in this Discussion Paper. It is reflected, in particular, in the Safeguards Guidelines, considered in Chapter 3.

Inclusion and participation

1.18 Closely related to the principles of dignity and equality, the principles of inclusion and participation are central to many contemporary perspectives on disability, particularly a social model of disability. Such a model emphasises that, ‘whilst a person might have an impairment, their disability comes from the way society treats them, or fails to support them’.²³ It has been suggested that promoting inclusion, through legal and social mechanisms, is a significant way of reducing these social barriers.²⁴

1.19 Inclusion and participation are active values, consistent with an approach to autonomy as empowerment. Children with Disability Australia submitted that it may be advantageous to take this idea further and to include ‘citizenship’ as a principle:

This principle involves consideration of responsibilities and active participation within community life whereas the other principles reflect more the rights and legal protections of people with disability.²⁵

1.20 The inclusion and participation of people with disability is a commitment that is grounded in both international law and in Australia’s domestic policy aims.²⁶ One of the principles of the CRPD is ‘full and effective participation and inclusion in society’.²⁷ At a domestic level, the Australian Government’s social inclusion agenda specifically prioritised people with disability in the goal of reducing disadvantage.²⁸ An emphasis on inclusion has important consequences for education, workforce participation and economic security, as people with disability are seen as ‘citizens with rights, not objects of charity’.²⁹ Further, one of the objects of the *National Disability Insurance Scheme Act 2013* (Cth) is to facilitate greater community inclusion of people with a disability.³⁰

22 Law Council of Australia, *Submission 83*.

23 Productivity Commission, ‘Disability Care and Support’ (July 2011) 54 Vol 1, 98.

24 *Ibid.*

25 Children with Disability Australia, *Submission 68*.

26 Productivity Commission, ‘Disability Care and Support’, above n 23, 203.

27 *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 3(c).

28 Australian Government Department of the Prime Minister and Cabinet, *Social Inclusion Policy* (2010).

29 Australian Government, *National Disability Strategy 2010–2020*, 16.

30 *National Disability Insurance Scheme Act 2013* (Cth) s 3.

1.21 In the NDS, inclusion is seen to involve a consultative and collaborative approach to law reform and policy development.³¹ It recognises the need to include people with disability and their carers in consultation with government to develop a ‘shared agenda’.³² Thus, inclusion is also linked with civic participation, voting and public office—‘that we all have something to contribute’.³³

1.22 The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance commented that a principle of inclusion and participation needs to acknowledge ‘a right to supports that enable community inclusion’ and that the availability of supports is ‘critical’ to persons with disability.³⁴

1.23 The emphasis on supported decision-making developed throughout this Discussion Paper reflects the principle of inclusion and participation.

Accountability

1.24 The concept of accountability has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards associated with measures that relate to arrangements for the exercise of legal capacity.

1.25 One important consequence of the shift towards empowering persons with disability to exercise their full legal capacity is the need to ensure that any ‘supporters’ who fulfil a supportive or assisted decision-making role are properly accountable. Article 16(1) of the CRPD stresses the need for States Parties to take

all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.

1.26 Consequently, an important focus of any reform relating to decision-making schemes is to ensure the inclusion of effective accountability mechanisms, both at a systemic and practical level. Another important component is the accountability and responsibility of people with disability for their decisions, recognising that with rights come responsibilities. Active participation carries with it responsibilities.³⁵

31 Australian Government, *National Disability Strategy 2010–2020*, 16.

32 Australian Government, *National Disability Strategy 2010–2020*, 15.

33 Melinda Jones, ‘Inclusion, Social Inclusion and Participation’ in Lee Ann Basser, Marcia Rioux and Melinda Jones (eds), *Critical Perspectives on Human Rights and Disability Law* (Martinus Nijhoff, 2012) 57.

34 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. The submission noted that the availability of support could be particularly lacking in rural and regional communities.

35 Children with Disability Australia, *Submission 68*.