



Physical Disability Council of NSW
Ordinary People Ordinary Lives

Submission for Australian Law Reform Commission

**Equality, Capacity and Disability in
Commonwealth Laws**

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Who is the Physical Disability Council of NSW?

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW

The objectives of PDCN are:

- To educate, inform and assist people with physical disabilities in NSW about the range of services, structure and programs available that enable their full participation, equality of opportunity and equality of citizenship
- To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (ie self advocate).
- To educate and inform stakeholders (ie about the needs of people with a physical disability) so they are able to achieve and maintain full participation, equality of opportunity and equality of citizenship.

The Physical Disability Council appreciates the opportunity to consider, and make comment to the Equality, Capacity and Disability in Commonwealth Laws Issue Paper. We will not be making comment on all of the questions raised, but will respond to those questions where we feel we can contribute to the discussion.

Where the acronym CRPD is used this refers to the Convention on the Rights of People with Disabilities

Comment

Question 1. Australia has an Interpretive Declaration in relation to Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities*. What impact does this have in Australia on:

- (a) Provision for supported or substitute decision-making arrangements; and**
- (b) the recognition of people with disability before the law and their ability to exercise legal capacity?**

PDCN would like to make comment that whilst people may have a physical disability; findings within the *Census, Disability Australia 2009* indicate 41% do not require assistance¹. Assumptions should therefore not be made that a person with physical disability will require supported decision-making or substitute decision making assistance.

In situations where an individual decides to use supported decision-making, the benefits of this model can be seen as a means to communicate and express their views; and this is particularly important for individuals who may experience speech limitations due to their disability. A person's physical disability may also limit their ability to access information

¹ Australian Bureau of Statistics. (2009). *Disability Australia 2009*.

relating to their rights. Supported decision making can reduce this barrier by acting in an informing capacity².

Where supported decision making is chosen, care should be taken that the person nominated to support the individual is chosen by the individual, and he/she is a person who demonstrates the ability to actively support an individual's right to self determination instead of limiting them.

In cases where substituted decision making is required (as a last resort); PDCN recommend that a tool is developed to assess capacity. The tool should include clear legal definitions to determine capacity, and appropriate training on how to use the tool, to reduce the risk of incorrect conclusions relating to an individual's capacity³.

Question 2. What changes, if any, should be made to the National Disability Strategy 2010 – 2020 to ensure equal recognition of people with disability before the law and their ability to exercise legal capacity?

The *National Disability Strategy 2010-2020* makes some important recommendations relating to the equal recognition of people with disability before the law and their ability to exercise their legal capacity. PDCN would however like to add to following points to this discussion.

Policy Direction 1 – Increase awareness and acceptance of Rights of People with Disability, discusses widespread awareness as a means to promote and acceptance of the rights of people with disability⁴. The impact of the media and “sensationalising” matters should be considered. Trained Media Liaison Officers should be available to work to manage detail and information that is released in the media that could be capable of reinforcing negative stereotypes for people with disability⁵.

Policy Direction 2 – Remove barriers preventing people with disability participating as equal citizens, highlights accessibility issues to court rooms and polling places. Research has found that adjustments to court proceedings require discussion and time to plan. Issues have been reported where Courts have not been made aware of these needs or adjustments, which have caused further barriers for people with physical disability.⁶

² Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

³ Public Interest Advisory Council – Are the Rights of People Whose Capacity is in Question Being Adequately Promoted and Protected? R.Banks, E Golledge & C Berry (2006).

⁴ Commonwealth of Australia (2011) 2010-2020 National Disability Strategy

⁵ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

⁶ Australian Institute of Criminology (2011) Police interviews with vulnerable adult suspects

Policy Direction 3 – People with disability have access to justice, should also consider findings from the Australian Council for Social Service reports, which identify that 620,000 Australians with disability are living in poverty⁷. Levels of bail conditions and fines can considerably affect individuals with disability.⁸ Lower levels of income also affect an individual's ability to access appropriate legal advice.⁹

The complexity of words and tone of language used during police interviews/statements/cross examination is also extremely important. Issues include individuals with physical and intellectual disability being spoken to in a patronising way (treated like a child), subject to language that is discriminatory and individuals who have communication issues being rushed. All can lead to feelings of fear or anxiety which can incorrectly be interpreted as guilt or their evidence misrepresented¹⁰.

Policy Direction 4 – People with disability to be safe from violence, exploitation and neglect, The paper correctly discusses the increased vulnerability of people with disability; and with this vulnerability for women with disability.. PDCN would also like to highlight being a person with physical disability, and being part of other minority groups (e.g. Indigenous, from an ethnic or migrant background, lesbian, gay or bisexual or a young person), can also increase risk and vulnerability.¹¹

Question 3. The ALRC has identified as framing principles; dignity; equality; autonomy; inclusion and participation; and accountability. Are there other key principles that should inform the ALRC's work in this area?

Within these framing principles an acknowledgement of a person's rights to be assisted in the exercise of self determination should be included.

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?

PDCN would like to refer again to the point made in our response to question 1 that regardless of a diagnosis of a disability, assumptions should not be made relating to a person's capacity. People who are 'Assessors' should be governed by guiding principles

⁷ Australian Council of Social Service (2012) Poverty in Australia

⁸ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

⁹ Law and Justice Foundation (2003) Access to justice and legal needs. Stage 1: public consultations

¹⁰ Australian Institute of Criminology (2011) Police interviews with vulnerable adult suspects

¹¹ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

relating to presumptions to safeguard against this issue occurring e.g. *a person has capacity until proven otherwise*¹².

PDCN agrees with the comments made at points 95 and 96 relating to there being no uniform standard for capacity and a variation of standards in different contexts and jurisdictions¹³. A national standard would reduce the risk of any misinterpretation that could be applied to an individual relating to capacity. An advantage of a uniform standard also reflects on an individual moving interstate where the different standards could affect their deemed 'capacity'.

Within the standard for capacity; acknowledgement of a person's ability to make decisions without coercion should also be included. This is consistent with the principles stated at 12.4 of the CRPD where a person's *will and preferences are free of conflict of interest and undue influence*¹⁴.

When considering a mechanism to assess a person's ability to exercise their legal capacity, the principles highlighted at point 102 and the NSW Capacity Toolkit should be included that *presume a person has capacity, don't assume a person lacks capacity based on appearances etc*¹⁵:

This would be in line with current trends and shifts within the disability sector from a medical model of disability to a person centred focus; which affirms the CRPD's notion that a person is 'disabled by their environment'¹⁶.

Question 5. How should the role of family members, carers and others in supporting people with disability to exercise legal capacity be recognised by Commonwealth laws and legal frameworks?

The issues paper has correctly acknowledged the varied capacity family members, carers and others can have in supporting an individual with disability to make decisions; from informal supports to formal appointment in roles such as nominee and guardian.¹⁷

PDCN would like to recommend, again following a person centred approach where support is required, the individual has the authority to choose who their support is. It is important to consider in some legal cases an individual may not wish to discuss matters in front of a carer or family member due to the nature of the situation. Involving family members in legal

¹² Public Interest Advisory Council – Are the Rights of People Whose Capacity is in Question Being Adequately Promoted and Protected? R.Banks, E Gollidge & C Berry (2006).

¹³ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

¹⁴ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

¹⁵ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

¹⁶ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

¹⁷ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

matters may also pose further challenges, where the individual in the supportive role is not trained and does not have the knowledge to support the individual.¹⁸

People may also feel threatened discussing matters to a person in authority. It is important in either scenario that a person should feel comfortable to be able to exercise their legal capacity in a way they feel supported without being coerced¹⁹.

Cultural considerations should also be noted and respected; in some cultures an individual may not feel comfortable discussing sensitive matters with a person of the opposite sex.²⁰

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?

Where a discrimination complaint on the grounds of disability is not conciliated by the Australian Human Rights Commission (AHRC), a referral to the Federal Court for Adjudication can be made following an issue of the Notice of Termination from the AHRC²¹

PDCN has identified two issues that can occur for people with disability continuing their complaint of discrimination to the Federal Court. First, the Australian Council for Social Service reports that 620,000 Australians with disability are living in poverty²². The Federal Court is a cost jurisdiction, where people with disability may have to pay other parties fees. The Federal Court has a financial hardship exemption scheme, however the exemption only covers an individual's first court fees and must be reapplied for, on each occasion a fee is payable in a proceeding²³. Whilst PDCN recognise the cost jurisdiction safeguards against vexatious litigants, the costing can create a barrier for people with disability who have a genuine litigation matter, but are unable to lodge due to their financial circumstance.

Another issue PDCN would like to highlight is the timescale for completing documentation to file a complaint through the Federal Court. A time limit is posed of 60 days from the receipt of issue of the Notice of Termination to submit a complete application²⁴. Consideration

¹⁸ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

¹⁹ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

²⁰ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

²¹ Australian Human Rights Commission (2013) Complaints Under the Disability Discrimination Act

²² Australian Council of Social Service (2012) Poverty in Australia

²³ Federal Court of Australia (2013) Human Rights Guide

²⁴ Federal Court of Australia (2013) Human Rights Guide

should be made relating to the steps and requirements to complete a submission. For an individual with a disability time delays may occur in completing and collecting the correct documentation due to their having a disability, this should be considered and allowances should be made.

Question 7. In what ways if any, should the general protections provision under the Fair Work Act 2009 (Cth) be amended to ensure people with disability are recognised as equal before the law and are able to exercise legal capacity?

Question 8. There is substantial overlap between the general protections provisions under the *Fair Work Act 2009* (Cth) and Commonwealth anti-discrimination legislation. In what ways, if any, should this legislation be amended to improve or clarify their interaction in circumstances of disability discrimination?

For questions 7 and 8, PDCN has chosen to provide a joint response;

Point 121 of the issue paper makes comment on how provisions under the *Fair Work Act 2009* provide 'statutory protection for people with disability seeking to challenge discriminatory treatment in the employment context'²⁵. An area that PDCN would like to focus on is in relation to remuneration.

Regarding the *Fair Work Act 2009*, PDCN would like to highlight concern in particular to Part 2-3 Modern Awards, Division 2, Over Arching Provisions– Special Provisions relating to Modern Award Minimum Wages or what is also known as the *Supported Wage System* (SWS). These provisions allow for an employer (after assessment) to pay an individual a rate based on their productivity to as little as 70% of their wage.²⁶

Under the *Disability Discrimination Act 1992*, Discrimination in Employment 15 (1), It is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person's disability:

(c) in the terms or conditions on which employment is offered;

PDCN believe there is an overlap between the provisions as referred in the *Fair Work Act 2009* and *Disability Discrimination Act 1992*. Where an individual seeks to claim discrimination on the basis of remuneration they receive, their complaint may be ignored and instead justified under the provisions of the *Fair Work Act*.

PDCN received feedback of this nature whilst collecting information for this response. An individual's account, told how she had worked in open employment under the 'Supported Wage System'. Her reviews were not kept up to date and when she expressed concern about her pay, she was threatened with dismissal and forced to make a formal apology to the organisation. This woman was then told that if she did not accept the terms of her employment she would lose her Disability Support Pension. This experience was a

²⁵ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

²⁶ Australian Government. Fair Work Act (2009)

traumatic time for this woman, who felt she had no legal support. Despite this experience happening years ago, she is still extremely upset with the way she was treated²⁷. In this circumstance the Laws were used to safeguard the organisation rather than the individual.

PDCN further add to the idea that the Laws are used to safeguard organisations, rather than individuals by the 'Supported Wage System' representation on the Job Access website:

*"Supported Wage System is a process that enables employers to pay productivity based wages to people whose productivity is significantly reduced as a result of the effects of their disability"*²⁸

PDCN believe this description insinuates the supported wage system is more of an incentive for employers, dismissing the rights of people with disability to equal and fair employment.

Question 11. What issues arise in relation to privacy 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 privacy to address these issues?

PDCN has cause for concern over the introduction of an eHealth records. The Issues paper discusses how existing legislative framework for eHealth has protections against mishandling of information²⁹. For individuals who use service providers, safeguards need to be included that protect their privacy due to the amount of people that may be involved in their lives. A large proportion of the community services workforce is now being employed on short term contractual or on a casual basis, which results in a high turnover of staff³⁰

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?

Question 13. What changes, if any, should be made to the nominee or child's representative provisions under the *National Disability Insurance Scheme Act 2013 (Cth)* or NDIS Rules to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

²⁷ Individual story. PDCN Member

²⁸ Australian Government (2013) Job Access Website: Supported Wage System.

²⁹ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

³⁰ Victorian Council of Social Service (2007) Recruitment and Retention in the Community Sector: *A snapshot of current concerns, future trends and workforce strategies*

Question 14. What changes, if any, should be made to the nominee provisions or appointment processes under the following laws or legal frameworks to ensure they interact effectively:

(a) the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules;

(b) social security legislation; and

(c) state and territory systems for guardians and administrators?

PDCN would like to make joint comment on questions 12, 13 and 14

Individuals over 65

The National Disability Insurance Scheme is available for people with disability aged 65 years or under. PDCN have received a number of calls and emails of concern from individuals over the age of 65 who feel that the National Disability Scheme is discriminatory to those over 65³¹

Fixed address requirement

The Australian Homelessness Clearing House has highlighted:

‘people with disability are more vulnerable to homelessness due to low income, limited engagement in the labour market and limited housing options’³²,

Yet to be eligible for the Disability Insurance Scheme an individual must satisfy qualifying residence and ongoing residence requirements (Section 23 – Residence requirements)³³. PDCN recommend the *National Disability Insurance Act 2013* should be amended to make provisions for those who have no fixed abode, or who are in tertiary homelessness (living in boarding houses).

Nominees

PDCN agree with comments made at point 152 of the issue paper, which highlights the concern that nominees may be appointed on the initiative of a delegate, rather than at the request of the individual³⁴. PDCN believe a provision that allows for appointment of a nominee without the consideration of an individual, is not consistent with person centred practice. In the event that a person is nominated, provisions should be included to involve the individual, and also clearly state that a nominee is acting on behalf of the individual and not acting on presumed ‘best interests’.

³¹ PDCN – Telephone Statistics 2013

³² Australian Homelessness Clearing House (2012) Addressing homelessness amongst persons with a disability: Identifying and enacting best practice

³³ National Disability Insurance Scheme Act (2013)

³⁴ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

Question 15. In what ways, if any, do Commonwealth laws or legal frameworks relating to employment diminish or facilitate the equal recognition of people with disability before the law and their ability to exercise legal capacity?

As discussed within our response at question 7 & 8, PDCN has a concern relating to how legislation acts can be used by Employers to justify acts that may be discriminatory. It is clear that even with protective legislation, people with disability are still not being recognised equally or being allowed to exercise their legal rights.

PDCN would also like to highlight the statements made by the World Health Organisation, '*Poverty and low living standards are powerful determinants of ill health and health inequity*'³⁵; amendments should be made to legislation that protect people with disability from receiving low wages.

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 in the Roll of Electors or to vote?

Question 17. What issues arise in relation to electoral matters 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 to address these issues?

PDCN will supply a joint response for questions 16 and 17

PDCN has identified a number of issues relating to the *Commonwealth Electoral Act 1918* and would like to make the following comment:

'Residence'

PDCN would again like to highlight the increased numbers of people with physical disability who may be homeless or living in temporary accommodation (tertiary homelessness)³⁶. The *Commonwealth Electoral Act 1918* should be amended to allow provisions for these individuals without a fixed residence to have an opportunity to exercise their legal capacity.

'Unsound mind'

Provision 93 (8) (a), of the *Commonwealth Electoral Act 1918*, makes reference to 'by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting'³⁷. 'Unsound mind', PDCN feel, is an ambiguous term which is open to misinterpretation. For continuity PDCN feel the uniform definition of capacity as discussed at question 4, should take its place. The provision should also include details of people who have the authority to declare if a person does not have the capacity to enrol or vote.

³⁵ CSDH (2008). Closing the gap in a generation: health equity through action on the social determinants of health. Final Report of the Commission on Social Determinants of Health. Geneva, World Health Organization

³⁶ Australian Homelessness Clearing House (2012) Addressing homelessness amongst persons with a disability: Identifying and enacting best practice

³⁷ Australian Government – Commonwealth Electoral Act 1918

'Application for postal vote'

Provision 184 (1) of the *Commonwealth Electoral Act 1918*, stipulates an application must be in writing in the approved format³⁸. Whilst PDCN acknowledge that postal votes should be in an approved format, the provision should consider alternative formats that are inclusive for people with physical disability and which allow them an opportunity to exercise their capacity to vote. Not acknowledging the alternative formats that individuals with disability may use, is not consistent with *Article 21 Freedom of Expression and Opinion of the CRPD 'Accepting and facilitating the use of sign languages, Braille, augmentative and communication of their choice by persons with disabilities in official interactions'*³⁹

PDCN also wish to highlight that relying on a postal vote is another form of apartheid for people with physical disability, keeping them 'out of sight' from polling stations.⁴⁰

PDCN feel that Provision 184 A (f) is no longer a relevant assessment of capacity with its outdated description of physical disability as '*an applicant is so physically incapacitated as to be incapable of signing his or her name*'⁴¹. This provision also does not reflect the allowance of a person being able to sign on a person's behalf⁴²

Separate Voting Compartments

Provision 206 of the *Commonwealth Electoral Act 1918* makes no reference to polling booths that are accessible for people with physical disability. Whilst there is an increase in voting compartments that are accessible, the provision should include detail relating to compartments that are inclusive to people with disability. Through surveys with our members, PDCN have highlighted that lack of accessible voting compartments is a major barrier for people with disability⁴³. Our members have also highlighted issues of privacy for inclusive voting compartments, privacy should also be included within this provision⁴⁴

'Certain voters voting outside'

PDCN would like to express strong concern with provision 234 (A) (1):

If the presiding officer at a polling place is satisfied that a voter is unable to enter the polling place because of physical disability....., may allow the voter to vote outside the polling place, in close proximity of the polling place'.⁴⁵

³⁸ Australian Government – Commonwealth Electoral Act 1918

³⁹ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

⁴⁰ PDCN (2007) Equal Access to Democracy - As Long As You Can't Be Seen

⁴¹ Australian Government – Commonwealth Electoral Act 1918

⁴² Australian Electoral Commission (2013) Electors unable to sign their name due to physical incapacity

⁴³ Survey Monkey (2013) PDCN: Local Government Election 8 September 2012

⁴⁴ Survey Monkey (2013) PDCN: Local Government Election 8 September 2012

⁴⁵ Australian Government – Commonwealth Electoral Act 1918

Providing a polling station that is inaccessible to people with disability, and having a provision within the Act to allow for this is discriminatory; as identified under the right to access to premises within the Disability Discriminatory Act 1992⁴⁶. Further, whilst surveying our members relating to their voting experience, individuals reported having to resort to voting outside in adverse weather conditions including storms and heavy rainfall. PDCN do not agree or support any legislation that allow people to experience such discriminatory actions.⁴⁷

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?

Question 25. What issues arise in relation to the law on federal offences 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?

PDCN has prepared a joint response for questions 23,24 and 25.

Costings

The Australian Council for Social Service reports that 620,000 Australians with disability are living in poverty⁴⁸. Levels of bail conditions and fines can considerably affect individuals with disability.⁴⁹ Lower levels of income also affect an individual's ability to access appropriate legal advice.⁵⁰

Interpreters

PDCN agree with issues raised at point 197 of the issues paper relating to lack of recognition of interpreters except those who interpret on the basis of other spoken languages within the *Evidence Act 1995*.⁵¹ The Act should be amended to recognise

⁴⁶ Australian Human Rights Commission (2013) Complaints Under the Disability Discrimination Act

⁴⁷ Survey Monkey (2013) PDCN: Local Government Election 8 September 2012

⁴⁸ Australian Council of Social Service (2012) Poverty in Australia

⁴⁹ Judicial Commission of New South Wales (2013) Equality Before the Law Bench Book: Section 5 People with Disabilities

⁵⁰ Law and Justice Foundation (2003) Access to justice and legal needs. Stage 1: public consultations

⁵¹ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

interpreters in relation to any augmented communication that may be used by people with disability; including Australian Sign Language (Auslan), Braille or any other aide used by a person with a disability. This amendment would complement the responsibilities under Article 12 of the *CRPD*:

'Accepting and facilitating the use of sign language, Braille, augmentative and alternative communication of their choice by person with disabilities in official interactions'⁵²

Communication

PDCN would like to make comment relating to the level and way language is used during police interviews/statements/cross examination etc. It has been previously identified that issues include individuals with physical and intellectual disability being spoken to in a patronising way (treated like a child), subject to language that is discriminatory and individuals who have communication issues being rushed. All can lead to feelings of fear or anxiety which can incorrectly be interpreted as guilt and/or can dramatically influence the information a person with disability is trying to communicate⁵³ PDCN welcomes any provisions that protect people with disability from inappropriate or aggressive cross-examination as discussed at point 198 of the issues paper⁵⁴.

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?

Question 30. What changes, if any should be made to the insurance exemption under the *Disability Discrimination Act 1992 (Cth)* to ensure people with disability are recognised as equal before the law and able to exercise legal cap

Question 31. What additional guidance or supporting material relating to the application and operation of the insurance exemption under the *Disability Discrimination Act 1992 (Cth)* would assist people with disability?

PDCN believes the provisions at 46 of the *Disability Discrimination Act 1992*:

"do not render it unlawful to discriminate against another person on the ground of disability by refusing to offer life insurance or any other policy of insurance"⁵⁵

Contradicts the integrity of the Disability Discrimination act, where the purpose is to, as cited, *'provide protection for everyone in Australia against discrimination based on disability and protect people with disability where they may be treated less fairly than people without a disability'⁵⁶*.

⁵² United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

⁵³ Australian Institute of Criminology (2011) Police interviews with vulnerable adult suspects

⁵⁴ Australian Law Reform Commission (2013) Equality, Capacity and Disability in Commonwealth Laws

⁵⁵ Australian Government – Disability Discrimination Act 1992

⁵⁶ Australian Human Rights Commission (2013) D.D.A Guide: What it is all about

Further, an act that allows for discrimination relating to insurance is in conflict of the responsibilities under Article 25 – Health of the *CRPD*:

‘Prohibit discrimination against persons with disabilities in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided in a fair and reasonable manner’⁵⁷.

PDCN believe this provision should be removed if people with disability are to be equally recognised in relation to their rights for insurance.

Question 32. What changes, if any, should be made to the superannuation exemption under the *Disability Discrimination Act 1992 (Cth)* to ensure people with disability are recognised as equal before the law and able to exercise legal capacity?

Question 33. What issues arise in relation to superannuation for people with disability that may affect their equal recognition before the law or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues.

PDCN has decided to provide a joint response for questions 32 and 33.

Again, the *Disability Discrimination Act 1992 (Cth)* does not render it unlawful for people with disability to be discriminated against relating to superannuation⁵⁸

The Australian Tax Office defines people who are not eligible to earn superannuation to be those who earn under \$450 a month⁵⁹. Already the employment rate of people with disability in Australia is low compared to the general population, with only 50% of people with disability being likely to be employed, of those who are employed a large number of contracts are part-time and see an individual earning under \$320 a week⁶⁰. The legislation permits that an employer does not have to contribute superannuation payments based on low earnings.

Whilst there are some superannuation concessions, this discriminatory practice does not take into consideration the degenerative effects of some disabilities, meaning individuals are not able to put money away for the times in their lives when they most need it. PDCN believe this should be considered and appropriate amendments be made to legislation that do not render it lawful for discrimination.

Question 34. What issues arise in relation to healthcare that may affect the equal recognition before the law of people with disability and their ability to exercise legal

⁵⁷ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

⁵⁸ Australian Government – Disability Discrimination Act 1992

⁵⁹ Australian Government Taxation Office - Employees who aren't eligible for super

⁶⁰ Price Waterhouse Coopers (2011) Disability In Australia

capacity? What changes, if any should be made to Commonwealth laws and legal frameworks relating to healthcare to address these issues?

Question 35. What issues arise in relation to aged care 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 aged care to address these issues?

PDCN will be providing a joint response for questions 34 and 35.

Historically, medical and political agendas have had an emphasis on development of institutionalised and discriminatory practices. Reflections on the conditions of people with disability saw a medical professional's responsibility to 'relieve the suffering' of those individuals with disability who are automatically cast into the 'sick role'⁶¹.

Whilst there has been a positive shift in attitude toward disability and a person centred focus relating to the health care; reports have found that people with disability are still dying of starvation in specialist disability services, having life sustaining medical treatments denied or withdrawn. Considerable gaps have also been found between care needed, against what is available⁶²

Lack of appropriate training and knowledge of medical professionals

Recommendations made within the *Shut Out Report*, found that a provision should be made to improve the training of health professionals. Alarming, submissions have been made where professionals were making clinical decisions based on myths and misconceptions of disability⁶³.

Early Intervention

Studies have shown early intervention is essential to ensuring children with disability reach their full potential. Again deficits have been highlighted where there is a lack of availability of resources and services. Consideration should be made in relation to the lack of resources and the detrimental effect this can have on an individual's development.⁶⁴

Resource Constraints

Deficits in health care and early intervention are largely due to resource constraints and lack of funding. Where resources are limited, individuals are not receiving the support/equipment they require, instead receiving a 'one size fits all' support⁶⁵. Legislation needs to include provisions that acknowledge the diverse needs of each individual and safeguard them from receiving generic and inappropriate support and equipment.

⁶¹G, Dewsbury; K, Clarke; D, Randall; M, Rouncefield & I Sommerville (2004). The anti-social model of disability

⁶² Australian Government (2009). Shut Out Report

⁶³ Australian Government (2009). Shut Out Report

⁶⁴ Australian Government (2009). Shut Out Report

⁶⁵ Australian Government (2009). Shut Out Report

During October 2013, PDCN conducted a survey relating to the service provided by EnableNSW, some respondents highlighted issues where they did not receive equipment and aides that were suitable to their individual needs, and some experienced delays which impacted on their wellbeing, health and independence⁶⁶

Aged Care

The *Aged Care Act 1997* refers to the *Quality of Care Principles 1997* as the guiding standards of care for older people. PDCN would like to make comment and suggestions relating to the *Quality of Care Principles 1997*:

At provisions 1.13 and 2.13 which relate to *behaviour management*, the use of the word 'challenging behaviour' is used. When reviewing the Act, there is no clear definition of the term⁶⁷. This leaves 'behaviour' open to interpretation, which can result in an individual being the subject of behaviour management without real need.

PDCN recommends a clear definition be included within the *Quality of Care Principles 1997*, which describes behaviour where an individual is at risk of causing injury to their self or others and the term *challenging behaviour* be replaced with another term; for example *behaviour of concern*⁶⁸

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?

Definitions

The *National Framework for Reducing the Use of Restrictive Practices* makes reference to environmental restraint under 6. *Other Restrictive Interventions*⁶⁹. PDCN recommend the framework elaborates more on what is meant by 'environmental restraint', as it could refer to for example, high walls that restrict an individual from leaving the facility into public places where they are at risk of becoming lost or injured; or does this refer to manipulations to a person's immediate environment that restrict their movement?⁷⁰ If the term relates to manipulations to an individual's immediate environment, this can be seen as a method of 'controlling an individual'. *Article 15 – Freedom from torture or cruel, inhumane or degrading treatment or punishment of the CRPD* is assumed to protect individuals from such practice⁷¹

Person centred focus

⁶⁶ Survey Monkey (2013) PDCN EnableNSW Survey

⁶⁷ Australian Government – Quality of Care Principles 1997

⁶⁸ PDCN (2013) Reducing the risk of restrictive practices

⁶⁹ Department of Social Services (2013) National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector

⁷⁰ PDCN (2013) Reducing the Risk of Restrictive Practices

⁷¹ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

PDCN believe the key principles for person centred focus should include the acknowledgement behaviour may be the result of a failure of the service system to understand the nature of the function of individual behaviour⁷². Behaviour may be the result of a number of contributing factors including; health issues, biophysical characteristics, environmental factors, communication issues, programmatic arrangements, social contexts or the side effects of aversive strategies being used⁷³

Review mechanisms and debriefing techniques

Often employers can become focused on the safety, wellbeing and debriefing of staff members in situations where behaviour of concern is displayed. PDCN recommend the review mechanisms and debriefing techniques of the National Framework include a provision that ensures the wellbeing of the individual has high importance during this debriefing period.⁷⁴

Question 37. What is the most appropriate approach to the regulation, reduction 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?

PDCN agree with the need for managers and staff to be trained in positive behaviour support and non aversive practice under the core strategy 4. *Workforce Development*.

PDCN would like to highlight how positive behaviour support plans are only successful if staff are committed, take time to fully develop plans and fully understand the process of positive behaviour support. Considering the broader context is crucial in developing plans, an aspect that service providers often fail to consider. The plan should also be based on functional assessment, rather than looking at deficits of individuals. The success of positive behaviour support also relies on the continual monitoring of strategies successes.⁷⁵

Where the Framework suggests development of guidelines, these guidelines should acknowledge the complex process and considerations that need to take place to allow a behavioural plan to be successful.

Question 38. What issues arise in relation to marriage that may affect the equal recognition before the law of people with a disability and their ability to exercise legal

⁷² Department of Families, Housing, Community Services and Indigenous Affairs (2013). Reducing the Use of Restrictive Practices.

⁷³ La Vigna, G, & Donnellan, A. (1986) "*Ethical Considerations*". Alternatives to Punishment – Solving Behaviour Problems with Non Aversive Strategies

⁷⁴ PDCN (2013) Reducing the Risk of Restrictive Practices

⁷⁵ Kerr, K., & Lacey, C. (2006) Positive Behaviour Support: Supporting Meaningful Change for Individuals, Families and Professionals

capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to marriage or marriage celebrants to address these issues?

To respond to this question PDCN reviewed the *Guidelines on the Marriage Act 1961 for marriage celebrants* and would like to make the following comment.

Interpreters

Provision 62. Interpreters of the *Guidelines on the Marriage Act 1961*; discusses the need of interpreters based on language or people who are deaf⁷⁶. Yet, omits to consider communication needs and augmented communication used by people with disability. Referring again to the points made in our response to question 25, the guidelines should be amended to acknowledge the responsibilities under Article 12 of the *CRPD*:

‘Accepting and facilitating the use of sign language, Braille, augmentative and alternative communication of their choice by person with disabilities in official interactions’.

The same amendments should be included at further reference to interpreters at provisions 5.9 and 41.2 of the *Guidelines on the Marriage Act 1961*.

Parties being ‘mentally incapable’

The *Guidelines on the Marriage Act 1961* makes reference on a number of occasions to a marriage being void based on an individual being ‘mentally incapable’. This again relates to discussions raised in relation to ‘capacity’ previously in the document. A clear definition needs to be determined. PDCN also do not believe that a celebrant who may not have any knowledge of disability should be authorised to base this judgement. Issues could potentially arise where for example, a person with physical disability who has issues with their speech be incorrectly classed as ‘incapable’.

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?

Point 281 of the issues paper discusses the prevention of service providers facilitating sex workers in some jurisdictions. PDCN feel that a national policy and guidelines should be put in place that complement the following responsibilities of the *CRPD*:

Article 5 – Equality and non-discrimination;

Article 10 – Right to Life⁷⁷

⁷⁶ Australian Government - Guidelines on the Marriage Act 1961

⁷⁷ United Nations Treaty Collection (2013). Convention on the Rights of Persons with Disabilities

Question 40. What issues arise in relation to family law that may affect the equal recognition of people with disability before the law and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to family law to address these issues?

PDCN agree with the points raised relating to point 284 of the discussion paper relating to the types of discrimination experienced by people with disability becoming parents⁷⁸

In 2013 PDCN conducted a survey to research the experience of people with disability becoming parents. Respondents reported presumptions made by health professionals relating to their capacity to be good parents based on their disability. Some of the parents also hid their disability or had a fear of asking for any support for risk they would have interventions imposed upon them. One parent reported a doctor asked if they would like to have a social worker after the birth of their daughter, the offer was declined, yet days later a social worker still turned up at their family home⁷⁹.

Information and education available was another issue reported; information about pregnancy was often not provided in alternative format. Some of the respondents also felt that due to some of the inaccessible practices during prenatal classes they were made to look like they were unwilling to engage in the class⁸⁰.

Reviewing the Family Law Act of 1975, PDCN note there is another issue where the word 'capacity' is used at provision 60 CC *Determining The Best Interests for the Child* at point (f), again a clear definition needs to be used.

At point 60 CC (g):

'the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant⁸¹'.

PDCN would like to express their concern that basing decisions based on lifestyle, sex and culture can be interpreted as discriminatory and lead to complaints made.

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;**
- b) Women;**
- c) Aboriginal and Torres Strait Islander;**
- d) From culturally and linguistically diverse backgrounds;**
- e) Older;**

⁷⁸ Australian Law Reform Commission (2013) *Equality, Capacity and Disability in Commonwealth Laws*

⁷⁹ PDCN (2013) *People with Disability Becoming Parents*

⁸⁰ PDCN (2013) *People with Disability Becoming Parents*

⁸¹ Australian Government – *Family Law Act 1975*

- f) Lesbian, gay, bisexual, transgender or intersex; or**
- g) Living in rural, remote and regional areas.**

PDCN would like to make comment that people with disability can be members of each of the above groups and so each legal framework needs to take into consideration needs of people with disability.