



Physical Disability Council of NSW
Ordinary People Ordinary Lives

Submission for Australian Law Reform Commission

**Equality, Capacity and Disability in
Commonwealth Laws (Discussion Paper)**

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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.

PDCN appreciates the opportunity to consider, and make comment to the Equality, Capacity and Disability in Commonwealth Laws Discussion Paper. PDCN will not be making comment on all of the questions or proposals discussed, but will make comment on proposals/questions where we feel we can contribute to the discussion.

3. National Decision-Making Principles

3.87 The ALRC is interested in hearing how best to express the ‘least restrictive’ Safeguard Guideline, consistent with a human rights approach and the supported decision-making model proposed in this Discussion Paper.

PDCN feel the comments made by the Public Interest Advocacy Interest Centre’s (PIAC) at 8.38 of the discussion paper should be incorporated into the definition:

‘implemented as a last resort; are implemented for the least amount of time possible; are recorded, monitored and reviewed;and are undertaken with a focus on ensuring decency, humanity and respect at all stages’.

4. Supported Decision-Making in Commonwealth Laws

Question 4-2 - Are the terms ‘supporter’ and ‘representative’ the most appropriate to use in the Commonwealth decision-making model? If not, what are the most appropriate terms?

PDCN agree with the use of terms ‘supporter’ and ‘representative’. Each term does not imply any power imbalance between the person and the individual appointed in either role. Instead, PDCN feel the terms maintain an individual’s position at the centre of decision making, consistent with person centred thinking. ‘Supporting’ and ‘representing’ an individual’s will, preferences and rights relating to decision making

provides opportunity for the person to be ‘actively involved in decision making processes’ as discussed at preamble ‘o.’ of the *Convention on the Rights of Persons with Disabilities (CRPD)*¹

Proposal 4–4 A Commonwealth supporter may perform the following functions:

- (a) assist the person who requires decision-making support to make decisions;**
- (b) handle the relevant personal information of the person;**
- (c) obtain or receive information on behalf of the person and assist the person to understand information;**
- (d) communicate, or assist the person to communicate, decisions to third parties;**
- (e) provide advice to the person about the decisions they might make; and**
- (f) endeavour to ensure the decisions of the person are given effect.**

4.58 The ALRC welcomes stakeholder feedback on the duties contained in the proposal, and whether there should be any additional duties of supporters. The ALRC considers a high level of responsibility and the imposition of particular duties is important. However, there may be concerns about unintended consequences, including, for example, people being deterred from acting as supporters.

PDCN would like to make comment on the use of the term ‘handle’ at *Proposal 4-4 point (b)*². PDCN believe the use of the term ‘handle’ does not pay particular attention to the sensitivity of information received, and the responsibility of a supporter in safeguarding this personal information. Whilst privacy has been discussed at Chapter 6, PDCN suggests the clause should be amended to include;

“Receive, record/store relevant personal information of the person, in a way that respects their right to privacy and confidentiality”.

At point (d), it should be recognised contact with third parties should be done with prior permission from the individual being supported.

This observation should also be considered at proposal 4-7 of the discussion paper.

This recommendation would be consistent with ‘*Article 22 - Respect for privacy*’ of the *Convention on the Rights of Persons with Disabilities*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 *Australian Law Reform Commission (2014) Equality, Capacity and Disability in Commonwealth Laws : Discussion Paper*

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

4.54 The ALRC acknowledges that the issue of the potential liability of supporters (and representatives) is a difficult one. In the case of supporters, ultimate decision-making authority rests with the person who requires decision-making support, and therefore why should a supporter be held liable for any consequences arising from the decision or decisions? The ALRC is interested in stakeholder views on the question of the standard of the duty of supporters. And

Question 4–3 In the Commonwealth decision-making model, should the relationship of supporter to the person who requires support be regarded as a fiduciary one?

PDCN would like to provide a joint response for point 4.54 and question 4-3.

The duties of supporters, as identified in proposal 4-5⁴ discuss, in particular point (c) *acting in a manner promoting personal, social financial and cultural wellbeing*. This duty requires a ‘supporter’ to recognise the moral implications that relate to their role. In order to fulfil this duty, the relationship between the individual and the supporter should be recognised as ‘fiduciary’, where the ‘supporter’ is assisting an individual to achieve the best possible outcome.

Where it is proven a supporter has not supported a person, fulfilling their duties as articulated in the National Decision Making Principles, they should be held accountable. PDCN would question how a person who requires support in decision making can provide informed consent relating to a decision, if they are not provided with as full and relevant information as possible, or assisted to identify the risk and benefits of a decision.

PDCN suggests a clause should be included that safeguard individuals, where they are not provided with appropriate support. For example:

“Where it is proven a supporter has not fulfilled their duties as articulated at clause (), the supporter will be held accountable for any negative consequences as a result of the decision”.

It is important to remember in a risk saturated society the important balance of duty of care and dignity of risk. Duty of care relates to the responsibility to act in a manner that does not cause harm or loss to a person. Dignity of risk refers to an individual’s right to make an informed choice, to experience life and take advantage of opportunities for developing competencies and independence, in doing so taking calculated risks. Often people with disability have these opportunities limited as people ‘fear’ for their safety and also due to being uncertain of their responsibilities⁵.

PDCN recognises there can be no ‘right’ answer when making decisions, only ‘choices’. There is always the potential for unintended and unforeseen outcomes, regardless of how informed an individual may be. In these circumstances and where a ‘supporter’ has fulfilled their duties, they would not be held liable.

⁴ Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws : Discussion Paper*

⁵ SEE Foundation. (2005). *Duty of Care and Dignity of Risk*

PDCN is aware of ALRC's concern, *people being deterred from acting as supporters at point 4.58 of the discussion paper*⁶. However, these concerns should be compared to the responsibilities of Australia as a signatory of the CRPD, in particular *Article 16 - Freedom from exploitation, violence and abuse*⁷.

4.57 Finally, the ALRC is interested in stakeholder views on the appropriateness of imposing an obligation on supporters to develop the capacity of the person being supported to make their own decisions. This would mirror an obligation imposed on nominees under the *National Disability Insurance Scheme (Nominee) Rules 2013 (Cth)*.⁴⁵ The nature and content of the obligation is likely to vary according to the circumstances of the appointment. For example, the identity of the supporter will affect their ability to develop the person's capacity, as will resource constraints.

4.77 The ALRC has outlined, in the context of supporters, some of the duties that a representative should have. The ALRC seeks stakeholder input on the appropriateness of these duties applying to both supporters and representatives. For example, in relation to the duty to develop the decision-making ability of the person being supported, the nature and content of the obligation should probably vary, according to the circumstances of the appointment. It would be unreasonable to expect a representative to fulfil this duty in circumstances where a person does not, and is unlikely ever to have, the ability to make decisions.

PDCN would like to provide a joint response to points 4.57 and 4.77 of the discussion paper.

PDCN strongly disagrees with the comment *'it would be unreasonable to expect a representative to fulfil this duty in the circumstances where a person does not, and is unlikely ever to have the ability to make decisions'*.

People with disability have been the subject of stereotypes entrenched in societal views, that see them as 'victims', 'burdens' and 'dependent' and who are not able to make valuable contributions. With this, many people have low expectations of people with disability, believing they are unable to learn or are not able to do anything useful. These misconceptions have resulted in people with disability having their rights restricted and opportunities denied to explore their potential⁸. PDCN feel comments that discuss a person as being 'unlikely ever to have ability', resonates the negative assumptions and barriers people with disability have experienced. A person's needs and strengths are also not static, it should be recognised and appreciated a person may experience transient periods where they may have limited ability. This should not be interpreted as they are unlikely to ever increase their capacity.

Considering the social model of disability, people with disability are further disadvantaged by societal responses to disability through attitudes, practices and structures. As the National Disability Strategy 2010-2020 suggests, there needs to be a *'greater focus on policy, seeking to remove those barriers'* experienced by

⁶ Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws : Discussion Paper*

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 Australian Government (2009). *Shut Out Report*

people with disability⁹. PDCN therefore suggest an obligation should be incorporated into the National Decision Making Principles which obligate ‘supporters’ and ‘representatives’ to develop the capacity of the person being supported to make their own decisions. This would also uphold obligations as identified at *Articles 3 - General principles and Article 4 - General obligations of the CRPD*¹⁰.

Use of term ‘Good Faith’ - Proposal 4-5; Points 5.59, 5.61, 6.14, 6.24, 6.82

PDCN does not agree with the use of the term ‘Good Faith’ throughout the discussion paper (Proposal 4-5; Points 5.59, 5.61, 6.14, 6.24, 6.82). PDCN consider the term ‘good faith’ is an abstract term, which holds a lot of ambiguity; the word ‘faith’ is also open to religious connotation.

Instead, PDCN suggest the term ‘good faith’ be replaced with the term ‘ethical/ethically’. Ethics concerns values that shape our behaviour. To act ethically goes beyond the realms of actions that are ‘good’ or ‘bad’, it signifies doing what is ‘right and fair’, and an action that considers other’s needs.¹¹

5. National Disability Insurance Scheme

Proposal 5–1 The objects and principles in the National Disability Insurance Scheme Act 2013 (Cth) should be amended to ensure consistency with the National Decision-Making Principles.

PDCN agrees that amendments should be made to the National Disability Insurance Scheme to ensure consistency with the National Decision Making Principles.

5.102 Under the NDIS Act, a participant may request that NDIS funds be self-managed by the participant, the participant’s plan nominee, a plan management provider nominated by the participant, or the NDIA. Different options can be chosen for different supports. If a plan nominee has been appointed, then funding for supports must be managed in accordance with the terms of the appointment. There are also currently a number of circumstances under which a participant must not manage plan funds, including if the CEO is satisfied that management of the plan would present an ‘unreasonable risk to the participant’

PDCN has concern with the use of the term ‘unreasonable risk’ at clause 44. (2) (a) of the NDIS Act. The term again is ambiguous and open to interpretation. There is risk the term can be misused, where people’s opportunities are regularly limited, instead of as a last resort.

⁹ Commonwealth of Australia (2011). *National Disability Strategy 2010-2020*. p.16

¹⁰ *UN Convention on the Rights of Persons with Disabilities* Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

¹¹ *Brotherhood of St Laurence. (2002). Doing business responsibly Perceptions of ethical practice and governance of Australasia’s top 100 companies*

The responsibility of deciding if a person should not manage their plan funds should not be the responsibility of the CEO. Referring to points made within the discussion paper at point 4.21, this appointment does not recognise and respect the role of family, carers and other supporters¹². The clause also has no mention of a person's right to appeal decisions. This should also be incorporated into the clause.

7. Access to Justice

Proposal 7–8 The Evidence Act 1995 (Cth) should be amended to provide that, in assessing whether a witness is competent to give evidence under s 13, the court may take the availability of communication and other support into account.

PDCN strongly agrees that availability of communication and other support should be taken into account when assessing if a person is competent to give evidence. The CRPD clearly states people with disability should be provided with appropriate accommodations *in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings*¹³. This provision will be consistent with these obligations.

An effective justice system must be accessible in all its parts. Without this, the system risks losing its relevance to, and the respect of, the community it serves. Accessibility is about more than ease of access to sandstone buildings or getting legal advice. It involves an appreciation and understanding of the needs of those who require the assistance of the legal system.

Proposal 7–9 The Crimes Act 1914 (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and that the court may give directions with regard to this.

Again, PDCN strongly agrees with this proposal, as identified in our response to proposal 7-8 (above), this provision fulfils responsibilities under article 13 of the CRPD¹⁴.

Courts need to have a understanding of adjustments to proceedings which may need to implemented as well as provide adequate time to put these adjustments in place. Issues have been reported where Courts have not been made aware of adjustments,

¹² Australian Law Reform Commission (2014) *Equality, Capacity and Disability in Commonwealth Laws : Discussion Paper – Point 4.21*

¹³ *UN Convention on the Rights of Persons with Disabilities* Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

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).

which has meant individual's needs have not been met, which has subsequently affected their participation in proceedings¹⁵.

Proposal 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may help to assist and support people with disability in giving evidence.

PDCN believe it is important that bench books are developed to provide judicial officers with guidance of how to help assist and support people with disability in giving evidence. Included within the guidance should be an emphasis of how each individual with disability has different needs associated with their condition. It is important judicial officers are aware they should not be descriptive based on a diagnosis and to clarify a person's needs with the individual.

9. Electoral Matters

9.53 Some stakeholders have advocated for inclusion of disability as a specific criterion excusing failure to vote. In particular, PIAC and People with Disability Australia and the Disability Discrimination Legal Centre have argued that s 245(4) should be amended to 'include people with an intellectual or psychiatric disability who are unwell at election time' as a valid and sufficient reason for failing to vote.

People with disability already experience significant costs associated with their disability¹⁶. To be fined for a failure to vote, for a reason beyond a person's control is seen to be insensitively punitive and unjust. We also agree s245 (4) should be amended to include specific criterion excusing failure to vote, the amendment should not however focus on specific disability, instead encompass a range of circumstances which may result in a person being unable to vote.

¹⁵ *Law and Justice Foundation (2003) Access to justice and legal needs. Stage 1: public consultations*

¹⁶ *National Council of Social Services. (2014). Cost of Living: Who is Really Hurting?*