

Legal Capacity

A number of Australian laws, policies and practices deny or diminish recognition of people with disability as persons before the law, and/or deny or diminish the right of a person with disability to exercise legal capacity.

This takes place in laws such as guardianship, estate management and mental health laws and affects areas such as financial services, voting, public office, board participation, access to justice, will making and deposition, providing evidence in court proceedings, and the opportunity for people with disability to choose what disability supports they need, who will provide them and when.¹ Australia continues to rely on its Interpretive Declaration to insist that this legislative and policy framework complies with article 12, despite the fact that it breaches, is inconsistent with, and/or fails to fulfil CRPD obligations as outlined in General Comment No. 1.

The Australian Law Reform Commission (ALRC) conducted an inquiry into barriers to equal recognition before the law and legal capacity for people with disability, and provided its final report from this inquiry in November 2014.² The ALRC made 55 recommendations for reform aimed at providing people with disability equal recognition before the law, in particular, in relation to the right to make decisions that affect their lives and to have those decisions respected. A key recommendation was for the recognition of National Decision-Making Principles and Guidelines to guide reform of Commonwealth, State and Territory laws and legal frameworks.³ Almost five years on from the release of the ALRC Report, there is still no government response to the Report.

Whilst the ALRC Inquiry was welcome, the inquiry was limited to Commonwealth legislation. It did not directly address the State and Territory financial management, guardianship and mental health laws but only had regard to how Commonwealth laws and legal frameworks interact with State and Territory laws in the areas under review.⁴ Substantive compliance with CRPD article 12 will be difficult to assess without a thorough analysis of financial management, guardianship and mental health laws at the State and Territory levels.

Australia's interpretative declaration in relation to CRPD article 12 states that Australia understands this article to allow for 'fully supported or substituted decision-making arrangements'.⁵ This interpretative declaration limits reform and provides for the ongoing practice of substitute decision-making. This is despite the concluding observations from the Committee on the Rights of Persons with Disabilities that Australia withdraw the interpretative declaration and replace substitute decision-making with supported decision-making.⁶

There is no comprehensive training across national, State and Territory levels for all actors on the recognition of legal capacity of persons with disability.

Recommendations

That Australia:

- Modify, repeal or nullify any law or policy, and counteract any practice or custom, which has the purpose or effect of denying or diminishing recognition of any person with disability as a person before the law.
- Implement the recommendations from the 2014 Report *'Equality, Capacity and Disability in Commonwealth Laws'*.

Endnotes

¹ See e.g. Disability Rights Now (2012) *CRPD Civil Society Report on Australia*.

² Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, (2014).

³ Ibid, p.11.

⁴ Australian Law Reform Commission, Equality, Capacity and Disability in Commonwealth Laws, ALRC Report 124, (2014).

⁵ Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia), opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

⁶ United Nations Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia, 10th Session (4 October 2013) [8] - [9] & [24] - [25].