

*Submission to the Australian Law Reform
Commission Issues Paper: Equality,
Capacity and Disability in Commonwealth
Laws*

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National Seniors

Australia

About National Seniors Australia

With around 200, 000 members Australia-wide National Seniors is the consumer lobby for the over-50s. It is the fourth largest organisation of its type in the world.

We give our members a voice – we listen and represent our members’ views to governments, business and the community on the issues of concern to the over 50s.

We keep our members informed – by providing news and information to our members through our Australia-wide branch network, comprehensive website, forums and meetings, bi-monthly lifestyle magazine and weekly e-newsletter.

We provide a world of opportunity – we offer members the chance to use their expertise, skills and life experience to make a difference by volunteering and making a difference to the lives of others.

We help our members save – we offer member rewards with discounts from over 7,000 business across Australia, we offer discount travel and tours designed for the over 50s, and we provide older Australians with affordable, quality insurance to suit their needs.

Contact:

National Seniors Public Affairs, Level 18, 215 Adelaide Street Brisbane QLD 4001

P: 1300 765 050 F: (07) 3211 9339

E: policy@nationalseniors.com.au

W: www.nationalseniors.com.au

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Introduction

National Seniors Australia welcomes the opportunity to provide input into the Australian Law Reform Commission's Inquiry into *Equality, Capacity and Disability in Commonwealth Laws*.

National Seniors is the largest organisation representing Australians aged 50 and older, with around 200,000 members nationally. We provide a well-informed and representative voice on behalf of older Australians and contribute to public education, debate and community consultation on issues of direct relevance to them.

The number of people aged 65 and older is set to increase from 13 per cent of the population in 2010 to 23 per cent of the population in 2050. People aged over 50 are estimated to comprise 40 per cent of the population in 2050. These demographic changes present opportunities and challenges for the economy, policy makers, business and the nation.

Furthermore, the number of older people with profound disability arising from stroke, musculoskeletal, nervous system, circulatory and respiratory conditions, and conditions related to vision, are estimated to nearly double from 2006 to 2031¹.

Alzheimer's Australia states that without a medical breakthrough, the number of people with dementia will be almost 900,000 by 2050. Dementia is the single greatest cause of disability in older Australians aged 65 years or older, and the third leading cause of disability burden in Australia. Dementia costs Australia more than \$6 billion per year or 0.8% of Gross Domestic Product (GDP). This is projected to reach almost 2% of GDP by 2050².

Disability law reform is an area of great significance to National Seniors. Older Australians with a disability repeatedly experience obstacles in accessing supports and services to assist them in maintaining their independence and quality of life.

Difficulties in accessing services and supports that are adequate to the needs of older Australians are exacerbated because of the blurred and inequitable separation of access to disability and ageing services. This division is clear in the age based rules to accessing supports through the National Disability Insurance Scheme (NDIS).

¹ Giles, L.C, Cameron, I.D, & Crotty, M. 2003. Disability in older Australians: projections for 2006–2031. *The Medical Journal of Australia*; 179 (3): 130-133.

² Alzheimer's Australia. 2013. *Collaborating for a better future for Australians living with Alzheimer's disease: Outcomes from a multidisciplinary roundtable discussion*.

Disability Discrimination Act 1992

Difficulties in accessing buildings, especially medical practices that have high, narrow stairs or narrow corridors.

The Access Code, in the *Disability Discrimination Act 1992* (DDA), sets a limit in relation to the number of accessible entrances to a building, requiring only 50% of entrances (including the principal pedestrian entrance) to be accessible. However, where there are no topographical or significant financial considerations associated with making all entrances accessible, designing beyond minimum requirements by making all those entrances accessible should be considered as good practice.

Additionally, under the Access Code, if modifications to an existing building are too onerous, costly or difficult for other reasons (such as a lack of space surrounding the building), the DDA exempts the owner from making specific building modifications. This is classified as 'unjustifiable hardship' and is an exception under the DDA.

National Seniors calls for a review of the Access Code to address concerns regarding access to buildings.

Disability Standards for Accessible Public Transport 2002

Road and pedestrian rules regarding the use of motorised mobility devices.

National Seniors supports the development of motorised mobility device regulations as a part of the Australian Road Rules and vehicle standards. Regulations should offer guidelines for safe use in and around public transportation and be formed in harmony with the Australian *Disability Standards for Accessible Public Transport 2002*.

Equal recognition before the law (section 19-54) and Capacity and Decision Making (Section 90-107)

Australia's interpretive declaration of Article 12 of the *United Nations Convention on the Rights of Persons with Disabilities* (the Convention) does not establish a point at which decisions for an individual require intervention through supported or substituted decision-making arrangements. This indicates that the Commonwealth believes that an individual is in the best position to make

decisions for their personal situation, which consequently gives strength to their legal capacity.

It is critical for attention to be given to the point at which decisions for an individual require intervention whether it be an informal (e.g. family), pre-emptive formal (e.g. powers of attorney) or formal arrangement (e.g. tribunals). We are aware of numerous instances when Centrelink customers or nominees have come up against barriers to accessing government supports including:

- A decline in capacity to update personal circumstances or finances with Centrelink resulting in cessation of income support payments and a lengthy reapplication for payment,
- Restrictions to the type of interaction a 'nominee' can undertake on behalf of a Centrelink customer e.g. update information online.

We understand that the implementation of Australia's interpretative declaration of Article 12 is used as a last resort to assess legal capacity. However, we support a nationally consistent approach to capacity to inform the initiation of further decision making supports.

A national approach to capacity should only take place following a review of Guardianship and Administration Acts and precedent in each state and territory. This will ensure that an appropriate mechanism for measuring decision making capacity will be evidence-based, supportive of individual circumstances and secure against forms of elder abuse or exploitation of power of attorney status.

National Disability Insurance Scheme (Section 144-149)

Inadequate level of aged care services for older Australians with disabilities when compared to more comprehensive disability support received by younger age cohorts with similar injuries and rehabilitation needs.

The exclusion of people aged 65 and older from the age requirement for eligibility for the NDIS is of great concern to older Australians (Section 22 (1)). This exclusion is perceived as discriminating on the basis of age and relegates people who were active, independent and productive prior to acquiring a severe and profound disability to user-pays, rationed aged care services well before they are required.

National Seniors believes that the Australian Government is failing to meet commitments under the Convention by excluding those who acquire a profound and significant disability at age 65 or older from the NDIS. The Convention commits Australia *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*³.

³ United Nations 2006. *Convention of the Rights of Persons with Disabilities and Optional Protocol*.

People aged 65 and older do not have certainty that people with disability will receive the care and support they need over their lifetime or the right to exercise informed choice and engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.

The current exclusion on the basis of age is against the General Principles of the NDIS:

- equality of opportunity and accessibility (Article 3 (e) and (f)) and Article 5.1 that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

We also point to Health Article 25 which states that State Parties shall:

(a) provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons...,

(b) provide health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons; and

(d) require health professionals to provide care of the same quality to persons with disabilities as to others.

Limiting people aged 65 and older with disabilities to the aged care services also fails to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life as required under Article 26 Habilitation and rehabilitation.

We are strongly opposed to the ineligibility of people aged 65 and older from the NDIS and their relegation as a group to the aged care system which is currently unable to meet the needs of older Australians for aged care services, let alone specialised disability services.