



New South Wales
Council for Civil Liberties

NSWCCL SUBMISSION

to

**NSW Law Reform Commission
Review of the *Guardianship Act*
1987 (NSW)**

21st March 2016

About NSW Council for Civil Liberties

NSWCCL is one of Australia's leading human rights and civil liberties organisations, founded in 1963. We are a non-political, non-religious and non-sectarian organisation that champions the rights of all to express their views and beliefs without suppression. We also listen to individual complaints and, through volunteer efforts; attempt to help members of the public with civil liberties problems. We prepare submissions to government, conduct court cases defending infringements of civil liberties, engage regularly in public debates, produce publications, and conduct many other activities.

CCL is a Non-Government Organisation in Special Consultative Status with the Economic and Social Council of the United Nations, by resolution 2006/221 (21 July 2006).

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1. Introduction

The NSW Council for Civil Liberties (NSWCCL) welcomes the opportunity to participate in a review of the *Guardianship Act 1987* currently being undertaken by the NSW Law Reform Commission (NSWLRC). Persons with disability in New South Wales are frequently subject to various forms of discrimination. The NSWCCL is concerned that such unequal treatment is particularly problematic when disabled people come into contact with the criminal justice system.

This submission highlights the need for domestic Australian legislatures to implement and recognise international human rights law. In particular, the NSWCCL supports the realisation of rights to equal recognition before the law and non-discrimination in accordance with the *United Nations Convention on the Rights of Persons with Disabilities*.

In this respect, the NSWCCL is guided by, *inter alia*, the Concluding Observations of the United Nations Committee on the Rights of Persons with Disabilities (the UNCRPD).¹ As the UNCRPD found, Australia has not yet brought its legislation into line with the Convention, particularly in regard to access to justice and rights of persons with disabilities, including children, indigenous people and women. The NSWCCL supports legislative intervention to address these concerns.

In addition, the NSWCCL fully endorses recommendations made by the Australian Law Reform Commission (ALRC) in 2014, including the proposal for a range of National Decision-Making Principles and the supported decision-making paradigm.² The ALRC proposals are also of particular importance to this review of State legislation by a State Law Reform Commission where the ALRC recommends jurisdictional uniformity between State and Federal disability discrimination law. The NSWCCL commends both the strength of these proposals and the jurisdictional breadth of their reform.

It is noted that through these submissions, the NSWCCL provides a limited response to the terms of reference of this review, but nevertheless wishes to convey its broad organisational support for the position taken by the recent ALRC report. We hope that a similar approach might be adopted in NSW.

2. Integrity of the person

The UNCRPD's recommendation reflects a widely shared international concern about non-therapeutic sterilisation. The UNCRPD, the Australian Human Rights Commission (AHRC), Women With Disabilities Australia, Children with Disability Australia and the NSWCCL are extremely concerned that involuntary or coerced sterilisation of children and women with disabilities continues to occur in Australia, despite repeated recommendations made especially by the United Nations treaty monitoring bodies. This practice is completely at odds with Australia's international treaty obligations and contravenes a range of some of the most basic inalienable human rights. These include: the right to be free from torture and cruel,

¹ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at Its 10th Session (2–13 September 2013)' (United Nations, 4 October 2013).

² Australian Reform Law Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014).

inhuman and degrading treatment; the right to liberty and security of person and the right to the integrity of the person³.

Recommendation 1: Adopt uniform national legislation prohibiting the sterilization of boys and girls with disabilities, and adults with disabilities, in the absence of their prior, fully informed and free consent

3. Respect for inherent dignity and individual autonomy including the freedom to make one's own decisions

The NSWCCCL supports this UNCRPD recommendation, acknowledging that it is consistent with the right of disabled persons to enjoy legal capacity on an equal basis with others in all aspects of life.⁴ As the UNCRPD has found, decision-making processes must prioritise personal autonomy and empower individuals to make decisions, including the right to take risks and make mistakes.⁵ The NSWCCCL would like to ensure, as far as practicable, that people with disabilities have the same rights to equality before the law as the rest of the community.

Recommendation 2: Replace substitute decision-making with supported decision-making [...] including with respect to a person's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work.

4. Effective access to justice for people with disabilities

This proposal was originally suggested by the ALRC in respect to the Commonwealth Criminal Code.⁶ In making this suggestion, the ALRC also condemned the presumption of incapacity to give evidence in respect to persons with disabilities. As the ALRC found, disabled people are often wrongly viewed as unreliable or unable to give evidence or participate in legal proceedings.⁷ Accordingly, the NSWCCCL wholly supports evidence law reform, or reform to the *Guardianship Act 1987* that effectively amends the *Evidence Act 1995*. The NSWCCCL contends that such reform is necessary to ensure equal access to justice when witnesses with disabilities give evidence in both criminal and civil proceedings.⁸

The NSWCCCL notes that people with mental health disorders and cognitive impairment are significantly over-represented in the criminal justice system.⁹ As a Council for Civil Liberties, we are in favour of recommendations aimed at reducing barriers to *access to justice and promoting the right to have the law applied consistently*. The NSWCCCL endorses strategies to improve access to appropriate communications and increase service capacity for

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) art.15, art.14, art.17.

⁴ *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.12.

⁵ United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [22].

⁶ <http://www.alrc.gov.au/publications/equality-capacity-disability-report-124>, **Recommendation 7–9**

⁷ 'Equal Before the Law: Towards Disability Justice Strategies'

⁸ CRPD, art.13

⁹ https://www.humanrights.gov.au/sites/default/files/20130822_CRPD_BriefingPapers.pdf

disabled court-users as well as early intervention and diversion for disabled accused and effective training and enhanced accountability for the staff of NSW courts and justice agencies.

Recommendation 3: Amend either the *Guardianship Act* or the *Evidence Act 1995* (NSW) to provide that a witness with a disability who needs support, is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers.

Living independently and being included in the community¹⁰

Another key concern of the UNCRPD is that persons with disabilities are forced to live in residential institutions, rather than in the general community. A corollary of this situation is that when disabled people *do* choose to live in the community, their access to support services is severely restricted. The NSWCCCL advocates stronger social services to protect and advance the rights of people with disability to allow them to participate in the community by living within it. Greater access to social services will allow disabled people the opportunity to choose their place of residence on an equal basis with others.¹¹

Recommendation 4: Take immediate action to ensure that persons with disabilities have a free choice as to where and with whom they want to live, and that they receive the necessary support regardless of their place of residence.

5. Safety of people with disabilities and freedom from violence

The UNCRPD has expressed concerns about the high rate of violence against, and sexual abuse of, women with disabilities. Indeed, 90% of women with intellectual disabilities have been sexually abused; and 68% of women with an intellectual disability will be subjected to sexual abuse before they reach 18 years of age.¹²

The NSWCCCL endorses the UNCRPD's recommendation on this matter, and advocates guaranteed protections from violence and abuse particularly for women and children with disabilities.

Recommendation 6: Include a more comprehensive consideration of women with disabilities in public programmes and policies on the prevention of gender-based violence, particularly so as to ensure access for women with disabilities to an effective, integrated response system.

6. Conclusion

¹⁰ CRPD, art.19

¹¹ CRPD, art.19

¹² S Salthouse and C Frohmader, 'Double the Odds: Domestic Violence and Women with Disabilities' (Paper presented at Home Truths Conference, Melbourne, 15–17 September 2004).

Given the importance of ensuring that the rights of people with disability are adequately protected, the NSWCCCL strongly supports the amendment of the existing disability discrimination framework and adoption of the proposed recommendations. Indeed, Australia is compelled under the CRPD to provide protection from unfair discrimination on the grounds of disability and to foster effective and inclusive participation for disabled people. We agree with the UNCRPD's approach that views persons with disability as rights-holders. Given that people with disabilities are still over-represented in the criminal justice system and are more likely to be subject to violence or non-therapeutic sterilisation, the NSWCCCL calls for a consolidation of Australia's State and Federal discrimination laws. We are supportive of the recommendations set out in the 2014 ALRC Report in order to implement a general framework of measures to ensure equality of chances and rights for persons with disability in NSW.

NSWCCL will make further contributions to this important review at the later stages in the process and would be available for face to face discussion with the NSWLRC.

This submission was written by Eugene Schofield-Georgeson CCL committee member and CCL intern Sonia Dirand on behalf of the NSWCCCL.

Yours sincerely,



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