

Australian Law Reform Commission Inquiry

Legal barriers for people with disability

Submission by:

The Centre for Rural Regional Law and Justice
The National Rural Law and Justice Alliance

Introduction – the focus of the submission

This submission has been prepared by the Centre for Rural Regional Law and Justice within Deakin University's Law School. It is made on behalf of the Centre itself together with the National Rural Law and Justice Alliance.

The Centre's mission is *to enhance access to improved justice systems and services for rural and regional communities through research, education, engagement and advocacy*. It focuses on how legal and justice issues are experienced by people living in regional and rural communities, with an emphasis on regional Victoria.

The Alliance is Australia's peak national non-government organisation for regional, rural and remote law and justice, and works with institutions across the nation to strengthen a focus of law and justice issues as they affect these communities.

Throughout this submission, the term "regional" will generally be used generically and should be read as referring to regional, rural and remote communities. While all of these terms have their own definitions, we stress that no two communities are the same in relation to social and human capital, economic base, access to services and resources, or proximity to large regional or metropolitan centres - all of which impact on their access to, and outcomes of, involvement with the justice system.

Consequently, the focus of this submission is particularly on the impact of the issues canvassed in the Commission's Issues Paper on this population in particular. Our attention is on the extent to which, and the ways in which, these issues are experienced differently for people with disabilities in these communities in comparison to people with disabilities more generally. Where we do not have evidence that a person with a disability in a regional or rural community experiences an issue different from a person with a disability in a metropolitan issue we will, generally, not comment on that issue. This does not mean the issue is not important, but simply that it is not an issue that we believe to have specific regional or rural significance.

The submission is underpinned by two key points:

- We stress an important distinction between legal capacity and decision-making capacity. The two concepts are sometimes used in popular commentary as if they mean the same thing, which they do not. Our understanding of legal capacity is the exercise of legal rights to enable equality before the law and equal participation in the social, economic and political life of the community. Decision-making capacity refers to

a person's ability to make decisions. Making decisions is an important part of exercising legal capacity, but it is not in itself legal capacity. The UN Convention recognises that a person with a disability may need some supports in relation to their decision-making capacity in order to exercise their legal capacity. We discuss this in our answer to the Issue Paper's first question.

- Access to services, including legal services, is an area in which people living in regional and rural areas are significantly disadvantaged. This will impact considerably on the exercise of legal capacity for a person with a disability in virtually all of the areas discussed in the Issues Paper. Although this issue is highlighted in our answer to some questions, it can be assumed to also be relatively important across the board, even when we do not mention it specifically.

Against the backdrop of these considerations, we have addressed each of the Issue Paper's questions below.

Question 1 (United Nations Convention on the Rights of Persons with Disabilities):

Australia's Interpretative Declaration in relation to Article 12 creates an obligation upon Australian jurisdictions to enable, and to recognise, a range of supported decision-making arrangements for people with cognitive impairment, where decision-making support may extend to decisions being made by a third party on behalf of the person with the impairment, but where such arrangements should be put in place only when they are necessary in order to enable to exercise of legal capacity and only where there are sufficient safeguards in place.

While the wording of the Declaration is arguably a little ambiguous, it appears to suggest that substitute decision making be understood as "fully supported decision making". In any event, such an interpretation of how substitute decision making should work would be consistent with the tenor of Article 12, in the sense that the role of any third-party decision maker should be primarily to enable the exercise of the person's legal capacity on an equal basis with other members of the community. This means realising the decisions that the person themselves would make if they were able to do so, rather than making the decision that the third party decision maker considers in their best interests.

For people living in regional and rural communities, this can create some significant practical challenges, particularly where a statutory decision-maker is appointed. This will be a staff member from a public advocacy, guardianship or administration office, located in a major city and unlikely to have regular personal contact with the represented person, or with their community. This makes their role of "standing in the shoes" of the represented person much more difficult and therefore will create a greater likelihood that decisions will be made according to the guardian's notions of best interests, rather than from the represented person's own perspective and choices, many of which will be shaped by the community within which they live.

While Guardianship legislation is a matter for State jurisdictions, it nevertheless raises the need for some national consistency on the issue of the appointment of statutory guardians (and administrators) in ways that ensure compliance with Article 12, and with Australia's Interpretative Declaration of the Article.

Question 2 (National Disability Strategy 2010 – 2020):

The National Disability Strategy should acknowledge the importance of access to local decision-making supports for people with cognitive impairment as a component of their exercise of legal capacity. The importance of a person being able to exercise this capacity, as well as being proclaimed in Article 12 of the Convention, is borne out in the way people participate socially, economically and politically in their communities. It is, as such, central to the effective implementation of the NDIS, which embeds social and economic participation in the guiding principles of its legislation.

The NDIS should, in reflecting the National Disability Strategy, be legislatively guided to address people's legal capacity needs, both through the allocation of resources to enable independent decision-making supporters through the NDIS planning process and then, more broadly, through people's participation in community life. This can be an important and necessary means by which the need for more restrictive decision-making interventions, such as guardianship and administration, can be avoided.

However, for this to be effective, and to provide genuine decision-making support based on a substitute judgement model rather than a best interests model, that support must be locally based so it can be well connected to the person and the community within which they live. This is especially important in regional areas where access to decision-making support that is city based will inevitably be less effective as a means of enabling genuine exercise of equal legal capacity.

Question 3 (Framing principles):

Given the commentary on the framing principles in the ALRC Issues Paper, and particularly the connection noted between equality and Article 12 of the Convention, these Principles seem to be comprehensive.

However, it is worth noting that the framing principle of Inclusion and Participation is one that clearly in the context of the UN Convention, particularly Article 19, gives a person a right to supports that enable community inclusion. This is mentioned in the text of the Issues Paper but almost, it seems in passing.

The availability of supports is critical to people with disabilities and they can be especially lacking in regional areas. A person's ability to participate in the community and to exercise legal capacity will often be to a significant extent reliant on the availability of supports and, where these are unavailable locally, the impacts on the person's life can be significant in the sense that they are either forced to dislocate from their community in order to receive support or to remain in their community unsupported.

Both of these can have a very deleterious effect upon their exercise of legal capacity which is typically very bound up with the person's connection to community. Remembering that legal capacity is about the exercise of legal rights and citizenship, community and community inclusion are inevitably and inextricably connected with this. It is community that provides the context within which the person's identity is shaped and, therefore, the environment within which issues of legal capacity are most relevant and most often need to be expressed and pursued.

For this reason, the availability of supports within local communities – a particularly pressing issue in rural and regional communities – is critical to the exercise of legal capacity.

Question 4 (A uniform approach to legal capacity?):

The Centre and the Alliance support the development of a nationally consistent definition of capacity but, in doing so, stresses the importance of recognising the difference between legal capacity and decision-making capacity. As noted earlier, the former is about the ability to meaningfully exercise legal rights and legal autonomy, and the latter is about cognitive ability to make decisions. Support in exercising the latter is often needed in order to realise the former.

As noted in our answers to earlier questions, it is often the chronic lack of resources to enable this support in regional communities that leads to a denial of the right to exercise legal capacity for people with disabilities in those communities.

The Centre and the Alliance note the definition of decision-making capacity proposed by the Victorian Law Reform Commission in Recommendations 24 and 25 of the final report of its review of Victoria’s Guardianship legislation:

“A person is unable to make a decision if they are unable to:

- (a) understand the information relevant to the decisions and the effect of the decision
- (b) retain that information to the extent necessary to make the decision
- (c) use or weigh that information as part of the process of making the decision, or
- (d) communicate the decision in some way.

A person has the capacity to make a decision if they are able to:

- (a) understand the information relevant to the decision and the effect of the decision
- (b) retain that information to the extent necessary to make the decision
- (c) use or weigh that information as part of the process of making the decision, and
- (d) communicate the decision in some way.”¹

Question 5 (The role of family, carers and supporters):

Exercise of legal capacity is, to no small extent, connected with a supportive, inclusive and accessible community. This includes not only immediate family, but also the more extended networks of neighbourhoods and the various community networks of which the person might be a part. These can be particularly strong, and important, in regional communities. They can

¹ Victorian Law Reform Commission, *Guardianship: Final Report*, 2012, Recommendations 24 and 25

provide rich and invaluable support in empowering people with disabilities and in supporting their decision making and, therefore, in enabling the exercise of legal capacity.

While legislation such as the *Carer Recognition Act 2010* (Cth) is important in acknowledging the caring and supportive relationships that exist particularly in the family context, they are not effective in recognising these relationships in the broader community context. As a result of this, neighbourhoods and communities are often not given sufficient regard when policy makers are developing new approaches to the support and inclusion of people with disabilities and, therefore, to the exercise of legal capacity.

More explicit recognition of the role of neighbourhoods and communities and therefore of the need to resource these more adequately, should therefore be encouraged in any legislation where these issue of informal, non-service-based supports to people with disabilities is being highlighted.

Greater recognition of the roles and needs of local communities, especially regional and rural communities, can greatly enhance a person with a cognitive impairment's access to decision-making supports. When the networks around a person are supported by programs that enhance community understanding of human rights, and by having within them community-building initiatives, their ability to function in ways that empower all their members, including those with a disability, is clearly also enhanced. This can be an important means by which more restrictive interventions – such as the appointment of substitute decision makers – can be avoided. It is not uncommon for those appointments to be made simply because there is a lack of a well-resourced and well-enabled local network of caring and supportive relationships.

It is vital that these relationships be understood as happening within a community, rather than solely a family, context.

Question 6 (Anti-discrimination law):

It would be helpful to include provisions relating to the exercise of legal capacity within Part 2 Division 2 of the *Disability Discrimination Act 1992*. Such provisions should be framed in a way that makes it unlawful for any entity to discriminate against a person because of their disability in their exercise of their legal rights within the purview of that entity.

We recognise that drafting such provisions would require some thought. It would require some clarity around just what sorts of entities the provisions would apply to, and what is meant by the exercise of legal capacity (or of legal rights) within the purview of that entity.

But, in broad terms, the intent of that provision would be to place some obligation on entities, such as public organisations, government departments, and private providers of goods and services, to operate in ways that accommodate the needs of people with disabilities in the exercise of their legal rights. So, for example, if the legal right to make a complaint in a particular service did not include provisions for a person with an intellectual disability having a support person with them to assist them through the process, or to help them access and understand information, then this should be unlawful under such a provision.

Beyond the *Disability Discrimination Act 1992*, we would also recommend that some consideration be given to the recognition of rurality and remoteness as a common area of

discrimination and that the Australian Human Rights Commission give thought to how this can be incorporated, if possible, into existing human rights and anti-discrimination frameworks. We recognise that the structure of existing human rights legislation, including the *Disability Discrimination Act 1992*, does not lend itself easily to including such provisions. However, it may be useful to include some general provisions in the Act that reinforce its equal application to all Australians with disabilities, regardless of a number of factors that might, in addition to their disability, make them more vulnerable to experiencing discrimination. This would include a range of attributes, including those already covered under other anti-discrimination legislation, such as race, age and gender, but also others not covered, such as sexuality, political and religious beliefs, physical appearance, and so on. Such a list could also include rurality and remoteness or some similar concept regarding where the person lives.

Questions 7 – 8 (General protections provisions (*Fair Work Act 2009*)):

Section 351(1) of the *Fair Work Act 2009* should include “living in a regional, rural or remote area” in its list of areas where it is unlawful for an employer to take adverse action against an employee.

A person with a disability living in a regional or remote area may experience particular difficulties getting to work, especially where public transport, particularly accessible public transport, is unavailable or available only to a limited extent. This may necessitate the need for greater flexibility in the workplace in ways that are similar to those needed by other people, such as people with family or carer responsibilities, who are already covered by this section of the Act.

Such an amendment to the Act would enhance the equality of legal rights to fair work conditions for any person living in a regional or rural area, including those who have a disability.

Question 9 (Administrative Law):

People with disabilities living in regional and rural communities can experience inordinate difficulties in exercising their rights to review of government decisions.

The processes of the Administrative Appeals Tribunal can themselves be very cumbersome and prohibitive to a person with a disability, particularly to someone with a cognitive impairment or mental illness.

These problems can be immensely exacerbated for a person in a regional rural or remote community, where access to the Tribunal and its services are so limited.

There is a need for much more accessible, and local, mechanisms for supporting people with a disability in making and proceeding with a complaint hearing complaints and reviews of government decisions.

The Centre and the Alliance recognise that this is an issue of considerable magnitude and would, therefore, recommend that this be a matter of independent inquiry in its own right.

Question 10 (Competition and consumer law):

People with disabilities, especially those with a cognitive impairment, can often experience considerable difficulties as consumers of goods and services. These difficulties can be experienced particularly in areas such as vulnerability to marketing strategies (such as mobile phone and internet accounts) a greater reliance on goods and services provided being of good quality and difficulties in understanding and asserting rights in relation to consumer law.

Access to information, and to support in understanding it and using it can be enormous for a person with a disability living in a regional area. Access to appropriate courts, tribunals and alternative dispute resolution processes to resolve disputes is also currently problematic for people in rural and regional communities.

People living in regional areas typically rely on the internet as the main first port of call for information about their rights, and about what to do when they feel those rights may have been compromised. This however is not typically a source of information that a person with a cognitive impairment will access.

Question 11 (Privacy):

No comment.

Questions 12 – 14 (National Disability Insurance Scheme):

An important component of the effective exercise of legal capacity under the *National Disability Insurance Scheme Act 2013* (the NDIS Act) is reflected in the ways in which decisions are made by and for participants.

The Act's nominee provisions, like those in social security legislation, are generally disempowering of the person with the disability, as they place no obligation on a nominee to act in ways that genuinely involve the person or that assist them to exercise their legal capacity.

There are two types of decision-making arrangements that could significantly enhance the exercise of legal capacity in relation to the NDIS:

- Supported decision-making arrangements, whereby a person is appointed with legal authority to access and deal with information on behalf of the person with the disability, similar to the role of a correspondence nominee appointed under the NDIS Act but with the added and vital responsibility of supporting the person to make their own decisions
- Co-decision-making arrangements, whereby a person is appointed to make decisions in partnership with the person with the disability, and the decision is only valid if both people agree to it.

Both of these arrangements provide significantly greater empowerment to a person with a disability who is unable to make their own decisions independently, but for whom a full substitute decision maker, such as a guardian or administrator appointed under state guardianship legislation or a Plan Nominee appointed under the NDIS Act, would be too restrictive.

Further, such arrangements may be especially relevant for people living in regional and rural communities, where local family and neighbourhood networks can be particularly strong and supportive.

The Centre and the Alliance note that, at present, mechanisms for the appointment of supported decision makers and co-decision makers do not exist either nationally in NDIS or social security legislation, or at state and territory level in guardianship legislation.

We also note the recommendations of the Victorian Law Reform Commission's review of guardianship legislation both in relation to these alternative decision-making appointments² and in relation to nationally consistent legislation in this area³.

The Centre and the Alliance support these recommendations and would further recommend that the Federal Attorney General investigate possibilities for nationally consistent provisions relating to alternative decision-making arrangements, as well as for incorporating into the NDIS Act arrangements similar to those proposed by the VLRC. In lieu of appropriate state or territory legislation for the appointment of supported decision makers and co decision makers, such arrangements should be able to set up by the National Disability Insurance Agency under the NDIS Act, instead of the nominee arrangements currently provided there. Under such arrangements, a substitute decision maker would effectively replace the need for a Correspondence Nominee. Where neither a supported decision maker nor a co-decision maker is an appropriate appointment for the person, and a substitute decision maker appears to be needed, such an appointment should only be able to be made by the relevant tribunal for appointing guardians and administrators in the person's state or territorial jurisdiction.

Question 15 (Employment):

The exercise of employee rights under the *Fair Work Act 2009* in general, and through the Fair Work Commission (FWC) in particular, is especially enhanced for people with disabilities living regional communities by the preparedness of the FWC to conduct proceedings outside of capital cities. We do not at this stage have reliable information on the extent to which these proceedings do in fact occur in regional areas, but would like to stress the importance of this practice and of all of the FWC's services being readily accessible to people living in regional areas. Obviously, this is particularly important for people with disabilities for whom mobility may be even more difficult than for others.

² Victorian Law Reform Commission, *Guardianship: Final Report*, 2012, Recommendations 30 - 91

³ Victorian Law Reform Commission, *Guardianship: Final Report*, 2012, Recommendation 440

Further, we stress the importance of accessible and flexible procedures at the FWC to enable genuine participation from workers with disabilities who may find the procedures of more formal tribunals intimidating and alienating.

Questions 16 – 22 (Citizenship rights, public service and board participation):

Voting

The availability of accessible polling centres and voting technologies is an ongoing issue for many people with disabilities, but particularly so in regional areas where there may be only one polling centre within a reasonable travelling distance and, if this is physically inaccessible, there are not likely to be other alternatives available for the voter.

Further the Centre and the Alliance note that the Australian Electoral Commission has been looking at available technologies to enable blind and vision-impaired voters to lodge their vote from home by phone, in response to earlier findings that secure web-based options trialled at the 2007 Federal election were too expensive.⁴ Aside from the fact that difficulties in voting are encountered by people with disabilities other than blindness and vision impairment, we stress the importance of continuing to pursue this work with some urgency to better enable people with disabilities, particularly in regional areas to exercise their right to vote in an accessible way.

We support a modernising of language used in federal legislative frameworks as noted in Paragraph 169 of the Commission's Issues Paper, and agrees that terminology such as "unsound mind" is now insulting to people with disabilities and outdated.

Jury service

People with physical disabilities can experience particular difficulties accessing courthouses where these are old buildings that have not been made accessible. This can mean that a person with a physical disability may not be able to undertake jury service simply because the building itself is not accessible. The importance of physically accessible court infrastructure should not be overlooked in regional communities.

In all other respects, the experience of people with disabilities in regional areas is similar to that of people with disabilities living in cities insofar as stereotypes about capacity to carry out the duties of juror can sometimes negatively affect considerations about that person's eligibility for jury service.

However, we note the Commission's observation that jury issues rarely arise within Commonwealth jurisdictions.

Board participation

⁴ Parliament of Australia, "E-voting: the promise and the practice", Parliamentary Library Background Note, October 2012, p 5

In general, we do not see the issues of Board participations being substantially different for people with disabilities in regional areas than for people with disabilities in metropolitan areas. However, we do stress the importance of ensuring adequate representation of regional communities, including members of those communities who have disabilities, on Boards and Committees that are appointed by the Australian Government. As Government of all jurisdictions slowly become accustomed to recognising the importance of people with disabilities' input into all areas of public policy and public life, the tendency to overlook the input of those coming from regional community perspective still needs to be consciously avoided.

Questions 23 – 25 (Access to justice, evidence and federal offences):

People living in regional areas can experience considerable frustrations and difficulties in the exercise of their legal capacity because of a federal court system that is largely city-based, despite the advent of the Federal Circuit Court of Australia and its capacity to deal with matters in both the Federal Court and the Family Court jurisdictions. As with other matters discussed in this submission, these problems are exacerbated if the person also has a disability and, therefore, may experience even greater difficulty accessing services and courts that are not within or near their local community.

It is also noted that, as with offences under state legislation, a lack of diversionary services and community-based options for people with disabilities across regional Australia will mean that those populations are more likely to receive custodial sentences, or are more likely to breach the terms of non-custodial orders or to reoffend.⁵

Access to legal advice and representation can also be very difficult in these communities, especially if the local lawyers that do exist lack experience with, or knowledge of, disability and its impact on a person's capacity to conduct their legal matter, instruct their solicitor, and to give evidence in court.

The general difficulties experienced in the delivery of legal services in regional communities, regardless of jurisdiction or disability, are well documented in the Centre's 2011 report on access to justice for people in regional Victoria. In this report, legal practitioners noted the issues in which they feel they are adversely impacted in comparison to their metropolitan counterparts. Conflicts of interest, recruiting suitably experienced staff and meeting community expectations were the three most frequently raised issues (by 69%, 61% and 58% of respondents respectively) in this regard.⁶

In areas such as Family Law, it is reasonable to assume that regional participants in the justice system, including those with a disability, will suffer significant disadvantage in relation to all these factors.

These issues have indeed been noted previously at federal level, as in the Productivity Commission's Inquiry into Access to Civil Justice, where the impact of geographical

⁵ Coverdale, Richard, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria*. Deakin University, 2011, pp 62-71

⁶ Coverdale, Richard, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria*, Deakin University, 2011, p 85.

constraints on people's ability to seek appropriate resolution to legal issues was noted.⁷ The joint submission of the Centre and Alliance to that inquiry stresses the significance of these constraints in the rise of self-represented litigants across all jurisdictions. The submission also notes the importance of new information technologies, such as those enabled through the roll out of a National Broadband Network, in providing alternative means by which people living in regional communities can access legal services⁸. As noted below in relation to banking services, alternative technologies are not always going to be accessible or realistic options for some people with disabilities, but for others they will provide enormously valuable opportunities for accessing services that they would otherwise be unable to use.

Questions 26 – 33 (Social security, financial services and superannuation):

Social security

The difficulties for people with disabilities in understanding and negotiating the social security system are widespread. These difficulties are often further compounded for those people living in regional and rural areas, where their capacity to access advocacy and legal advice in relation to legal rights is additionally limited.

Further, the Social Security Nominee system is one that, as already argued above in relation to National Disability Insurance Scheme nominees, can significantly disadvantage some people with disability in their exercise of legal capacity. The greater recognition of decision-making supporters and co-decision makers in social security legislation could go a long way to address this disadvantage, especially for people living in regional and rural communities where informal and supportive decision-making arrangements can be particularly strong and effective.

Banking

As banks tend to move more to online services, and branches of banks become less common in regional towns, difficulties clearly arise for people with disabilities who need to do their banking in this way.

While remote and online banking services can in fact be very helpful for people who are geographically isolated, they are not generally accessible for people with limited financial literacy who already experience difficulty understanding the growing complexity of financial management arrangements.⁹

Further, greater recognition of co-decision-making and supported decision-making arrangements, as noted in relation to social security issues, could better enable people with disabilities to exercise equal legal capacity in their use of financial services. As noted in the Commission's Issues Paper, banks are sometimes reluctant to recognise informal

⁷ *Access to Justice Arrangements*, Productivity Commission Issues Paper, Australian Government, September 2013, p 9

⁸ Centre for Rural Regional Law and Justice, and National Rural Law and Justice Alliance, *Joint Submission to Productivity Commission Inquiry into Access to Civil Justice*, 2013, pp 11-13. The submission can be accessed on the Centre's website at <http://www.deakin.edu.au/buslaw/law/crrlj/research.php>

⁹ For information on this issue, the Centre's submission to the Reserve Bank of Australia's Proposed Variation to the Access Regime for the ATM System can be accessed on the Centre's website at <http://www.deakin.edu.au/buslaw/law/crrlj/research.php>.

arrangements for people with disabilities doing their banking. This is understandable, given the need to guard against financial abuse and to provide some certainty to banking staff in their interactions with customers who have disabilities. Proper legislative provisions for the alternative decision-making arrangements already mentioned, could help provide this certainty for banks while still ensuring that support for people with disabilities in the exercise of legal capacity is tailored to their needs, as required by the Article 12 of the Convention. As already noted, these arrangements can be especially useful for people with disabilities in regional communities.

We recognise that the development of such decision-making arrangements is largely a matter for state and territory jurisdictions and therefore urge the Federal Attorney General to initiate a process whereby such arrangements can be explored across jurisdictions.

The Centre and the Alliance also suggest that there may be opportunities to further strengthen the Australian Consumer Law provisions of the *Competition and Consumer Act 2010* in relation to avenues of redress for people with disabilities (or others) who are supported in decision-making processes when acting as a consumer of services. Provisions that specifically addressed this issue, through outlining the responsibilities of supporters and co-decision makers in the context of consumer law as well as providing guidance on unconscionable practices, may further strengthen the legal rights of people with disabilities when accessing financial services.

Insurance and superannuation

The limited capacity of people with disabilities living in regional areas to access assistance and support services, including medical and legal documents typically required for insurance and superannuation purposes, as well as difficulty accessing effective and responsible financial planning (itself further limited by current federal changes to the reporting requirements of financial planners), all work to create additional difficulties for people with disabilities in regional communities in relation to these issues.

These problems are further exacerbated by the lack of regional access to dispute resolution mechanisms such as the Superannuation Complaints Tribunal and the Financial Services Ombudsman.

Questions 34 and 35 (Health care and aged care):

Health care

Access to medical practitioners can, of course, be particularly difficult for people living in regional areas and, while access to service delivery is not an issue being considered by the Commission, this lack of service access does have particular significance in relation to the exercise of legal capacity. When a person with a disability has to travel a long way to access medical treatment, or is receiving medical treatment from a practitioner who, because of being physically dislocated, does not know them, issues of consent can become even more problematic than usual. In such situations there is a great risk that the practitioner will either provide medical treatment without consent or will look for the appointment of a substitute decision maker when, with better knowledge of the patient, less restrictive options might be more appropriate.

The Centre and the Alliance recognise that, in general, issues relating to consent to medical treatment, including major medical procedures such as sterilisations, is a matter for state and territory jurisdictions. The importance of facilitating national consistency on this matter is, as in matters discussed previously in this submission, once again stressed.

Notwithstanding all of the above, the Centre and the Alliance stress the limited access to expert evidence such as through medical, legal and psychiatric reports for people living in regional areas. These directly the person's ability to exercise legal capacity when they are required for a federal jurisdiction, such as an anti-discrimination matter, a family law matter, or in relation to a federal offence.

Aged care

As in many issues discussed throughout this submission, the difficulties experienced by older people in regional communities are similar to those of older people generally, but worsened by the lack of access to local supports and services. In terms of aged care services particularly, difficulties accessing in-home support and respite services can greatly exacerbate the disabling effects of ageing and, thereby, create greater difficulties for the person in the exercise of legal capacity. A person's admission to an aged care facility as a permanent resident can, and does, in many situations accelerate the progress of dementia where the person is dislocated from their home environment, with its familiar routines and memory triggers.

So while service provision is not a direct concern of the Commission's inquiry, we feel that it is important to note the impact this has on the exercise of legal capacity.

The Centre and the Alliance also stress the value of supported and co decision-making arrangements within the context of aged care and again notes the particular relevance of these in the regional and rural context. Aged care legislation should accommodate these arrangements, even though the processes for establishing them will largely rest with state and territory jurisdictions.

Questions 36 and 37 (Restrictive practices):

The Centre and the Alliance support the development of national consistency around the use and monitoring of restrictive practices in services for people with disabilities and notes that a national framework should be one that includes provisions and protections that ensure:

- Open and transparent criteria for the use of restrictive practices that are consistent with human rights provisions regarding such practices (such as the use of such practices only when they are the least restrictive means of ensuring the protection of the rights and safety of the person with the disability or of other people and/or their property)
- Open and transparent processes for obtaining consent to, or approval for, the use of restrictive practices
- Clear reporting requirements for all uses of restrictive practices
- Clear avenues for appeal to an independent authority regarding the use of restrictive practices

- Ongoing monitoring of all uses of restrictive practices

We are not aware of any data that indicates greater, or more inappropriate, use of restrictive practices in regional areas than in metropolitan areas, but does note that more limited access to service options and choices is apt to increase the likelihood, first, that service users might exhibit “challenging behaviours” and, second, that, when they do, there will be less access to non-restrictive interventions to address those behaviours, such as through specialist behaviour supports. In this sense, then, the need for strong and nationally consistent standards in this area becomes even more important.

Questions 38 – 40 (Marriage, intimate relationships, parenthood and family law)

The main issue affecting people with disabilities in regional areas as opposed to people with disabilities more generally in relation to marriage, intimate relationships, parenthood and family law is access both to legal and other advocacy services that might assist the person if they are experiencing discrimination or some other compromise of their rights in these areas and to the services of the Family Court.

We are not aware of research or evidence that indicates the extent to which a person with a disability is likely to experience difficulties, such as discrimination, on these issues in a regional community as opposed to a metropolitan area. The extent to which living in regional communities impacts on public perceptions in relation to matters of intimacy and relationships generally and particularly to people with disabilities, is not known. However, the lack of informed awareness and access to legal services to enable redress of those issues is well documented¹⁰ and should be noted as a significant impediment to the exercise of equal legal capacity on these matters.

Question 41 (Particular disability communities):

As noted at the beginning of this submission, the Centre and the Alliance have been commenting here on the Commission’s questions in relation to a specific disability community: people living in rural, remote and regional areas. The non-addressing of or lack of responses to some issues throughout this submission is not an indicator that we believe the issue is unimportant, but rather that we do not see it as applying differently to people with disabilities in regional communities than to people with disabilities more generally.

¹⁰ Coverdale, Richard, *Postcode Justice: Rural and Regional Disadvantage in the Administration of the Law in Victoria*, Deakin University, 2011