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Abstract

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QUESTIONING LAW'S CAPACITY

FLEUR BEAUPERT and LINDA STEELE

The past ten years have witnessed an increased public awareness of the marginalisation and discrimination experienced by people with disability in the Australian legal system, and an associated proliferation of law reform reports on disability law.¹ A particular focus has been legal schemes applicable to people with disability found lacking legal capacity. A recent example is the 2014 report of the Australian Law Reform Commission ('ALRC') in its inquiry into equality, capacity and disability in Commonwealth laws.² Running parallel to these domestic law reform recommendations, the *Convention on the Rights of Persons with Disabilities*³ ('CRPD') has brought about paradigm shifts in legal understandings of disability and the appropriate treatment of people with disability. In particular, Article 12 establishes that people with disability are entitled to legal capacity and places obligations on States Parties to repeal laws that deny legal capacity. Legal capacity has been recast as an international human rights issue, central to recognising the equality of people with disability under domestic legal systems.

Bringing these two trajectories in disability law together, in this article we consider how the ALRC's recommendations fare by reference to the human rights advancements reflected in the CRPD, and in particular the approach to capacity. The article argues that the ALRC's recommendations do not go far enough in recognising the right to legal capacity, in particular due to a lack of clarity about how a shift to supported decision-making may be implemented and a failure to explicitly address the problematic role of mental capacity and how it may continue to inform the implementation of any new laws developed. It also considers the need for policy and cultural change to ensure that any new laws developed are not implemented in a manner that contravenes the CRPD.

Legal capacity, mental incapacity and disability

'Legal capacity' is the basis for recognising an individual as a person before the law and specifically consists of 'the ability to hold rights and duties (legal standing) and to exercise those rights and duties (legal agency)'.⁴ Legal capacity is a foundational concept in Australian law and central to an individual's ability to be recognised as a legal subject (eg, be a party to legal proceedings, engage in commercial transactions), have control over one's body (eg, consent to medical procedures done to one's body) and to participate in society more broadly (eg, vote, choose where to live). Not everyone holds legal capacity. For individuals who lack legal capacity third parties make legal decisions on their behalf. There are a variety of substitute decision-making schemes — such as guardianship, the civil and forensic mental health systems and the Family Court's welfare jurisdiction — which provide structure and oversight to third parties making decisions on behalf of people lacking legal capacity. These schemes have been viewed as 'protective', supportive and even empowering, because they direct third party decision-making towards working out what is in the individual's 'best interests'.

Legal capacity is linked to 'mental capacity' and has traditionally been denied to people on the basis that they lack mental capacity. Mental capacity comprises 'the decision-making skills of a person'⁵ and mental incapacity has largely been assessed in terms of individualistic, internal psychological processes, by reference to diagnoses of mental and cognitive impairments (eg, it is linked to such diagnoses as intellectual disability, dementia and schizophrenia).⁶ Significantly, this means that it is largely people with disability (and specifically with diagnoses or perceived diagnoses of mental and cognitive impairments) who are deemed mentally incapable and in turn are considered to lack legal capacity.

The assumed relationship between mental incapacity and disability is commonly presented as objective, scientific and natural. Yet the self-evidence of the association between disability and mental incapacity has been contested in disability studies scholarship and disability rights activism. This contestation can be summarised in three points. First, disability is constructed as negative variations in human existence through the operation of social norms which provide a narrow scope of valorised 'normality', through a focus on particular perceived deficits.⁷ Secondly, society has failed to provide necessary supports for people with disability in many respects and those supports which are provided typically focus on managing or obliterating the disability — recuperating individuals to a state of normality or minimising the impacts of their abnormality.⁸ Thirdly, mental incapacity is not, as commonly presented, an objective, scientific and naturally occurring phenomenon. Through association with problematic notions of disability, mental capacity is similarly constructed as a negative difference and devalued through the application of social norms of decision-making ability. The concepts of mental capacity and incapacity are contingent on social and political contexts, as are the disciplines, professions and practices which play a dominant role in assessing mental capacity and incapacity.⁹

It is the combined effects of the links between, first, disability and mental incapacity and, second, mental incapacity and legal capacity which render legal capacity and associated substitute decision-making regimes highly discriminatory and marginalising to people with disability. Being denied legal capacity means being denied the ability to make one's own choices and being at the whim of the decisions of others (including decisions ranging from public matters of civic participation to some of the most intimate and private matters, and extending to decisions involving violence, forced treatment and invasion of privacy).

Legal capacity as an international human rights issue

The CRPD casts the denial of legal capacity as a discriminatory mechanism within the law. It seeks to make existing human rights realisable for people with disability by taking account of their experiences, and contests pervasive medical and individual

models of disability that have historically served to deny realisation of human rights. The CRPD applies to people with disability, including (relevantly for this article) people with mental illnesses/psychosocial disability, and intellectual disability/cognitive impairment. The CRPD marks a shift from a medical model to social model of disability.

Article 12 of the CRPD relates to legal capacity and commences with the following three paragraphs:

States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.

States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 12 elaborates on the content of the right to equality before the law — also guaranteed by Article 26 of the *International Covenant on Civil and Political Rights*¹⁰ — as it relates specifically to people with disabilities. Article 12 places obligations on States Parties to repeal laws which deny legal capacity to people with disability and to introduce measures to support individuals with disability to exercise their legal capacity. It is generally acknowledged that Article 12 calls for a shift to the paradigm of supported decision-making. ‘Supported decision-making’ is a range of informal and formal measures which support people to exercise their legal capacity, notably to make their own choices to enter into legal relations and exercise their legal rights. Examples of supported decision-making models range from advice provided by family and friends to formal appointment of a support person.¹¹ Supported decision-making can be contrasted with ‘substitute decision-making’, of which the clearest examples are appointment of a guardian under guardianship law and compulsory treatment under mental health laws. While it is now generally recognised that there should be a shift to supported decision-making, in most developed countries substitute decision-making continues alongside increased supported decision-making options.

The UN Committee on the Rights of Persons with Disabilities (‘the Committee’) has recently considered Article 12 in depth. Following a submission process, to which the authors of this article made a submission,¹² the Committee adopted its General Comment dealing with this Article — ‘Article 12: Equal recognition before the law’ (‘General Comment’) — on 11 April 2014,¹³ informed by the fact that there appeared to be a general misunderstanding of the exact scope of the obligations imposed by Article 12.

The General Comment provides that States Parties to the CRPD must holistically examine all areas of law to ensure that the right of people with disability to legal capacity is not restricted on an unequal basis. The General Comment urges States Parties to abolish substitute decision-making regimes in order to ensure that full legal capacity is restored to people with disability on an equal basis with others,¹⁴ and reaffirms that:

a person’s status as a person with a disability or the existence of an impairment (including a physical or sensory impairment) must never be grounds for denying legal capacity or any of the rights provided for in article 12.¹⁵

The Committee outlines three different approaches often taken in judging whether a person has impaired decision-making skills: the status, outcome and functional approaches. The Committee rejects all three, on the basis that they result in a ‘discriminatory denial of legal capacity’ because ‘a person’s disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law’.¹⁶

The Committee emphasises that legal capacity and mental capacity are distinct concepts, noting that the law in most countries conflates the two concepts, so that a person is denied legal capacity if considered to have impaired decision-making skills. Although the focus of the General Comment is legal capacity, the General Comment also discusses and contests the concept of mental capacity, stating that this ‘is not, as is commonly presented, an objective, scientific and naturally occurring phenomenon’.¹⁷

The CRPD entered into force on 3 May 2008, and was ratified by Australia on 17 July 2008. Australia has entered an interpretive declaration in relation to Article 12, which includes the following:

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards¹⁸

While this means that technically it is impossible for Australia to ‘breach’ Article 12 by retaining substitute decision-making (because it has no legal duty to meet the requirements of this particular Article), the ALRC in its inquiry into equality, capacity and disability in Commonwealth laws considered whether this reservation should be withdrawn.¹⁹

We now consider to what extent the ALRC’s recommendations meet the expectations of Article 12.

The Australian Law Reform Commission Inquiry

Australian jurisdictions have taken steps towards making their laws and practices comply with the CRPD. While there have been positive developments, many of the reforms proposed and initiated to date fall short of the wholesale shift towards recognition of legal capacity and implementation of supported decision-making envisaged by the CRPD. On 23 July 2013 the Commonwealth Attorney-General charged the ALRC with conducting an inquiry into Commonwealth laws that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, with a view to ensuring compliance with the rights in the CRPD. This was a wide-ranging reference, requiring the ALRC to examine the full spectrum of Commonwealth laws, ranging far beyond laws dealing primarily with disability-related issues and touching on areas including employment, contracts, electoral matters, participation in the legal system, marriage and partnerships, and social security. Following a public consultation process (in relation to which the authors, together with Piers Gooding, made a written submission),²⁰ the Final Report was tabled on 24 November 2014.

The ALRC’s overarching approach, which breaks new ground in striving to realise the rights set out in the CRPD, is embodied in its proposed ‘National Decision-Making Principles’ and accompanying Guidelines, intended to guide reform of Commonwealth laws. The National Decision-Making Principles are:

Principle 1: All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.²¹

One innovative aspect of this approach is the starting point that adults have the right to make decisions for themselves, rather than the traditional presumption of legal capacity. As the ALRC comments, the ‘conceptual difficulty in starting with a presumption of legal capacity as an overarching principle is that it already contains a binary classification — of those who have legal capacity, and those who do not’.²² Instead, the ALRC approach starts by asking what level of support is needed to assist people to express their will and preferences. National Decision-Making Principles 2 and 3 clearly reflect the supported decision-making paradigm encouraged in the CRPD.

Another critical shift is the move away from a ‘best interests’ standard for decision-making towards an approach requiring decision-makers to act on the ‘will, preferences and rights’ of the person. Many substitute decision-making regimes require substitute decision-makers to make certain decisions based on what is believed to be in the objective ‘best interests’ of the person. Australian guardianship laws, for example, continue to incorporate this standard,²³ which denies legal capacity by permitting the substitute decision-maker to override an individual’s wishes. The ALRC considered that it was preferable to move away from ‘best interests’ language altogether, to be consistent with the CRPD.²⁴ It ultimately recommended a spectrum of decision-making based on the will and preferences of the person, defaulting to consideration of relevant human rights where their will and preferences cannot be determined.²⁵

Supported and ‘fully supported’ decision-making

The ALRC proposed a Commonwealth decision-making model, incorporating both supported and ‘fully supported’ decision-making, aiming to realise the paradigm shift required by the CRPD. This model relies upon two categories of support people, depending upon where the person falls along a spectrum of formal supported decision-making. *Supporters* would be appointed by individuals to support or assist them to make decisions. At the other end of the spectrum, *representatives* would be appointed by a court or tribunal as a mechanism for the provision of ‘fully supported’ decision-making, to support the person to make decisions *or* make decisions on their behalf if necessary. Appointment of a representative would be a last resort measure, be limited in scope, apply for the shortest time possible and be subject to review.²⁶

The ALRC was careful to distinguish their concept of ‘fully supported’ decision-making from substitute decision-making. The ALRC suggests that both concepts involve an appointed person making decisions on another person’s behalf. However, the posited difference is that ‘fully supported’ decision-making requires the representative to make decisions according to what the person would likely want based on all the available information, whereas substitute decision-making generally means that the substitute decision-maker acts on what they think the ‘best interests’ of the person are. This is a critical difference, and one that appears to be consistent with the approach of the General Comment.²⁷

Ensuring compliance in the *implementation* of any new laws developed, based on the ALRC’s recommendations about supported decision-making, will be a significant challenge because cultures and practices which deny legal capacity to people with disabilities are so entrenched. In addition, if the ALRC approach were to be incorporated into domestic laws, there is the very real risk that ‘fully supported’ decision-making would be overused (particularly through reference to individuals’ ‘mental incapacity’) and become substitute decision-making by a different name. Unless concerted efforts are made to effect cultural change to the ideas that inform legal capacity, any new laws developed will still *operate* in accordance with a paradigm based on problematic associations between legal capacity, mental capacity and disability.

The identification of support needs and provision of support should not in itself operate to deny an individual’s legal capacity, by imposing paternalistic and intensive interventions contrary to the person’s wishes. Current disability-related laws are often implemented such that courts and tribunals uncritically accept the views of clinicians, without taking into account opposing views of the person.²⁸ This can effectively mean that clinicians are empowered to override a person’s wishes where they disagree with those wishes, on the basis that the person lacks mental capacity (sometimes in combination with other factors, such as a perceived risk of harm). It would be all too easy for ‘fully-supported’ decision-making to be used to this same effect.

The functional test of decision-making ability

The ALRC recommended new Representative Decision-Making Guidelines to inform determinations about a person’s decision-making ability and the appointment of representatives, and whether they can exercise a number of specific rights, such as participating in legal proceedings, voting and serving on a jury. The key criteria are whether a person can understand and retain information relevant to a decision, use that information as part of the decision-making process and communicate the decision.²⁹

The ALRC approach diverges from the approach of the General Comment in this respect because the ALRC has effectively proposed the inclusion of a ‘functional approach’ to assessing a person’s legal capacity, as acknowledged by the ALRC itself.³⁰ This approach was criticised by the Committee because it: (1) is discriminatorily applied to people with disability; and (2) ‘presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law’.³¹ The ALRC considers that with appropriate safeguards, and a rights emphasis, there is no ‘discriminatory denial of legal capacity’ inherent in a functional test.³²

We suggest that the proposed functional approach, although seemingly value-neutral and non-discriminatory, would continue to result in discrimination against people with disability. It would result in people with intellectual disability, cognitive impairment and mental illness/psychosocial disability being more likely to be made subject to assessments of their decision-making ability, and more likely to be judged as lacking in this respect.³³ The focus should not be on whether a person lacks decision-making ability but on what kind of supports they need to exercise their legal capacity. As stated by the Committee, the functional approach has the consequence that ‘a person’s disability and/or decision-making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status as a person before the law’.³⁴

In our view, the proposed functional approach will result in denial of a person’s legal capacity on the questionable basis that they lack mental capacity. It will effectively operate as a mental capacity test, hinging on assessments carried out by professionals such as psychiatrists, psychologists and neuropsychologists, unless current policies and practices for the provision of health,

psychological and social services are radically overhauled.³⁵ Even if the question whether a person has a disability is not explicitly addressed, their opposition to treatment or rehabilitation recommended by clinicians is likely to be taken as evidence of an inability to understand, retain and weigh information as part of the relevant decision-making process.³⁶ We note that the Committee has stated that denials of legal capacity that discriminate on the basis of disability 'in purpose or effect' must be abolished.³⁷

Reform of mental health and guardianship laws

The ALRC highlighted the need for consistency in relation to state and territory guardianship and mental health laws to ensure recognition of supported decision-making arrangements across jurisdictional boundaries and a nationally consistent approach to capacity. It recommended that such laws be reviewed to ensure consistency with the proposed National Decision-Making Principles and Commonwealth decision-making model.³⁸ This would be a valuable process for governments to engage in. However, in our view, separate, disability-specific legislation such as guardianship and mental health legislation should be repealed. This is because their primary function is to provide for status-based substitute decision-making processes (based on status as a person with a disability), which deny the right to exercise legal capacity.

In relation to guardianship laws, the ALRC suggested that relevant laws should be reviewed to ensure that guardianship and administration are invoked only in a limited fashion and as a last resort, in ways that respect the will, preferences and rights of the individual.³⁹ States and territories were encouraged to move towards supported decision-making models similar to those in the new Victorian and Western Australian mental health legislation.⁴⁰ The ALRC did not draw out the full implications of the CRPD for reform of these types of laws or go so far as to recommend their abolition.

As stated above, the Committee urged States Parties to the CRPD to abolish substitute decision-making practices such as guardianship, conservatorship and mental health laws that permit forced treatment. It is not enough to incorporate supported decision-making models into guardianship and mental health laws if substitute decision-making continues as the dominant model. Supported decision-making arrangements should instead be implemented through laws that apply equally to everyone.

Conclusion

Article 12 has significant implications for the status of legal capacity in Australia, as well as implications in core areas of law (eg, particularly contract law and criminal law) where legal capacity is relevant. In addition, Article 12 necessitates major reforms (and possible removal) of areas of law which apply exclusively to individuals who are denied legal capacity (such as guardianship laws and forensic and civil mental health laws). We have argued that the ALRC's recommendations do indicate a general desire to achieve reform consistent with the CRPD. In particular, it is commendable that the ALRC recommends a complete shift to supported decision-making at a Commonwealth level. Yet the recommendations fall short of the spirit and word of the Convention for a number of reasons: (1) there is a lack of clarity about the way in which a shift to supported decision-making may be implemented — ie, the role that 'mental incapacity' will play; (2) the recommendations do not explicitly address the problematic role of mental capacity and how it may continue to inform the implementation of any new laws developed; (3) the recommended functional approach to decision-making ability will operate akin to a mental capacity test; and (4) there is a failure to recommend the abolition of separate disability-based systems based on mental incapacity.

The CRPD has presented us with a significant opportunity to reflect on the meaning of a foundational legal concept and in doing so readjust significant aspects of our legal system. Such a process could reveal both the deeply embedded inequality that currently exists and the immense possibilities of a new law with the capacity to truly protect disability rights. Law reform will not, in and of itself, change the discriminatory institutional, professional and cultural practices which often characterise approaches to decision-making about the lives of people with disability — practices which have tended to revolve around problematic notions of mental capacity. A deeper consideration is needed of the ideas informing how we think about disability and its enduring link to incapacity. Yet now is better than any other time to take such a leap and challenge the way we have understood capacity up until now.

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REFERENCES

1. See, eg, more recently Australian Human Rights Commission, *Equal before the Law: Towards Disability Justice Strategies* (2014); Australian Law Reform Commission ('ALRC'), *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014); NSW Law Reform Commission, *People with Cognitive and Mental Health Impairments in the Criminal Justice System: Criminal Responsibility and Consequences*, Report No 138 (2013); Senate, *Involuntary or Coerced Sterilisation of People with Disabilities in Australia* (Senate Community Affairs Committee Secretariat, 2013); Victoria, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers: Final Report*, Parl Paper No 216 (2013).
2. ALRC, above n 1.
3. *Convention on the Rights of Persons with Disabilities* ('CRPD'), opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
4. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014): Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), 3 [12]–[13].
5. *Ibid* 4 [13].
6. Children and young persons are another category of individuals who might also be denied legal capacity: see, eg, *Secretary, Department of Health and Community Services v JWB* (1992) 175 CLR 218, 237 (Mason CJ, Dawson, Toohey and Gaudron JJ), approving *Gillick v West Norfolk AHA* [1986] AC 112, 183–184 (Lord Scarman).
7. See, eg, Fiona Kumari Campbell, *Contours of Ableism: The Production of Disability and Abledness* (Palgrave Macmillan, 2009); Margrit Shildrick, *Dangerous Discourses of Disability, Subjectivity and Sexuality* (Palgrave Macmillan, 2009); Shelley Tremain, 'On the Subject of Impairment' in Mairian Corker and Tom Shakespeare (eds), *Disability/Postmodernity: Embodying Disability Theory* (Continuum, 2002) 32.

8. See, eg, Tremain, above n 7; Shelley Tremain, 'Foucault, Governmentality, and Critical Disability Theory: An Introduction' in Shelley Tremain (ed), *Foucault and the Government of Disability* (The University of Michigan Press, 2005).
9. See, eg, Alison C Carey, *On the Margins of Citizenship: Intellectual Disability and Civil Rights in Twentieth-Century America* (Temple University Press, 2009); Licia Carlson, *The Faces of Intellectual Disability: Philosophical Reflections* (Indiana University Press, 2010); Licia Carlson, 'Cognitive Ableism and Disability Studies: Feminist Reflections on the History of Mental Retardation' (2001) 16(4) *Hypatia* 124; Eva Feder Kittay and Licia Carlson (eds), *Cognitive Disability and its Challenge to Moral Philosophy* (Wiley-Blackwell, 2010).
10. *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171; 1057 UNTS 407 (entered into force 23 March 1976).
11. Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with the Convention on the Rights of Persons with Disabilities' in Bernadette McSherry and Penny Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Bloomsbury, 2010), 151, 160–162; Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law' (2013) 20(3) *Psychiatry, Psychology And Law* 431.
12. Fleur Beaupert and Linda Steele, Submission No 10 to the Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 – on Equal Recognition before the Law*, 21 February 2014 <<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>>.
13. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, above n 4.
14. *Ibid* 3 [7].
15. *Ibid* 3 [9].
16. *Ibid* 4 [13].
17. *Ibid* 4 [14].
18. *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
19. ALRC, above n 1, 35–62.
20. Fleur Beaupert, Piers Gooding and Linda Steele, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Australia (DP 81)*, May 2014 <https://www.academia.edu/10027685/Submission_to_the_Australian_Law_Reform_Commission_Equality_Capacity_and_Disability_in_Commonwealth_Laws_2014_>.
21. ALRC, above n 1, 11.
22. *Ibid* 66.
23. See, eg, *Guardianship and Administration Act 1986* (Vic), ss 42E, 42H, 60AI; *Guardianship Act 1987* (NSW), ss 4(a), 46A.
24. ALRC, above n 1, 81.
25. *Ibid* 76. This approach, however, has also been subject to criticism: eg, Centre for Disability Law and Policy (NUI Galway), Submission No 130 to the Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws Australia (DP 81)*, (2014), 10 <<http://www.alrc.gov.au/inquiries/disability/submissions>>.
26. ALRC, above n 1, 87.
27. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, above n 4, 5 [21].
28. For example, Elizabeth Perkins, *Decision-Making in Mental Health Review Tribunals* (Aldershot, 2003) 104–108; Michael L Perlin, 'Sanism and the law' (2013) 15(10) *AMA Journal of Ethics* 13 <journalofethics.ama-assn.org/2013/10/msoc1-1310.html>.
29. For example, ALRC, above n 1, 268.
30. ALRC, above n 1, 73.
31. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, above n 4, 4 [15].
32. ALRC, above n 1, 74.
33. Beaupert, Gooding and Steele, above n 20, 4.
34. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, above n 4, 4 [14].
35. Beaupert, Gooding and Steele, above n 20, 7.
36. A similar process ('circularity in assessing the criterion of mental illness') was observed to be of concern in relation to Australian mental health tribunal decision-making by a recent Australian Research Council funded study: Terry Carney et al, *Australian Mental Health Tribunals: Space for Fairness, Freedom, Protection & Treatment* (Themis Press, 2011), 232.
37. Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014)*, above n 4, 6 [25] (emphasis added).
38. ALRC, above n 1, 280, 288.
39. *Ibid* 278.
40. See *Mental Health Act 2014* (WA); *Mental Health Act 2014* (Vic).