



Australian Lawyers for Human Rights Position Statement on Capacity, Consent and Decision-Making by Persons with Disabilities

1. Australian Lawyers for Human Rights (ALHR) condemns the serious human rights violations that stem from denying individuals with disabilities their right to make decisions, including treatment decisions, for themselves to the greatest degree possible.
2. At law, consent and capacity are inextricably linked. Without capacity, an individual cannot consent to treatment. However, in light of the UN Convention on the Rights of the Persons with Disabilities (CRPD), it is the position of ALHR that an assessment of impaired capacity is no longer the end point of the autonomous decision-making process.
3. Capacity is considered impaired where an individual is unable to understand, retain or weigh treatment information or communicate the decision reached. ALHR is concerned that persons with disabilities are denied the right to make decisions with legal effect on the basis of lacking one or more of these abilities.
4. ALHR is concerned with the continued use of substitute decision-making arrangements against persons with disabilities. It is the position of ALHR that the use of substitute decision-making arrangements against persons with disabilities is unacceptable under any circumstances and is a clear violation of human rights standards under the CRPD.
5. ALHR strongly supports the need for domestic law reform and international measures to protect the human rights of the many thousands of persons with disabilities annually who are subjected to substitute decision-making due to impaired capacity.
6. It is the position of the ALHR that an assessment of impaired capacity should not lead to an individual with disabilities being subjected to substitute decision-making and thus unable to make their own decisions, and that rather, individuals with impaired capacity should be provided with support in the exercise of legal capacity as required under Article 12(3) of the CRPD. Further, ALHR urges that support in the exercise of legal capacity be

broadly interpreted to provide persons with disabilities the greatest opportunity to make their own decisions. A broad interpretation includes not only supported decision-making, but also measures such as advance directives, care and treatment plans, the provision of information in simple terms, and discussing information at a time and environment most conducive for the individual to make a decision.

7. It is the view of ALHR that a determination that an individual lacks capacity and thus cannot consent to treatment violates the requirements of the CRPD if support in the exercise of legal capacity is not provided prior to the determination being made. The recognition of legal capacity and the provision of support in the exercise of legal capacity are required under Article 12. Other articles of the CRPD may be violated depending on the circumstances surrounding the decision. These include the right to the highest attainable standard of health (Article 25), respect for reproductive and family planning (Article 23), and the right to bodily and mental integrity (Article 17).
8. In order to prevent human rights violations and protect all Australians with disabilities from the use of substitute decision-making, ALHR calls on the Federal and State and Territory Governments to:
 - a. Repeal legislation that permits the imposition of substitute decision-making arrangements upon persons with disabilities on the basis of impaired capacity and replace it with supported decision-making arrangements;
 - b. Enact the requirements of the Convention on the Rights of Persons with Disabilities that promote the recognition of the legal capacity of persons with disabilities, the provision of support in the exercise of legal capacity, the right to bodily integrity, the right to liberty and security of person, respect for reproductive and family planning rights, and the right to the highest attainable standard of health;
 - c. Provide reasonable accommodations to persons with disabilities to engage in supported decision-making and make their own decisions to the greatest degree possible.
9. ALHR strongly believes that Australia is well-placed to undertake legislative reform in the area of consent, capacity and substitute decision-making, to reduce the occurrence of



substitute decision-making and develop the decision-making ability of persons with disabilities to allow them to make their own decisions.

About ALHR

ALHR was established in 1993 and is a national network of over 800 Australian solicitors, barristers, academics, judicial officers and law students who practise and promote international human rights law in Australia. ALHR has active and engaged National, State and Territory committees as well as specialist national thematic committees.

ALHR seeks to utilise its extensive experience and expertise in the principles and practice of international human rights law in Australia in order to:

- Promote and support lawyers' practice of human rights law in Australia
- Promote Federal and State laws across Australia that comply with the principles of international human rights law
- Engage with the United Nations in relation to Australian human rights violations
- Engage internationally to promote human rights and the rule of law.

Through the provision of training, education, publications, CLE courses, conferences, seminars and mentoring, ALHR assists members to continue to develop their knowledge of human rights law and incorporate human rights principles into their areas of legal practice in Australia.