Disability and the Law

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Introduction

While people with a disability are generally subject to the same laws as the rest of the community, some laws have particular relevance to, and consequences for, people with disabilities. Establishing the rights of people with a disability has involved a shift away from a welfare approach to a human rights perspective, which embraces the notion of people with disabilities as rights bearers.

To understand what disability means and what it means to be a ‘person with a disability’, it is useful to distinguish between impairment, disability and handicap.

What is Disability?

The World Health Organisation distinguishes between impairment, disability and handicap and states the following:

- An impairment is any loss of physical or psychological function (e.g. brain damage).
- A disability is any loss or reduction in a person’s functional ability caused by an impairment.
- A handicap is the social or environmental disadvantage that society imposes on a person with a disability (e.g. physical barriers to people who use wheelchairs).

Accordingly, it is incorrect to say that a person has a handicap, when it is society that handicaps people who have a disability. Therefore disability can be generally defined as:

the functional consequence of impairment of the body or human functioning, leading to restrictions on a person’s mental, sensory or mobility functions to do tasks.

A disability:

- may or may not be visible
- can be caused by an accident, trauma, disease, genetics, ageing, or environmental and social factors
- is specific to each person.

Human Rights of People with a Disability

People with disabilities have the same rights as everyone else, which includes being able to enforce their rights through legal and other remedies. Some of these rights are protected under international human rights law while others are also protected in domestic legislation.

International human rights law

Australia is a party to seven core human rights treaties. People with disabilities are entitled to all of the rights articulated in each of these conventions. However, the United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides a statement of rights that are specific to people with disability and enshrines a social model conception of people with disability. ‘Disability’ does not reside in the individual as the result of some impairment, but is the result of societal and environmental barriers.
While it is not legally enforceable domestically, it is nonetheless a valuable tool that can be used to ensure that people with disabilities have access to the same rights and opportunities as everybody else.

The CRPD contains eight guiding principles these are:

- respect for inherent dignity and individual autonomy including the freedom to make one’s own choices
- non-discrimination
- full and effective participation and inclusion in society
- respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- equality of opportunity
- accessibility
- equality between men and women
- respect for evolving capacities of children with disabilities, and respect for the right of children with disabilities to preserve their identities.

**International human rights complaints mechanism and the Optional Protocol to the CRPD**

Australians are able to make complaints to the Committee on the Rights of Persons with Disabilities about violations of their rights under the CRPD. In order for a complaint to be admissible to the committee, the complainant must establish that they have exhausted all available domestic remedies and that they have been personally impacted by the violation (for more information about the complaints mechanism visit the Australian Government Attorney-General’s Department website).

**Domestic protection of human rights**

While not all of the rights articulated in international human rights law are enforceable in Australia, the right to be free from discrimination, based on disability is protected by both state and Commonwealth legislation.

The relevant legislation in Queensland is the *Anti-Discrimination Act 1991* (Qld) (Anti-discrimination Act) and the relevant Commonwealth legislation is the *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act).

**Direct or Indirect Discrimination Against People with Disabilities**

Discrimination can be either direct or indirect. Direct discrimination occurs when a person with a disability is treated less favourably than a person without a disability would be treated under the same circumstances. Under s 11 of the Anti-discrimination Act and s 6 of the Disability Discrimination Act, indirect discrimination occurs when a person is required to comply with an unreasonable condition
that they do not or are not able to comply with because of their disability, and which is likely to have a greater effect on persons with a disability.

These anti-discrimination laws contain some exemptions that make what would otherwise be a discriminatory practice acceptable under certain conditions. For example, it is not unlawful to discriminate if a person with a disability requires special services or facilities (e.g. a person’s transport from one point to another), and it would impose unjustifiable hardship to provide these. In considering unjustifiable hardship, all the relevant circumstances of the case are taken into account, including:

- the nature of the special services or facilities
- the cost of supplying the special services or facilities
- the number of people who would benefit or be disadvantaged
- the financial circumstances of the person or organisation who is being requested to provide the special services or facilities
- the nature of any benefit or detriment to all people concerned.

Making a complaint

People who believe they have been discriminated against can make a complaint to the Anti-Discrimination Commission Queensland or the Australian Human Rights Commission. These organisations can help people to decide whether it is better to make a complaint under the Commonwealth or the state anti-discrimination laws.

Process of making a complaint

Complaints must be made in writing. If anti-discrimination laws apply, the complaint will be investigated, and attempts will be made to conciliate the complaint.

If a resolution is not reached through conciliation, the person has the option of pursuing the matter in the Queensland Civil and Administrative Tribunal if the complaint was made pursuant to the Anti-discrimination Act, or to the Federal Court if the complaint was made pursuant to the Disability Discrimination Act.

For a full discussion on both the law and procedure for making a complaint about discrimination see the chapter on Discrimination and Human Rights.

Protecting Human Rights of People with Disabilities using Non-legal and Quasi-legal Mechanisms

In seeking to protect the legal rights of a person with a disability, it is important to consider the range of options available and decide which is most likely to give the desired result. Non-legal remedies can be just as effective as legal remedies.
Advocacy

In seeking to have rights recognised and protected, it can be important for a person with a disability to have an advocate to act on their behalf. An advocate is someone whose job it is to speak, act or write on behalf of the particular person in order to promote, protect and defend the rights of that person. The advocate needs to have a clear loyalty and accountability to the person with a disability.

Advocacy can be either formal or informal. A number of different types of advocacy exist within Australia. They are:

- individual advocacy—the process of standing up for the rights of someone who is being treated unfairly
- citizen advocacy—a form of individual advocacy where an individual volunteer is matched with a person whose disability means that they cannot get their needs and rights addressed on their own
- self advocacy—people who have a disability advocate for themselves as individuals or in groups
- family/parent advocacy—families or parents may adopt an advocacy stance on behalf of their family members or collectively for other people who have a disability
- legal advocacy—a specialist advocacy assistance, as well as advocacy by solicitors and barristers
- systems advocacy—advocacy groups focus on system change and broad societal changes.
  Systems advocacy is often a component of family and legal advocacy.

Mediation

Some rights issues or complaints may be able to be resolved through mediation if both parties are willing to discuss the matter and work toward a solution. However, sometimes the power imbalance between parties may mean that mediation is unsuitable. This power imbalance can be offset if the person with a disability has a support person present.

Negotiation

Negotiation may help to prevent the need for formal and costly court or tribunal proceedings. However, people with a disability may feel powerless and intimidated when trying to negotiate. A person with a disability should ask family, friends, advocates and, if possible, a lawyer to assist and support them. While this is not their legal right, it is good practice and in line with procedural fairness principles to allow a person with a disability to bring a support person along to meetings. If this is refused, written reasons for the refusal should be requested.

Complaints to ministers

Complaints about government bodies or other more general problems (e.g. lack of accessible transport) can be made to the local member of parliament. A complaint can also be made to the state and Commonwealth government ministers responsible for the area in which the problem has arisen. Local members and ministers are required to respond to complaints they receive.
The Ombudsman

The Queensland Ombudsman can investigate the decisions and actions of state government departments, prescribed and statutory authorities, public universities and local councils. Before making a complaint to the Ombudsman, the person with a complaint must first try to resolve the matter with the agency concerned using their internal complaints mechanism.

The Commonwealth Ombudsman can investigate complaints about actions and decisions of Australian Government agencies to see if they are wrong, unjust, unlawful, discriminatory or just plain unfair. The Ombudsman also seeks remedies for those affected by administrative deficiency, and acts to improve public administration generally. For more information see the chapter on *Complaints to the Ombudsman*.

Often, legal advice will be useful prior to making a complaint to either the Human Rights or Anti-Discrimination Commission. Legal representation is also useful during the conciliation process and when participating in proceedings before the Queensland Civil and Administrative Tribunal or the Federal Court. For further information see the chapter on *Discrimination and Human Rights*.

Restriction of Intellectually or Cognitively Disabled People to Prevent Harm

Some adults with an intellectual or cognitive disability can exhibit behaviours that place themselves or others at risk of harm. To manage these risks in a way that ensures people are safe, restrictions are sometimes necessary. This is known as restrictive practices.

Queensland’s restrictive practices scheme is established under pt 6 of the *Disability Services Act 2006* (Qld) (Disability Services Act) and ch 5B of the *Guardianship and Administration Act 2000* (Qld) ( Guardianship and Administration Act). This regime seeks to ensure that restrictive practices used by service providers take account of the person’s human rights and are the least restrictive ways of safeguarding them and others. The legislation applies only to:

- adults 18 years or over, who have an intellectual or cognitive disability
- people who are at risk of harming themselves or others and who receive services from government-provided and/or government-funded disability service providers.

It does not apply to families, or private or non-funded organisations.

What is a restrictive practice?

Containment

Containment means to physically prevent the free exit of the adult from the place where the adult receives disability services, other than by seclusion. However the adult is not contained if the adult has a skills deficit and cannot safely exit the premises without supervision, and the adult’s free exit from the place is prevented by the locking of gates, doors or windows.

Seclusion

Seclusion means to physically confine the adult alone, at any time of the day or night, in a room or area from which free exit is prevented.
Chemical restraint
Chemical restraint means using medication for the primary purpose of controlling the adult’s behaviour. Using medication to treat a diagnosed mental illness or medical condition is not chemical restraint.

Physical restraint
Physical restraint means using any part of another person’s body to restrict the adult’s movement for the primary purpose of controlling the adult’s behaviour.

Mechanical restraint
Mechanical restraint means using a device to restrict movement of the adult or preventing or reducing the adult injuring themselves, for the primary purpose of controlling the adult’s behaviour.

Restricting access to objects
Restricting access to objects means restricting the adult’s access to an object to prevent the adult using the object to cause themselves or others harm.

Approvals
Before gaining general approval to use restrictive practices, disability service providers must complete an assessment of the person and develop a positive behaviour support plan, which is designed to encourage positive behaviour. Family members, guardians, advocates and healthcare professionals should be consulted as part of this process.

Section 150 of the Disability Services Act provides that positive behaviour support plans must specify for each restrictive practice:

- why the restrictive practice is to be used in the circumstances
- how it is the least restrictive arrangement
- the procedure for using the restrictive practice
- the measures to ensure the adult is receiving proper care and treatment and is safeguarded
- the positive and negative effects of using the restrictive practice
- how often the arrangement will be reviewed.

For each particular restrictive practice, there may be further requirements that the support plan must include.

General approvals
The use of seclusion and containment as well as other restrictive practices used in combination with seclusion and containment must be approved by the Queensland Civil and Administrative Tribunal (QCAT). Restrictive practice guardians can approve/consent to:

- containment
- seclusion
• chemical, physical and mechanical restraint
• restricting access to objects.

If there is no restrictive practice guardian, an informal decision maker can only approve restricting access to objects.

The decision maker must be satisfied that the restrictive practice is necessary and that it is the least restrictive way to keep the adult or others safe. Approvals last for a maximum of 12 months, after which time they are reviewed by QCAT to determine whether they are still necessary. However, QCAT can review the arrangements at any time.

**Short-term approvals**

Where there is immediate and serious risk of the person harming themselves or others, short-term approvals for the use of restrictive practices can be made for periods of up to six months.

The Public Guardian approves the short-term use of containment and seclusion while approvals for short-term use of chemical, mechanical or physical restraints and restrictions to access are made by the person’s restrictive practice guardian or, in their absence, the Chief Executive of the Department of Health.

The legislation grants immunity to relevant disability service providers and individuals acting on their behalf in relation to restrictive practices, provided they have complied with the statutory requirements set out in pt 6 of the Disability Services Act.

**Disability and Medical Treatment**

If a doctor treats a person without their consent, the doctor commits an assault for which the person is entitled to bring legal action. Treatment carried out without consent in an emergency is not, however, assault (see the case of *Rogers v Whitaker* (1992) 175 CLR 479).

In some institutions, residents routinely receive medication, particularly sedative drugs. If such drugs are given against the will of the resident, especially if force is used to administer them, the administration of the drugs may amount to an assault.

Signed blanket consent to medical treatment does not automatically provide a doctor with the authority to give all forms of medical treatment.

A person who has a disability can consent to medical treatment if they are:

• capable of understanding the nature and effect of the treatment (as well as the consequences of refusing treatment)
• able to freely and voluntarily decide whether to have the treatment
• able to communicate their decision about whether to have the treatment.

If a person who has a disability is not capable of making healthcare decisions, a statutory health attorney or guardian is able to make these decisions for them (see the chapter on *Laws Relating to Individual Decision Making*).
Complaints about health services

The Office of the Health Ombudsman has the authority to hear and conciliate complaints about any unreasonable aspect of health services. It can accept complaints about:

- hospitals
- nursing homes
- some hostels and supported accommodation services
- psychiatric hospitals
- services provided in association with the use of premises for the care, treatment or accommodation of people with a physical or mental illness.

For details about the operation of the Office of the Health Ombudsman and the process of making a complaint see the chapter on Complaints Against Professionals.

Disability, Marriage, Family and Adoption

Marriage

Any person is free to marry provided they are old enough, and they understand the nature and effect of the marriage ceremony at the time of the ceremony. Usually there is no legal reason why a person with a disability may not marry, unless the nature of their disability is such that they cannot understand the nature and effect of the marriage ceremony.

In Queensland, a person’s capacity to consent to marriage is defined in sch 4 of the Guardianship and Administration Act. This test is designed to assess whether the person is capable of:

- understanding the nature and effect of the decisions about the matter
- freely and voluntarily making decisions about the matter
- communicating the decision in some way.

Children

People with a disability have the right to become parents. There is no presumption in the law that a person with an intellectual disability is an unfit parent.

Contraception

A person with a disability has the right to choose to use contraception and decide which type to use.

Sterilisation

In the case of a person under the age of 18, a sterilisation that is to be performed for non-therapeutic reasons can only be performed with the consent of the court. The relevant legislation is the Family Law Act 1975 (Cth), and applications are referred to as special medical procedure applications. When considering an application for consent for sterilisation, courts must not authorise a sterilisation that is proposed on account of its convenience as a contraceptive measure.
In the case of an adult, sterilisation can only be performed with that person’s consent. Any medical treatment performed without consent, except in an emergency, can constitute an assault for which the doctor can be held legally responsible.

However, if a person is over 18 years of age and is not able to give consent, then sterilisation falls under special healthcare matters for the purposes of the Guardianship and Administration Act. On application, QCAT can give consent for these procedures—an attorney or guardian cannot. The tribunal must decide whether or not the procedure is necessary for the adult’s health and wellbeing.

For further information where a person is not capable of giving consent, see the chapter on *Laws Relating to Individual Decision Making*.

**Abortion**

Abortion is illegal in Queensland unless the operation is performed for the preservation of the mother’s life (ss 224–225, 282 *Criminal Code Act 1899* (Qld)). It is still unclear exactly how broadly the courts will interpret the requirement that the operation be for the preservation of the mother’s life, and there are no formal legal mechanisms for obtaining consent on behalf of a woman with a disability who is unable to consent herself.

On application, QCAT can provide consent for a termination of a pregnancy to be carried out to preserve the safety of the mother where there is serious danger to her life, or physical or mental health.

**Adoption**

In general, a child cannot be adopted without the consent of the parents.

**People with disabilities as adoptive parents**

People with a disability can encounter difficulties when applying to adopt a child in Queensland.

Part 6 of the *Adoption Act 2009* (Qld) (Adoption Act) provides for the assessment of prospective adoptive parents, and div 5 outlines the basis for deciding suitability generally. Under s 122, if the person has a disability or impairment then there are additional criteria that the Chief Executive of the Department of Communities, Child Safety and Disability Services must consider in deciding if the person is suitable. These additional criteria exclude many people with a disability from being deemed suitable to be a prospective adoptive parent.

**Needs of a child with a disability**

Section 156 of the Adoption Act provides that the particular needs of a child with a disability must be taken into consideration when selecting prospective adoptive parents.

**Disability, Contracts and Consumer Protection**

**Capacity**

If a person does not have the required legal capacity to enter a contract, then any contract entered by that person will be voidable.
In deciding whether a person has legal capacity in relation to a particular transaction, particular attention is paid to the level of understanding of the person, the complexity of the transaction and the value of the property involved. The more complex the transaction and the higher the value of the property, the greater the understanding required.

Capacity has no effect on contracts for purchase of necessaries, providing a reasonable price has been paid. Necessaries are things a person needs to maintain a reasonable lifestyle (e.g. food, clothing, medical treatment and rent).

If a person who lacks legal capacity makes a gift, the gift may be able to be retrieved if it has not been given, sold or disposed of to someone else who is unaware of the donor’s incapacity. It is not necessary that the recipient of the gift ought to have realised that the disabled person did not have legal capacity.

**Mistake**

If there has been a mistake by one or both of the parties about something that is crucial to the contract, the contract may be void ab initio (void from the very beginning) or voidable (able to be terminated by one or both parties).

For a full discussion about mistakes in contracts see the chapter on *Consumers and Contracts*.

**Improper conduct**

Sometimes, a person with a disability will enter a contract because (or partly because) of a misleading statement. This is called misrepresentation.

Sometimes a misrepresentation is fraudulent (intentionally false or made without caring whether it is false). In this case, the person with a disability can normally avoid the contract and sue for damages to recover any loss suffered.

A court can also overturn transactions entered into following undue influence or unconscionable bargaining. Where a presumption of undue influence arises, it is up to the other party to prove that the person with a disability made an informed and independent decision to enter the transaction. This will be easier to prove if the person with the disability received independent advice before completing the transaction.

**Consumer protection legislation**

As well as the common law of contract outlined above, the *Competition and Consumer Act 2010* (Cth) contains a schedule that is known as the Australian Consumer Law, which deals with disputes about contracts (see the chapter on *Consumers and Contracts*).

**Seeking redress**

The legal rights outlined above are rights that a person has under the common law or legislation. There are different ways of enforcing these rights:

Advocacy is the simplest way to resolve a complaint (e.g. go directly to the other party). It may be wise to have someone else present to act as an advocate.
Complaints of breaches of consumer protection legislation can be made to the Australian Competition and Consumer Commission, the Queensland Office of Fair Trading or the relevant industry ombudsman (e.g. in banking, telecommunications or insurance). The Office of Fair Trading can also inform consumers about their rights, negotiate on a consumer’s behalf and investigate a consumer’s claims.

Complaints can be made to QCAT. The maximum amount in dispute cannot be more than $25 000.

Disability and the Criminal Justice System

A person with a disability may become involved with the criminal justice system as a victim of crime, as a person accused of a crime or as a witness. In all of these cases, the capacity of the person to give evidence may arise as an issue.

People with disabilities as witnesses

A person is only able to give evidence in court if they are considered competent to do so.

Every person is presumed to be competent to act as a witness unless it is demonstrated to the judge that they are not.

In general, to be a competent witness, a person must be able to understand the nature of the oath and have sufficient memory and capacity to express their memory. In considering whether or not a person is competent as a witness, a court will consider whether the witness’s disability will affect the reliability of evidence on the facts of the particular case. Considerations may be a witness’s capacity for observation, their ability to recollect what happened, or whether it is possible to know whether what they say is in any way related to real experience.

In Queensland, a person who is not considered by the judge to be competent to take an oath may give unsworn evidence if the judge is satisfied that they understand that the truth must be told and that they may be punished if the truth is not told.

Special witness provisions

Appearing before a court as a witness can be an intimidating experience. For some people with a disability, this prospect may be sufficient to discourage them from following a complaint through to court. However, special arrangements can be made to make a person who has a disability feel more comfortable in court.

Under pt 2 div 4 of the Evidence Act 1977 (Qld), a court can make exceptions to the normal mode of giving evidence for a special witness. A special witness is a person who, if required to give evidence in accordance with the usual rules and practice of the court, would:

- as a result of intellectual impairment or cultural differences be likely to be disadvantaged as a witness
- be likely to suffer severe emotional trauma
- be likely to be so intimidated as to be disadvantaged as a witness.

The orders that the court may make are:
• in criminal proceedings, to exclude the person charged from the court room or obscure them from the view of the special witness, while the special witness is giving evidence or is in court for any other purpose
• to exclude all persons other than those nominated by the court from the court room
• to order that the special witness give evidence in a room other than the court room, and from which all persons other than those nominated are excluded
• to approve a particular person to be present while the special witness is giving evidence or is required to appear in court for any purpose, in order to provide emotional support to the special witness
• to order that a video tape of the evidence of the special witness be made, and that the videotaped evidence be viewed and heard in the proceedings instead of direct testimony.

**People with disabilities as victims**

According to the law, a person with a disability who is a victim of crime has the same rights to the protection and assistance of the law as any other person. Often it does not work this way.

Many factors can cause the less favourable treatment of a person with a disability. A victim with an intellectual or psychiatric disability may be less likely to complain about an infringement of legal rights. Even when a person with a disability does manage to contact the police or someone does on their behalf, the police may decide not to prosecute because they feel the person with a disability will not be a good or reliable witness.

**People with disabilities as offenders**

Some criminal acts (e.g. murder) require that the person committing the offence had the intention to commit it (or to commit the act that led to the offence). Some people with a disability may be incapable of forming an intention to commit a crime due to their disability. Other criminal acts (e.g. assault) do not require that the person committing the offence had any such intention. However, even in these cases, a person with a disability may not be criminally responsible for an act where they could not understand what they were doing.

**Support person**

In Queensland, when police interview a person with a disability, they are required to have a support person (independent person) present. The support person may be a parent or friend of the person with disability. People with a disability are also entitled, before they are questioned, to speak with a support person without being overheard. Moreover, if it becomes apparent to the police that a person they have charged has a disability, the police must suspend questioning until they have allowed the person to speak with a support person (s 422 Police Powers and Responsibilities Act 2000 (Qld) (PPR Act)).

**Interpreters**

A person with a hearing impairment is entitled to have both an interpreter and an independent person present during the interview. Under both the Crimes Act 1914 (Cth) and the PPR Act, federal and
Queensland police officers investigating a case must arrange for an interpreter to be present, if they believe that the person under arrest is unable to communicate verbally due to a physical disability.

**Consequences of unfair treatment**

The police are legally bound to follow the requirements outlined above. A failure to comply with them may result in the officers being personally penalised. In addition, any confession obtained in an interview in which these procedures have not been followed may be inadmissible as evidence.

When doubt exists about the fairness of an interrogation of a person with a disability or the voluntariness of a confession, an application should be made to the court to exclude such evidence.

**Defences**

The two defences most commonly pleaded by people with a severe or profound intellectual or psychiatric disability are insanity and diminished responsibility.

Insanity is a complete defence, leading to a finding of not guilty. Someone who is found not guilty in this way may still be detained in an institution.

The defence of diminished responsibility is only available in Queensland for murder charges to reduce the charge to manslaughter.

These and similar matters are dealt with under the *Mental Health Act 2000* (Qld) (*Mental Health Act*), which is designed to protect the rights of people with mental illness (for further information see the chapter on *Mental Health Laws*). The *Mental Health Act* also complements the provisions of the Guardianship and Administration Act, which are addressed in the chapter on *Laws Relating to Individual Decision Making*.

**Fitness to plead and to stand trial**

Every accused person is asked to plead guilty or not guilty. Silence is assumed to be a plea of not guilty. A person who is judged to be unfit to plead may still be detained in custody (in jail or a psychiatric hospital) until they are fit to plead.

An accused person must be able to understand the significance of telling the truth to the court, comprehend the nature of the charge and assist with their defence (e.g. able to instruct their solicitor). Someone considered unfit to stand trial can be kept in custody until they are fit to stand trial.

**Alternatives to imprisonment**

Imprisonment may be an inappropriate sentence for many people with a disability. In the prison environment, a person with a disability may be vulnerable. It is also likely that imprisonment, for many people with a disability, is unlikely to fulfil any of the purposes of punishment such as retribution, rehabilitation, deterrence and community protection.

Even when a person with a disability has been convicted of a serious offence, alternatives to imprisonment exist.

A solicitor who is aware of their client’s disability should attempt to establish whether the client has the ability and willingness to comply with any conditions that might be imposed as part of an
alternative punishment. For example, if a person with a disability is placed on a good behaviour bond, they must understand and agree to the ramifications of this before it can be imposed.

Legal representatives should also be aware of the resources and support services available in the community for clients with disabilities.

**Disability, Wills and Estates**

A person with a disability, like anyone else in the community, can make a will as long as they have the capacity to do so.

**Capacity to make a will**

To make a will, a person must be of sound mind, memory and understanding. They cannot be delusional in a way that impacts decisions about disposing of the estate. This is described as having testamentary capacity and means that they must understand:

- that a will is a document saying what is going to happen to their property when they die
- the amount and type of property they have
- who has a reasonable claim on their property.

If a person with a disability has this level of understanding, they are entitled to make a will.

**Precautions when making a will**

If there is any likelihood a person’s capacity to make a will may be challenged after their death, it is wise to take precautions to protect the validity of the will. For example it may be advantageous:

- to use a witness who can attest to the person’s capacity. The witness could be a doctor, psychologist or psychiatrist who could sign a statement that they were satisfied that the testator had testamentary capacity, and knew and approved of the contents of the will
- to draft the will in plain, clear language so that the testator understands it; however, they do not need to understand all of the legal terms
- to use a solicitor experienced in will making and working with people with disabilities. The solicitor should keep detailed notes of the circumstances and state of mind of the testator at the time of making the will.

**Knowing and approving a will**

A person making the will must know and approve its contents.

**Persons without testamentary capacity**

A person can apply to the Supreme Court for an order that provides the authority to draft, amend or revoke a will on behalf of a person who does not have testamentary capacity (see ss 21–27 Succession Act 1981 (Qld)). The court may only make the order if:

- the person in relation to whom the order is sought lacks testamentary capacity
- the person is alive when the order is made
• the court has approved the proposed will, alteration or revocation (s 21).

Providing for a person with a disability in a will

When a parent fails to provide adequately for their child in their will, that child is able to make a family provisions application (see the chapter on Wills and Estates). When providing for a person with a disability in a will, it is important to consider the age of that person, their future needs and their ability to manage finances. An intended beneficiary who is over the age of 18 and capable of managing property can be left property outright in a will—this is described as a direct gift. If a direct gift is left to a person who lacks capacity to manage it, the executor may encounter difficulties when trying to administer the estate. If an intended beneficiary is not able to manage property due to their disability or their age, it may be left to them in a trust. The trust can be established in the will. This type of trust is described as a testamentary trust.

It is not wise to leave the share of the estate intended for the person with a disability to another family member on the understanding that they will provide for the person with a disability. It immediately places the family member in a position that may give rise to a conflict of interest.

What is a trust?

A trust is a concept by which property is transferred and managed by a person for the benefit of another person (called a beneficiary). Two main types of trusts are generally used—fixed trusts and discretionary trusts.

Fixed trusts

Fixed trusts clearly state the dollar amount or share of the property to be distributed to the beneficiary. For example, the trustee may be required to distribute $10,000 annually to the beneficiary. A fixed trust does not allow the trustee to use their discretion to respond to changing circumstances and needs of the beneficiary.

Discretionary trusts

The discretionary trust is a flexible way of making provisions for a person with a disability. A discretionary trust allows the trustee to respond to needs of the beneficiary as they arise. For example, under a discretionary trust, the trustee may be directed to invest the capital and then to use the income from investing for the benefit of the person with a disability. Alternatively, the trustee may have an absolute discretion to use both the income and the capital in the interests of the beneficiary.

A disadvantage of the discretionary trust is that it may be more difficult to hold the trustee accountable for the way in which they use the money generated from the trust.

It is important to note that assets and money held in a trust for the benefit of a person with a disability are considered to be assets for the purpose of determining a person’s entitlement to the disability support pension and public housing. If a person with a disability will be relying on the disability support pension and/or public housing, and they will receive a benefit from a will, it is important to get legal and accounting advice to ensure that these entitlements are not affected. One option is to consider establishing a Special Disability Trust; these are special trusts that have been designed to enable people with ‘severe disability’ (the characteristics outlined in s 1209M of the Social Security
Act 1991 (Cth)) benefit from funds that are not taken into consideration when determining that person’s entitlement to the pension and/or housing. More information about special disability trusts is available at the Australian Government Department of Social Services website.

The duties and powers of trustees
In addition to the duties and powers stipulated in a will, a trustee also has certain powers and duties laid down by law (for further information see the chapter on Wills and Estates).

Restrictions upon trustees
One method of placing some restrictions upon the way a trustee exercises their discretion is to require the trustee to administer the trust fund in accordance with certain stated principles. If the trustee fails to exercise their discretion in accordance with the expressed principles of the trust, the beneficiary may seek to have the trustee’s acts and decisions reviewed by the Supreme Court under the Trusts Act 1973 (Qld).

It can also be useful to include a memorandum of wishes in a trust deed. The memorandum of wishes is not binding on the trustee, but is a way for a testator to spell out to the trustee their wishes for the management of the trust fund. This is like a personal brief to the trustee expressing the subjective aspects of the management of the trust fund that cannot be included in the trust deed itself.

Choosing a trustee
It is common to appoint more than one trustee and to appoint the same people appointed as executors in a will. A testator should appoint trustees whom they can trust to carry out their wishes regarding the child with a disability. At least one trustee should be skilled in financial and property management or able to seek appropriate professional advice.

Professional trustees
Parents of people with a disability can appoint private trustee companies, the Public Trustee (an organisation providing trustee services) or private individuals as trustees.

Other children as trustees
Parents sometimes consider appointing one or more of their other children to act as trustee for the child with a disability. If those other children are residuary beneficiaries (i.e. they take the property that is left over when the person dies) there may be a conflict between their own interests and that of their sibling. Such potential conflict may be avoided by appointing more than one trustee (e.g. one trustee who is a child and one who is not), so that any conflict of interest one trustee may have can be guarded against by the co-trustee.

Providing for children with a disability under 18 years of age
When making provisions in a will for a child with a disability under the age of 18, two aspects of the child’s needs must be considered—guardianship (personal welfare) and financial provision.

Testamentary guardian
A testamentary guardian may be appointed by the parents in a will to take over the parents’ role as guardians of their children after they die. A testamentary guardian has all the powers, rights and responsibilities for making decisions about the long-term care, welfare and development of the child.
that are ordinarily vested in a guardian such as education or religion. The testamentary guardian’s powers only apply until the child reaches the age of 18 (pt 5A Succession Act 1981 (Qld)). It is important that consideration is given to making an appointment that is in the best interest of the child to avoid disputes about the appointment.

Financial provision

Children under the age of 18 cannot legally own or manage property in their own right. The property must be held in a trust until the child turns 18.

Elections, Capacity and Assistance for Disabled Voters

It is compulsory for all eligible people to enrol and vote in any local, state or federal election, however, many people with a disability do not vote, even though they are capable of understanding the electoral process.

People who can vote

A person can vote if they:

- are 18 years of age or older
- are an Australian citizen
- have lived at their present address for at least one month.

People who cannot vote

People are not entitled to vote if they are incapable of understanding the nature and significance of enrolment and voting. Usually the doctor of a person with a disability will decide whether they have the capacity to vote.

Assistance with voting

At both Commonwealth and state elections, arrangements can be made to assist people with a disability to exercise their right to vote. For example, people may be allowed a postal vote, a vote through an electoral visitor or pre-poll voting.

People who are able to understand the nature of voting but are physically unable to sign a form can either authorise another person to sign the enrolment form, fill in the voting form or make their mark on the enrolment form. The Electoral Commission of Queensland (ECQ) has offered blind and vision-impaired electors the opportunity to have a secret vote using a Braille ballot paper and postal voting.

Sections 234 and 235 of the Commonwealth Electoral Act 1918 (Cth) provide for persons with disabilities to seek assistance to vote or to vote outside of a polling booth. Additionally, ss 23 and 24 of the Disability Discrimination Act prohibit discrimination in relation to access to premises and to services. The administration of Commonwealth laws and programs (s 29 Disability Discrimination Act) is relevant to how federal elections are conducted.
Legal Notices

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