

ENSURING EQUALITY FOR PERSONS WITH COGNITIVE DISABILITIES IN CONSUMER CONTRACTING: AN INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVE

YVETTE MAKER,^{*} ANNA ARSTEIN-KERSLAKE,^{*} BERNADETTE MCSHERRY,[†]
JEANNIE MARIE PATERSON[‡] AND LISA BROPHY^{‡‡}

This article explores the implications of the United Nations Convention on the Rights of Persons with Disabilities ('CRPD') for the exercise of consumer rights and consumer protection of persons with cognitive disabilities in Australia. It identifies several limitations of existing consumer protection laws and principles in realising the rights of persons with disabilities to equality and non-discrimination, to live independently and be included in the community, to accessibility of services and information and to equal recognition before the law. Most centrally, the emphasis in Australian consumer protection law on setting aside contracts where consent is invalid or vitiated has potentially discriminatory consequences and does not offer the means for contracting parties to exercise their legal capacity and enter contracts for goods and services on an equal basis with others. Models of 'supported decision-making' — which respect the legal capacity of the individual while providing support to exercise that capacity — are proposed as a necessary complement to the existing consumer protection regime. Drawing on the findings of a qualitative study, the article identifies existing barriers to consumer transactions for persons with cognitive disabilities and explores the role of supported decision-making in removing those barriers. The article concludes by proposing an approach to supporting persons with cognitive disabilities in the conduct of consumer transactions by prioritising accessibility of information, privacy and non-discrimination and supported decision-making.

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^{*} Senior Research Associate, Melbourne Social Equity Institute, The University of Melbourne (maker.y@unimelb.edu.au). The authors thank Rachel Hale for her contribution to the pilot study discussed in this paper, and the research participants and services (Mind Australia and Scope) that supported the research. We also thank Alex Callahan for her research assistance with this paper, and the two anonymous peer reviewers for their useful comments. The authors gratefully acknowledge funding support provided by Melbourne Law School.

^{*} Senior Lecturer, Melbourne Law School, The University of Melbourne.

[†] Foundation Director, Melbourne Social Equity Institute and Adjunct Professor of Law, Melbourne Law School, The University of Melbourne and Faculty of Law, Monash University.

[‡] Associate Professor, Melbourne Law School, The University of Melbourne.

^{‡‡} Associate Professor, Centre for Mental Health, Melbourne School of Population and Global Health, The University of Melbourne and Mind Australia Principal Research Fellow.

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I INTRODUCTION

Consumer transactions are an essential element of modern capitalist systems.¹ The assumption underlying the free market economy is that individuals will — if they have the freedom to do so — engage in contractual relationships that will maximise their own welfare and promote market efficiency.² Such benefit and efficiency will ultimately, in theory, be passed on to the wider society. In the ideal market on which the capitalist system is premised, it is the freedom to contract that allows the individual to protect himself or herself from undesirable or substandard transactions. For example, if a consumer enters into a contract for credit, water or power, and the service does not arrive or meet reasonable expectations, the consumer can terminate the contract. If the market is working, the consumer should have multiple alternative providers to choose from, and the unsuitable provider should eventually go out of business. In other words, consumers will be seeking more efficient and beneficial contractual relationships.³ While a pure capitalist society does not exist, capitalist principles are very much alive in modern economies and marketplaces.⁴

The premise of consumer choice informs the market structure and drives policy decisions in modern socio-economic systems like Australia.⁵ In particular, the premise underlies the reframing of services previously provided by the state as privatised consumer services. Consumer transactions are critical for access to most basic or essential services, including water, electricity and gas and telecommunications. These essential services are, in turn, an important aspect of social participation and inclusion. They are also crucial for ensuring that persons with disabilities have an adequate standard of living. The full and effective social participation and inclusion of persons with disabilities is a guiding principle of the United Nations *Convention on the Rights of Persons with Disabilities* ('CRPD').⁶ Yet persons with disabilities around the world, including in Australia, frequently face barriers to exercising their rights as consumers. Chief

¹ For a description of the role of consumer transactions in modern economies, see generally Yanis Varoufakis, *Foundations of Economics: A Beginner's Companion* (Routledge, 2002) 30–93.

² For a discussion of utility maximisation and instrumental rationality, see *ibid* 43–117.

³ *Ibid*.

⁴ See generally Yanis Varoufakis, *Talking to my Daughter about the Economy: A Brief History of Capitalism* (Vintage Publishing, 2017).

⁵ See generally Varoufakis, *Foundations of Economics*, above n 1.

⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) Preamble para (n), art 3(a) ('CRPD').

among these is the deprivation of legal capacity of persons with disabilities⁷ — especially persons with cognitive disabilities.⁸ The *CRPD* emphasises that states party must recognise the legal capacity of all persons with disabilities and furthermore obliges states party to provide appropriate support for persons with disabilities to exercise that legal capacity.⁹

This article discusses the human rights obligations that states party and private entities have in relation to ensuring that consumer transactions are accessible for all, including persons with cognitive disabilities. The article is in three main parts. Part II sets out the obligations that the *CRPD* places on states party (including Australia) regarding the participation of persons with cognitive disabilities in consumer transactions, and identifies the obligation to provide support for decision-making as an essential foundation to the exercise of consumer rights. Part III discusses the Australian situation, outlining the major shortcomings of the consumer protection regime in meeting these obligations. Part IV introduces a qualitative study conducted by the authors to identify key human rights issues that may affect persons with cognitive disabilities when contracting, or attempting to contract, for basic or essential services. It further canvasses the types of support that Australians with cognitive disabilities require to improve their access to participation in these transactions.

II DISABILITY HUMAN RIGHTS AND CONSUMER TRANSACTIONS

A *The Convention on the Rights of Persons with Disabilities*

Australia ratified the *CRPD* in July 2008.¹⁰ The *CRPD* entered into force on 3 May 2008,¹¹ and is renowned for having been negotiated and adopted more quickly than other UN conventions. It also has the distinction of having had unprecedented levels of involvement from civil society in its drafting — specifically, the people to whom the *Convention* is addressed, persons with disabilities and their representative organisations.¹² The *CRPD* affirmed the application of universal human rights to persons with disabilities and specified

⁷ The term ‘legal capacity’ refers to the capacity to be a holder of rights under the law as well as the capacity ‘to engage in transactions and create, modify or end legal relationships’: 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) para 12 (*‘General Comment No 1’*).

⁸ The term ‘cognitive disabilities’ is a broad term that encompasses all impairments that may affect cognition. The term ‘persons with cognitive disabilities’ is used in this paper to refer to persons with a range of disabilities, including intellectual disabilities, Alzheimer’s disease, autism, acquired brain injuries, mental health challenges and so on, who experience difficulties regarding: the ability to learn, process, concentrate on, remember or communicate information; awareness; and/or decision-making.

⁹ *CRPD* art 12.

¹⁰ *CRPD*; United Nations, *Status of Treaties: Convention of the Rights of Persons with Disabilities* (5 May 2018) United Nations Treaty Collection <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&clang=_en#EndDec> archived at <<https://perma.cc/P769-U6Z4>>.

¹¹ United Nations, *Status of Treaties*, above n 10.

¹² Rosemary Kayess and Phillip French, ‘Out of Darkness into Light? Introducing the *Convention on the Rights of Persons with Disabilities*’ (2008) 8 *Human Rights Law Review* 1, 3–4.

the obligations of states party to ensure that human rights protections extended to persons with disabilities without discrimination.¹³

The *CRPD* sets out that ‘disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others’.¹⁴ This reflects and extends the ‘social model’ of disability that was developed by members of the disability rights movement in the 1980s and 1990s.¹⁵ The social model was proposed as a corrective to the traditional ‘medical’ or ‘individual’ model that has long dominated law and policy-making.¹⁶ This traditional model views disability as a deficit to be medically remedied or ameliorated. Mike Oliver points out that under this model, disability is viewed as resulting from ‘personal tragedy’ — ‘some terrible chance event which occurs at random to unfortunate individuals’.¹⁷ Theresia Degener explains that disability ‘is seen as a deviation from the normal health status. Exclusion of disabled persons from society is regarded as an individual problem and the reasons for exclusion are seen in the impairment’.¹⁸ The social model, as reflected and extended in the *CRPD*, rejects the traditional medical model of disability and embraces disability as a social construct.¹⁹ This means acknowledging that, while individuals may experience a physical, mental, intellectual or sensory impairment that affects their appearance or functioning, people are only ‘disabled’ to the extent that society creates barriers to their ability to live an independent life and to participate and be fully included in society on an equal basis with others.²⁰ This perspective repositions impairment as an element of human diversity.²¹ Recognising disability as an inherent aspect of humanity but not a barrier to the universal enjoyment of human rights creates an assumption that diversity must be positively accommodated in order to ensure that all people’s human rights are met.²² The *CRPD* enshrines the social model of disability in international human

¹³ United Nations, ‘Committee Negotiating *Convention on Rights of Disabled Persons* Concludes Current Session on Persons with Disabilities’ (Press Release, SOC/4680, 12 August 2005) <<http://www.un.org/press/en/2005/soc4680.doc.htm>> archived at <<https://perma.cc/8TVW-2566>> archived at <<https://perma.cc/M5KK-7YDW>>. Cf Kayess and French, above n 12, 20.

¹⁴ *CRPD* Preamble para (e).

¹⁵ Theresia Degener, ‘Disability in a Human Rights Context’ (2016) 5 *Laws* 35.

¹⁶ Mike Oliver, ‘The Individual and Social Models of Disability’ (Paper presented at the Joint Workshop of the Living Options Group and the Research Unit of the Royal College of Physicians on People with Established Locomotor Disabilities in Hospitals, 23 July 1990) 2.

¹⁷ *Ibid* 3.

¹⁸ Degener, above n 15, 36–7.

¹⁹ See Mike Oliver, ‘The Social Model in Action: If I Had a Hammer’ in Colin Barnes and Geof Mercer (eds), *Implementing the Social Model of Disability: Theory and Research* (Disability Press, 2004) 18.

²⁰ Jenny Morris, ‘Impairment and Disability: Constructing an Ethics of Care that Promotes Human Rights’ (2001) 16 *Hypatia: A Journal of Feminist Philosophy* 1; Tom Shakespeare, ‘The Social Relations of Care’ in Gail Lewis, Sharon Gewirtz and John Clarke (eds), *Rethinking Social Policy* (Open University, 2000) 52.

²¹ Degener, above n 15.

²² See Gerard Quinn and Theresia Degener, ‘The Moral Authority for Change: Human Rights Values and the Worldwide Process of Disability Reform’ in Gerard Quinn and Theresia Degener (eds), *Human Rights and Disability: The Current Use and Future Potential of United Nations Human Rights Instruments in the Context of Disability* (United Nations, 2002) 13, 13–16.

rights law, and obliges states party to focus their efforts on the social causes of disability that produce and perpetuate the marginalisation of persons with disabilities in many spheres of life.

The *CRPD* has implications for millions of people worldwide. According to the World Health Organization ('WHO'), there are more than 1 billion persons with disabilities (approximately 15 per cent of the world's population).²³ The WHO also reports that persons with disabilities endure poorer health outcomes, lower educational achievements, less economic participation and higher rates of poverty than persons without disabilities.²⁴ As of 2015, approximately 18 per cent of Australians had a disability (or 4.3 million people).²⁵ The *CRPD* monitoring mechanism — the Committee on the Rights of Persons with Disabilities ('the Committee') — has highlighted a range of disability human rights concerns in Australia including the high incidence of violence (including sexual violence) against women with disabilities,²⁶ poor compliance with accessibility standards and regulations,²⁷ the legalisation and use of involuntary medical treatment (especially mental health treatment),²⁸ the practice of involuntary or coerced sterilisation of persons with disabilities,²⁹ the exclusion of some persons with disabilities from the federal electoral roll on the basis of 'unsound mind',³⁰ and the use of substituted decision-making systems (such as guardianship) that violate the right to equal recognition before the law.³¹

B *Human Rights Principles Relevant to Consumer Transactions*

Consumer transactions are a part of daily living. They encompass everything from purchasing food at a market to signing up for life insurance or entering a mortgage for the purchase of a home. The ability to contract for basic or essential services — like utilities, telecommunications, banking and insurance — is also an important precursor to full social and economic participation. For instance, living independently and being included in the community — a right enshrined in art 19 of the *CRPD* — will only be possible in some societies and communities if persons with disabilities can connect utilities of their choice to their homes, access telecommunications services like mobile telephones and

²³ World Health Organization and The World Bank, 'Summary World Report on Disability' (Report No WHO/NMH/VIP/11.01, 2011) 7 <http://apps.who.int/iris/bitstream/10665/70670/1/WHO_NMH_VIP_11.01_eng.pdf/> archived at <<https://perma.cc/QR2T-P59T>>.

²⁴ Ibid 11.

²⁵ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings*, 2015 (29 June 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?Opendocument>> archived at <<https://perma.cc/6N9G-X7UN>> archived at <<https://perma.cc/6N9G-X7UN>>.

²⁶ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Australia, Adopted by the Committee at its Tenth Session (2–13 September 2013)*, 10th sess, 118th mtg, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) para 16.

²⁷ Ibid para 20.

²⁸ Ibid paras 33–4.

²⁹ Ibid para 39.

³⁰ Ibid para 51.

³¹ Ibid para 24.

internet services and arrange payment for those services via credit cards and/or bank accounts.³²

There has long been debate over whether consumer rights are (or should be) recognised as human rights.³³ A number of internationally recognised human rights, particularly the economic and social rights that have been set out in the *International Covenant on Economic, Social and Cultural Rights*,³⁴ can only be fully implemented through the introduction of consumer protection measures.³⁵ The application of many of these rights to persons with disabilities is reaffirmed in the *CRPD*. For example, arts 4 and 5 of the *CRPD* require states party to recognise that ‘all persons are equal before and under the law’³⁶ and to prohibit and eliminate discrimination on the basis of disability ‘by any person, organisation or private enterprise’.³⁷ Article 5 also requires that reasonable accommodation be provided to persons with disabilities, meaning:³⁸

necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.³⁹

These articles impose on states party an obligation to ensure that persons with disabilities are not discriminated against in their dealings with private entities, including entities providing goods and services.

Article 9 of the *CRPD* addresses accessibility, and obliges states party to take measures to ensure that persons with disabilities have access — on an equal basis with others — to transportation, information and communications and other facilities and services open or provided to the public.⁴⁰ In the case of *Nyusti v Hungary*, the Committee elaborated on the extent of the obligation of states party to ensure that private entities eliminate discrimination and provide accessibility.⁴¹ In that case, which concerned the accessibility of banking services for blind or visually impaired persons in Hungary, the Committee recommended that the Hungarian government

create a legislative framework with concrete, enforceable and time-bound benchmarks for monitoring and assessing the gradual modification and

³² See Yvette Maker et al, ‘Supporting People with Decision-Making Impairments: Choice, Control and Consumer Transactions’ (2017) 24 *Journal of Law and Medicine* 756, 758.

³³ See Iris Benörh and Hans W Micklitz, ‘Consumer Protection and Human Rights’ in Geraint Howells et al (eds), *Handbook of Research on International Consumer Law* (Edward Elgar, 2010) 18.

³⁴ *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

³⁵ Sinai Deutch, ‘Are Consumer Rights Human Rights?’ (1994) 32 *Osgoode Hall Law Journal* 537, 562.

³⁶ *CRPD* art 5(1).

³⁷ *Ibid* arts 4(1)(e), 5(2).

³⁸ *Ibid* art 5(3).

³⁹ *Ibid* art 2.

⁴⁰ *Ibid* art 9.

⁴¹ Committee on the Rights of Persons with Disabilities, *Communication No 1/2010: Views Adopted by the Committee at its Ninth Session (15–19 April 2013)*, 9th sess, UN Doc CRPD/C/9/D/1/2010 (21 June 2013) (‘*Nyusti v Hungary*’).

adjustment by private financial institutions of previously inaccessible banking services provided by them into accessible ones.⁴²

Other articles of the *CRPD* imply the need to protect and empower persons with disabilities when they act as consumers. As noted above, art 19 describes the right to live independently and be included in the community.⁴³ It requires states party to ensure that persons with disabilities have equal choice as others over their place of residence, access to ‘a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community’ and equal access to mainstream community services and facilities.⁴⁴ According to the Committee, this also means that services and facilities such as the internet must be ‘available, universally accessible, acceptable and adaptable for all persons with disabilities within the community’.⁴⁵ Article 21 affirms that the rights of freedom of expression and opinion, and to access information, are held by all persons with disabilities.⁴⁶ It requires that information intended for the public be made available in accessible formats and imposes an obligation on states party to urge private entities that provide services to the public to do so in accessible and usable formats.⁴⁷

C *Equal Recognition Before the Law: A Precursor to the Exercise of Consumer Rights*

Article 12 of the *CRPD* ‘reaffirm[s] that persons with disabilities have the right to recognition everywhere as persons before the law’.⁴⁸ It also requires that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.⁴⁹ It places an obligation on states party to provide access to the support that persons with disabilities may require in exercising their legal capacity.⁵⁰ In short, it means that the law must recognise all persons, including all persons with disabilities, as legal decision-makers with legal agency, and states party must provide the support that is necessary for all persons to exercise their decision-making rights.

The Committee has made it clear that legal capacity is not the same as mental capacity.⁵¹ The Committee defines mental capacity as ‘the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental

⁴² Ibid para 10(2)(a). See Oliver Lewis, ‘*Nyusti and Takács v Hungary: Decision of the UN Committee on the Rights of Persons with Disabilities*’ (2013) 4 *European Human Rights Law Review* 418.

⁴³ *CRPD* art 19.

⁴⁴ Ibid.

⁴⁵ Committee on the Rights of Persons with Disabilities, *General Comment No 5 (2017) on Living Independently and Being Included in the Community*, UN Doc CRPD/C/GC/5 (27 October 2017) para 32.

⁴⁶ *CRPD* art 21.

⁴⁷ Ibid arts 21(a), (c).

⁴⁸ Ibid art 12(1).

⁴⁹ Ibid art 12(2).

⁵⁰ Ibid art 12(2)–(3).

⁵¹ *General Comment No 1*, UN Doc CRPD/C/GC/1, para 13.

and social factors'.⁵² The Committee has stated that, '[u]nder article 12 of the *Convention*, perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity'.⁵³ Article 12 is a direct challenge to the tendency for the legal personhood and capacity of persons with disabilities to be unrecognised, or denied, in law, policy and practice.⁵⁴ It can no longer be assumed (as was traditionally the case) that an actual or perceived lack of mental capacity means that a person should not or cannot have legal capacity to make their own decisions.⁵⁵ This is also a challenge to regimes of 'substitute[d] decision-making', where guardians or others are appointed to act in the 'best interests' of people who are considered unable to make their own decisions.⁵⁶

Article 12 also specifies that states party must provide safeguards to prevent abuse in relation to this right, including ensuring that, most importantly, 'measures relating to the exercise of legal capacity respect the rights, will and preferences of the person'.⁵⁷ Finally, it explains that persons with disabilities have equal rights to 'own and inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit'.⁵⁸

In the context of consumer transactions, art 12 means that persons with cognitive disabilities must have their legal capacity to contract recognised on an equal basis with others. This requires that the basis for limitations on an individual's legal capacity to contract are non-discriminatory in both purpose and effect — in line with the definition of discrimination in art 2 of the *CRPD*. Where the state limits an individual's legal capacity to contract, it must do so on an equal basis for people with and without cognitive disabilities.

Laws that limit an individual's legal capacity to contract vary by jurisdiction and are often found in multiple areas of the law.⁵⁹ For example, substituted decision-making laws — such as trusteeship, guardianship, conservatorship and interdiction — often deny an individual subjected to them the right to contract.⁶⁰

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ See Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity' (2014) 10 *International Journal of Law in Context* 81; Bernadette McSherry, 'Legal Capacity under the *Convention on the Rights of Persons with Disabilities*' (2012) 20 *Journal of Law and Medicine* 22, 24.

⁵⁵ *General Comment No 1*, UN Doc CRPD/C/GC/1, paras 14–15.

⁵⁶ *Ibid* paras 27–8.

⁵⁷ *CRPD* art 12(4).

⁵⁸ *Ibid* art 12(5).

⁵⁹ See, eg, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Hungary*, 8th sess, UN Doc CRPD/C/HUN/CO/1 (22 October 2012) para 26; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Periodic Report of Argentina*, 8th sess, UN Doc CRPD/C/ARG/CO/1 (8 October 2012) paras 19–20, 31–2; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Lithuania*, 15th sess, UN Doc CRPD/C/LTU/CO/1 (11 May 2016) paras 25–6.

⁶⁰ See, eg, Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Ethiopia*, 16th sess, UN Doc CRPD/C/ETH/CO/1 (4 November 2016) paras 25–6; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Mauritius*, 14th sess, UN Doc CRPD/C/MUS/CO/1 (30 September 2015) paras 21–2; Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of the Republic of Korea*, 12th sess, CRPD/C/KOR/CO/1 (29 October 2014) paras 47–8.

This constitutes a denial of legal capacity to contract. Many jurisdictions also have laws that invalidate a contract where the individual can, retrospectively, be found to have lacked the legal capacity to contract. A person can be found to lack the legal capacity to contract for several reasons, including minority age and lacking ‘mental capacity’. There are also laws that invalidate a contract where the contract was entered into under circumstances that are said to vitiate consent, such as through undue influence, duress, misrepresentation or unconscionable conduct.⁶¹ The purpose of these laws is to prevent unfair contracting practices and to protect individuals who are viewed as ‘vulnerable’ consumers from exploitation or abuse. These laws may also have the effect of denying the legal capacity of the contracting parties retrospectively. They essentially determine that the law will not recognise the exercise of legal capacity to enter into these kinds of contract because it judges that consent is not valid or has been vitiated.

When such denials of legal capacity to contract are applied equally to all, they are an important part of contract law, preserving the integrity of the bargaining process, as well as an important part of ensuring equality in market-based systems.⁶² Problems arise when such laws apply differently to certain groups, or when they affect certain groups differently, such as persons with cognitive disabilities. These circumstances amount to a violation of the human right to legal capacity set out in art 12 of the *CRPD*. They may also have significant negative effects on the socio-economic status of the disenfranchised group. This occurs, for example, where persons with cognitive disabilities are disproportionately placed under trusteeship or guardianship and lose their legal capacity to contract. It also happens where a person is assumed to lack capacity to contract or to be vulnerable to undue influence and other vitiating circumstances simply because they have a cognitive disability. This constitutes unfair stereotyping of persons with cognitive disabilities and can amount to discrimination.

Another problem arises where all laws related to denial of legal capacity to contract may apply equally — and may even have equal effects — yet persons with cognitive disabilities are disadvantaged simply because they are not being provided with the support required for the exercise of legal capacity. Paragraph 3 of art 12 of the *CRPD* requires that states party provide access to support for the exercise of legal capacity. A common form of such support has been termed ‘supported decision-making’; it gives primacy to a person’s will and preferences and ensures that his or her rights are respected.⁶³ Support for exercising legal capacity can take the form of, for example, support with voting, support when interacting with the justice system, and support to enter contracts and financial transactions. Different levels of support may be necessary depending on a person’s circumstances, including the nature of the disability and the disabling barriers he or she is subject to. These can range from informal support (accessible information, accessible buildings, and ‘circles of support’ involving

⁶¹ See generally Jeannie Marie Paterson and Gerard Brody, “‘Safety Net’ Consumer Protection: Using Prohibitions on Unfair and Unconscionable Conduct to Respond to Predatory Business Models” (2015) 38 *Journal of Consumer Policy* 331.

⁶² See Eliza Varney, ‘Redefining Contractual Capacity? The UN *Convention on the Rights of Persons with Disabilities* and the Incapacity Defence in English Contract Law’ (2017) 37 *Legal Studies* 493.

⁶³ *General Comment No 1*, UN Doc CRPD/C/GC/1, para 29.

trusted family members and friends in decision-making) to more formal support arrangements (such as formal ‘representation agreements’ and supported decision-making personnel).⁶⁴ In the context of consumer transactions, supported decision-making could be facilitated through multiple means. This includes one or more support persons throughout the transacting process, creating contracts that are easy to read, providing additional information for people to better understand the contracts and providing extra time and support for reading and understanding the contract.⁶⁵

In summary, article 12 of the *CRPD* establishes that persons with cognitive disabilities have an equal right to exercise legal capacity to contract and that states party must provide access to the support that may be required for the exercise of legal capacity to contract. This requires research into the types of support that persons with cognitive disabilities would like when entering into consumer transactions.⁶⁶ It also requires a collaboration between industry, persons with disabilities and policymakers to ensure that appropriate supports are made available. Finally, it requires a review of contract law, consumer protection law and other areas of the law — such as guardianship and other substituted decision-making laws — to consider whether it meets the requirements of art 12, in terms of the equal recognition of legal capacity and the availability of safeguards and supports for exercising that capacity. The next section sets out the Australian approach to capacity to contract, and demonstrates some of its key shortcomings in promoting the rights protections in the *CRPD*.

III EQUITABLE SUPPORT FOR CONSUMER TRANSACTIONS IN THE AUSTRALIAN CONTEXT

A Australia’s Consumer Protection System

Australia has a comprehensive consumer protection regime, much of which is directed to the contracting process to provide relief where consumer consent is tainted by unfair or exploitative conduct. The primary protective legislation is the *Australian Consumer Law* (‘*ACL*’).⁶⁷ Section 18 of the *ACL* prohibits conduct in trade or commerce that is misleading or likely to mislead and ss 20 and 21 prohibit conduct that is unconscionable.⁶⁸ In determining whether conduct is unconscionable, the court may take into account matters such as ‘the relative

⁶⁴ See Flynn and Arstein-Kerslake, above n 54, 95; Michelle Browning, Christine Bigby and Jacinta Douglas, ‘Supported Decision Making: Understanding How Its Conceptual Link to Legal Capacity is Influencing the Development of Practice’ (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities* 34.

⁶⁵ For a discussion of different forms of supported decision-making for financial affairs, see Yotam Tolub, *Alternative to Guardianship in Financial Affairs* (2014) Bizchut <<http://bizchut.org.il/en/wp-content/uploads/2014/12/Alternative-to-Guardianship-report.pdf>> archived at <<https://perma.cc/EW27-VFZA>>.

⁶⁶ See, eg, Rachel Hale et al, ‘Consumer Transactions: Equitable Support Models for Individuals with Decision-Making Impairments’ (Pilot Study, Melbourne Social Equity Institute, February 2017) <http://socialequity.unimelb.edu.au/__data/assets/pdf_file/0007/2277520/Consumer-Transactions-Pilot-Study.pdf> archived at <<https://perma.cc/FP9S-PCNR>> (‘*Equitable Support Models Study*’).

⁶⁷ *Competition and Consumer Act 2010* (Cth) sch 2 (‘*ACL*’).

⁶⁸ *Ibid.*

strengths of the bargaining positions' of each party, whether the consumer was 'required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests' of the supplier, whether the customer could 'understand any documents' relating to the supply of the goods or services and whether 'undue influence' or 'unfair tactics' were used, among others.⁶⁹ Section 50 of the *ACL* prohibits the use of 'physical force, or undue harassment or coercion', in connection with the supply of, or payment for, goods or services.⁷⁰ Where these prohibitions have been contravened, an affected consumer may seek damages or other forms of compensation orders, including being released from the contract.⁷¹ These rules operate differently from a straight denial of legal capacity, as may occur under guardianship regimes. The claim for relief will come from the consumer. However, from a *CRPD* perspective, there is the concern that a challenge to a transaction may be used by suppliers of goods and services to discriminate against people they perceive as lacking the requisite capacity to contract.

Australian consumer law also contains provisions aimed at providing more substantive protection to consumers in making contracting decisions, through information disclosure, requirements for transparency and standards of fairness in standard form contracts. For example, the *Telecommunications Consumer Protection Code* includes provisions to promote fair contract-making by requiring providers to give consumers 'clear and accurate' information about products and the contracts relating to them,⁷² and to communicate with consumers 'in a way that is appropriate to [their] communication needs including those with special needs'.⁷³ The *ACL* provides that 'unfair terms' in standard form contracts are void — meaning any terms that 'would cause a significant imbalance in the parties' rights and obligations arising under the contract', that are 'not reasonably necessary to protect the legitimate interests of the party that would be advantaged' and that 'would cause detriment (whether financial or otherwise) to a party' if they were relied on.⁷⁴ Importantly, in assessing whether a term is unfair, courts must take into account, among other things, the extent to which the term is transparent, meaning it is 'expressed in reasonably plain language', 'legible', 'presented clearly' and 'readily available to any party affected by the term'.⁷⁵

While these rules impose some obligations on service providers to improve the quality of information they provide and the way in which they provide it, they are not focused on ensuring that consumers have sufficient support to exercise their legal capacity and make decisions according to their will and preferences, as required by art 12 of the *CRPD*. As discussed further below, the

⁶⁹ *Ibid* s 22(1).

⁷⁰ *Ibid* s 50.

⁷¹ *Ibid* ss 236, 237, 242.

⁷² Communications Alliance, *Telecommunications Consumer Protections Code*, C628:2015, August 2017, rr 3.2.1, 4.1, 4.5, 5.3 ('*TCA Code*'). See also the disclosure requirements in the *National Credit Code: National Consumer Credit Protection Act 2009* (Cth) sch 1.

⁷³ *TCA Code* r 3.2.2. See also r 4.4.2.

⁷⁴ *ACL* ss 23–4.

⁷⁵ *Ibid* s 24(3). See also Jeannie Marie Paterson, 'The Australian Unfair Terms Law: The Rise of Substantive Unfairness as a Ground for Review of Standard Form Consumer Contracts' (2009) 33 *Melbourne University Law Review* 934.

mere provision of information does not equate to decision-making support nor does it overcome the risk of providers of goods and services (including essential services) declining to deal with consumers who they suspect of lacking capacity to contract. Thus, consumers may simply never get to the point of entering a contract because they do not have the support to do so.

A comparable problem affects the common law principles that may enable a consumer to be released from a contract on the basis that they did not have the requisite capacity. Most fundamentally, a contract is voidable if one of the parties did not have the mental capacity to contract, meaning he or she was not capable of understanding the contract when it was explained, and that the other party was or should have been aware of this incapacity.⁷⁶ As discussed in Part II above, this may raise problems from an international human rights law perspective if assessments of capacity are made on the basis of the mere presence of a disability or if they affect certain groups (such as persons with cognitive disabilities) differently to others. More practically, an action to set aside a contract on the basis of a lack of capacity may enable a person to avoid a contract, but it does not provide the means for that person to enter an alternative contract where it is desired. Other principles or doctrines, such as non est factum (by which a contract can be set aside where a party lacked understanding of the document's purpose)⁷⁷ and undue influence (where there is a 'relationship of influence' that affected one party's mind and judgment)⁷⁸ have a similar limitation. Although these doctrines aim to protect more 'vulnerable' individuals from abuse, they may instead have the effect of excluding persons with disabilities from exercising the ability to contract if they are applied in a non-reflexive manner.⁷⁹

These shortcomings suggest the need for review and reform of Australia's approach to capacity to contract and associated consumer protections, which is discussed in further detail below. The focus of this system on voiding contracts once difficulties have emerged, rather than facilitating entry into contracts, also indicates a clear place for supported decision-making to ensure that persons with cognitive disabilities have equal access to goods and services. Such support could enhance consumers' understanding prior to giving consent, facilitate the exercise of their legal capacity, and ultimately ensure they get access to the products and services that they are seeking.

B *Australian Precedents for Supported Decision-Making in Consumer Transactions*

Australia's ratification of the *CRPD* was accompanied by a declaration of its 'understanding that [art 12] allows for fully supported or substituted decision-making' where 'necessary, as a last resort and subject to safeguards'.⁸⁰ This

⁷⁶ See, eg, *Gibbons v Wright* (1954) 91 CLR 423, 437, 438, 441 (Dixon CJ, Kitto and Taylor JJ).

⁷⁷ See *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42.

⁷⁸ See *Johnson v Buttress* (1936) 56 CLR 113; *Hart v O'Connor* [1985] 1 NZLR 159.

⁷⁹ See Robyn Honey, 'Renovating the Concept of Consent in Contract and Property Law' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 337.

⁸⁰ See Australia's declaration for the *Convention on the Rights of Persons with Disabilities*: United Nations, *Status of Treaties*, above n 10.

indicated a reluctance by the Australian government to fully abolish substituted decision-making in this country.⁸¹ Nevertheless, a number of inquiries, reviews and studies have sought to assess Australia's compliance with art 12 and develop models of supported decision-making to replace (or at least complement) substituted decision-making practices and laws. Several Offices of the Public Advocate, state-based bodies that act as a public guardian and make applications for the appointment of a guardian or administrator, have conducted trials of supported decision-making processes.⁸² For example, the South Australian Office of the Public Advocate trialled a supported decision-making model between 2010 and 2012, wherein supporters 'drawn from existing circles of trusted family and friends' entered agreements with participants (persons with cognitive disabilities) to support them to make specific decisions that participants wanted to make about their accommodation, lifestyle or health.⁸³ An evaluation of the trial reported benefits to participants in terms of their decision-making skills and confidence.⁸⁴

Academic researchers have also conducted, or are currently conducting, a number of projects to develop models for support for persons with disabilities in different circumstances. One recent study related to persons with cognitive disabilities in the criminal justice system;⁸⁵ another involves the design of education and support packages for supporting persons with cognitive disabilities to make decisions.⁸⁶ A third study examined supported decision-making for people with severe mental health problems.⁸⁷ Such empirical research is crucial

⁸¹ For a discussion, see Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report No 124 (2014) 47–62 ('*Equality, Capacity and Disability Report*').

⁸² Margaret Wallace, *Evaluation of the Supported Decision Making Project* (Evaluation Report, South Australian Office of the Public Advocate, November 2012) <http://www.opa.sa.gov.au/files/batch1376447055_final_supported_decision_making_evaluation.pdf> archived at <<https://perma.cc/2TWB-KHHC>> ('*Supported Decision Making Project Evaluation Report*'); Victorian Office of the Public Advocate, *Project Description: Supported Decision-Making Pilot Project* (Brochure) <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/support-decision-making/59-supported-decision-making-pilot-project-description>> archived at <<https://perma.cc/3ZDK-AMSB>>.

⁸³ *Supported Decision Making Project Evaluation Report*, above n 82, 8.

⁸⁴ *Ibid.*, 31. For a review of six pilot projects on supported decision-making for persons with cognitive disabilities (including a discussion of their limitations), see Christine Bigby et al, 'Delivering Decision-Making Support to People with Cognitive Disability — What Has Been Learned from Pilot Programs in Australia from 2010 to 2015' (2017) 52 *Australian Journal of Social Issues* 222.

⁸⁵ Bernadette McSherry et al, *Unfitness to Plead and Indefinite Detention of Persons with Cognitive Disabilities: Addressing the Legal Barriers and Creating Appropriate Alternative Supports in the Community* (Report, Melbourne Social Equity Institute, August 2017) <http://socialequity.unimelb.edu.au/__data/assets/pdf_file/0006/2477031/Unfitness-to-Plead-Main-Project-Report.pdf> archived at <<https://perma.cc/RF7V-AMZG>>.

⁸⁶ Living with Disability Research Centre, *Effective Decision-Making Support: About This Project* (16 March 2018) La Trobe University <<https://www.latrobe.edu.au/lids/research/effective-disability-services/decision-making/support>> archived at <<https://perma.cc/P5TL-F453>>.

⁸⁷ Renata Kokanovic et al, *Options for Supported Decision-Making to Enhance the Recovery of People Experiencing Severe Mental Health Problems* (Report, Melbourne Social Equity Institute, August 2017) <<http://healthtalkaustralia.org/wp-content/uploads/2017/09/Kokanovic-et-al-2017-Mental-Health-and-Supported-Decision-Making-ARC-LP-Project-Report-.pdf>> archived at <<https://perma.cc/48GR-5C4F>>.

to developing ‘the research base that is so necessary to sound policymaking or law reform’ in relation to supported decision-making.⁸⁸ However, there remain many gaps in this research field; most relevantly, no previous studies have focused specifically on support for persons with cognitive disabilities to engage in consumer transactions for essential services, or for other forms of goods or services.

IV IDENTIFYING CHALLENGES AND PROPOSING MODELS OF SUPPORT FOR HUMAN RIGHTS-COMPLIANT CONSUMER TRANSACTIONS

A research team at the University of Melbourne is undertaking a program of research that aims to explore some of the limitations of existing law and policy responses to Australian consumers with cognitive disabilities, and to enhance the realisation of the rights of this group in relation to consumer transactions. In 2016, we conducted a pilot study to explore the challenges that persons with cognitive disabilities encounter when they engage in consumer transactions.⁸⁹ The primary objective was to establish which support models for persons with cognitive disabilities may assist them to engage in consumer transactions. The study focused on transactions regarding utilities, telecommunications, finance and insurance. Semi-structured interviews were conducted with nine people who self-identified as ‘experiencing challenges’ with their cognition or mental health, the majority of whom had diagnoses of psychosocial disabilities or mental health conditions, including depression, Asperger’s syndrome and schizoaffective disorder.⁹⁰ Interviews were also conducted with five specialists in consumer law and advocacy (two community lawyers and three consumer advocates who provide specialist assistance and support to ‘vulnerable’ consumers at community legal centres) and five industry representatives from the finance and insurance sectors.⁹¹ While the limited sample size means the findings are not highly generalisable, they do indicate the practical barriers that affect consumers with cognitive disabilities when they attempt to transact for basic or essential services.

A *Challenges to Engaging in Consumer Transactions*

The pilot study confirmed that persons with cognitive disabilities face several barriers to engaging in consumer transactions. Many of these barriers relate to the exercise of consumers’ human rights. The findings fall into three broad categories — accessibility issues; concerns about discrimination and invasion of privacy; and a lack of support for decision-making.

Consumers interviewed for the study reported that they experienced financial hardship.⁹² This was linked to the unsuitability of the products available, with participants reporting that consumers often resorted to unaffordable options in

⁸⁸ Terry Carney, ‘Clarifying, Operationalising, and Evaluating Supported Decision-Making Models’ (2014) 1 *Research and Practice in Intellectual and Developmental Disabilities* 46, 49.

⁸⁹ *Equitable Support Models Study*, above n 66.

⁹⁰ *Ibid.*

⁹¹ The interviews were conducted by Melbourne Social Equity Institute Research Fellow, Rachel Hale.

⁹² *Equitable Support Models Study*, above n 66, 31–2.

the absence of appropriate alternatives. This was even the case when consumers reported their financial circumstances to sales staff:

I spoke very clearly to the tellers ... 'If you were to offer me a credit card, go ahead. Be prepared to write it off within two weeks because you're not getting anything from me, because I'm saying to you I don't want it'. [Teller] 'Oh but you have a credit-' [consumer] 'No. Not my problem if I've got that on my file'. ... I actually said to them, go ahead. But I've told you I don't want a credit card, your clause says that I can only use money which I've got in my account. You are giving me something, which I didn't particularly want, and now you're telling me I'm paying fees for it. If I did this three or four times over a year, I daresay that's going to be more than any annual fee you pay for a credit card which you're going to end up writing off anyway ... (Consumer 3)⁹³

A community lawyer discussed the serious financial and emotional consequences for consumers with decision-making impairment:

What I've seen often times over the years, really tragic stories of people who in sort of a manic state go out and spend huge amounts of money will often [—] they either have credit available to them or will go and get credit and often lie to get credit because they're delusional essentially and then spend it on crap [sic], like buy jewellery, just stuff that they really don't need. They'll then come down and be stuck with 10s of thousands of dollars of debt, which is devastating. I think it's a really tragic reminder for them of their manic state. But it's also [—] I think it really impairs their ability to move on with their lives because they're burdened by a whole bunch of debt. (Lawyer)⁹⁴

I think it resonates with me more because the emotional impact is often greater. But also it sits within a cluster of a whole bunch of problems so that the social, financial, emotional impact is amplified. To put that in terms of a human story, it's like this client [—] yeah, it's not just the ... [specific] contract they're battling. They might be battling with their housing security, struggling with money anyway, might have a credit card [—] a debt collector chasing them for something else. And so the emotional impact is worse. (Lawyer)⁹⁵

Some consumers identified a lack of personal confidence as a further problem they experienced when transacting. There were two issues here: first, a lack of confidence to approach utilities, telecommunications, finance and insurance providers when seeking a product or service and, secondly, a lack of confidence to decline offers of products or services, especially in relation to door-to-door 'pressure selling':

Being in someone's face, being in someone's home, and that is about pressure selling, and it is about pushing people to make decisions they wouldn't make in a different environment, and that's where a lot of vulnerable people are targeted. So, your telecommunications, your energy companies. And it's progressed — solar companies, all sorts of companies, and it rotates with who's doing it at the time, but a lot of the education signups were done from door-to-door selling. That's the latest outrageous thing. (Consumer advocate 1)⁹⁶

⁹³ Ibid.

⁹⁴ Ibid 29.

⁹⁵ Ibid.

⁹⁶ Ibid 30.

Another significant issue for consumers with cognitive disabilities was the inaccessibility of product information and contracts, meaning consumers may not understand the terms and conditions to which they are agreeing. A consumer lawyer observed that consumer contracts and product disclosure statements are ‘really difficult to understand and counter-intuitive’ for all consumers, regardless of whether they have cognitive disabilities.⁹⁷ However, some participants indicated that information was not available in formats that were appropriate for them:

Well, it’s always a challenge. I’m just saying, with my Asperger’s, anything that requires something that’s complex, it’s not clear cut, it’s not documented properly you know. I understand all the technical stuff, but as an example — when I tried to study at [university], it’s the pedantic stuff, it’s all the form filling, it’s all the rigmarole of stuff that doesn’t allow flexibility, it’s all that sort of stuff. It’s hard to explain, but I mean I actually have a document that someone at the council of education explained — he has problems with organising things. And, I struggle and I try and organise things, to make sure that I don’t fall foul of these things, but I still do. (Consumer 5)⁹⁸

That policy thing that takes like half an hour it felt like. My mind is starting flipping out, I’ve got a pretty short attention span, so I’m losing my shit [sic] after all this talking. (Consumer 1)⁹⁹

B *Human Rights Implications: Accessibility of Information*

The pilot study raises several concerns about the extent to which Australians with cognitive disabilities can exercise their human rights in relation to consumer transactions. Many of these issues relate to a lack of accessibility, and specifically a lack of access to information, which potentially contravenes arts 9 and 21 of the *CRPD*. The tailoring of information to different consumer groups, particularly to consumers with different communication styles or requirements, is necessary to ensure that they can access goods and services on an equal basis with others. One consumer in the pilot study made just such a suggestion:

to actually put this on the TV screen of two people actually playing this, about a person talking with a financial counsellor. ‘I went to borrow \$20; I paid \$25 back’ and put it into a verbal format where people could watch it. At a hockshop you’ve got a TV there and the video ... what that contract means and what it actually does cost, as opposed to putting it in writing ... I would be inclined to say that if it went into video format to keep it accessible, have subtitles anyway ... I’d be making a very good case, it should be a sign language interpreter as well. After all, the people that are hearing impaired are a big part of the community as well, and they have to reach their contracts too. (Consumer 3)¹⁰⁰

It is also likely that service providers will need to improve their processes beyond simply improving the quality of information provided. For instance, expanded options for communicating with sales and technical support staff and

⁹⁷ Ibid 43.

⁹⁸ Ibid 41.

⁹⁹ Ibid.

¹⁰⁰ Ibid 42–3.

for practically including the consumer's support people in decision-making processes may be necessary. Measures to ensure information and transaction processes are accessible for consumers with cognitive disabilities may include providing essential information in multiple formats, such as easy-to-read or audio-visual versions of sales material and contracts, ensuring that frontline staff are appropriately trained to interact with consumers with cognitive disabilities, and making live assistance (such as sign language interpretation) available upon request.¹⁰¹ It is particularly important to educate sales staff and others in the community about supported decision-making and the right of all persons to recognition of their legal capacity.¹⁰² Without this, the decisions of consumers with cognitive disabilities may be disregarded or substituted for the 'best interests' determinations of others.

These measures have the potential to make information and transaction processes more accessible to all consumers, including those with and without disabilities. However, while universal or group measures may be enough in some circumstances, 'reasonable accommodations', or specific modifications or adjustments, may also be required for individual consumers with disabilities;¹⁰³ one-size-fits-all approaches will not necessarily be sufficient.

C *Human Rights Implications: Privacy and Non-Discrimination*

Some industry representatives, advocates and consumers interviewed for the study suggested that, in order to provide appropriate products and assistance to persons with disabilities, and to avoid ending up in a situation where they have few remedies available, consumers should disclose their disability prior to entering a contract. Some participants also expressed concern that the growth of telephone and internet-based sales and customer service is making it increasingly difficult for service providers to assess consumers' capacity to contract or to determine other accessibility or support requirements they might have.¹⁰⁴ However, asking persons with disabilities to disclose their disability status was identified as risky in terms of violating consumers' rights to privacy and to be free from discrimination on the basis of disability, both of which are guaranteed under the *CRPD*.¹⁰⁵ For instance, some consumers expressed concern that disclosure could lead to discrimination or ill-treatment due to the stigma surrounding mental health issues, and they reported that disclosure did not necessarily lead them to getting the support they required:

We can all talk about respecting people with disability and people with mental health issues, but not everybody walks into a branch or into a telco shopfront with a sign on their forehead or a sign on their chest, whatever it is, saying 'I identify as having a mental health issue. Can you please treat me with respect?' And that exists for so many people in society. You can't necessarily walk in somewhere

¹⁰¹ Committee on the Rights of Persons with Disabilities, *General Comment No 2 (2014) — Article 9: Accessibility*, 11th sess, UN Doc CRPD/C/GC/2 (22 May 2014) para 21.

¹⁰² See Terry Carney and Fleur Beaupert, 'Public and Private Bricolage — Challenges Balancing Law, Services and Civil Society in Advancing *CRPD* Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175, 186.

¹⁰³ *CRPD* arts 2, 5. See Committee on the Rights of Persons with Disabilities, above n 101, para 25.

¹⁰⁴ *Equitable Support Models Study*, above n 66.

¹⁰⁵ *CRPD* arts 5, 22.

and have someone know that you speak English as a second language. None of us wear signs on our forehead or our chests, to be honest. (Consumer 7)¹⁰⁶

It's too hard to deal with people. You know if you make a mistake or miss a payment because you've had personality switches, you're the biggest monster in the world and even if you say, '[w]ell look it's because I have an illness' they're more inclined to just dump you, than help you sort it ... for a long time I was very sick and didn't look like a regular other person. So I didn't want to go in and again get that poor treatment. I've even had people kind of laughing going '[a]re you sure you really want this?' And things like that ... sometimes I would forget things and I would get a little bit muddled up, so I'll need to ask more questions at that time and they'll laugh or they'll just look at me like I'm an alien or something like that, you know what I mean. (Consumer 4)¹⁰⁷

Advocates and industry representatives also noted their concerns about avoiding discrimination and interfering with consumers' autonomy:

The decision made at one point, is it blowing on a person later on and what does that mean for that person's autonomy. I think that's a really complicated issue. (Lawyer)

We accommodate people the best we can, unfortunately we're not fully aware of some people's personal circumstances and we need to be extremely careful about that, we can't make accusations about someone's state of health; we've got to respect them and respect their privacy. And they're able to engage in products and services, if it's suitably available to them and suitably for their needs. (Bank representative)

I'm very conscious of neither wanting to over or under estimate the ability of people with disabilities to manage their own affairs. I guess it's a really difficult balancing act, in this kind of area, in this policy area. That once you say 'oh well, all of these additional hurdles have to be cleared' in dealing with people with intellectual disability or other forms of impairment. I would hate to make what would otherwise be accessible, to people in the marketplace, appropriate products. You don't want to risk discriminating against people, accessing ordinary goods and services, because of their disability status. (Lawyer)¹⁰⁸

Study participants' comments about the implications of disclosure of disability status further underlines the need to make accessible information available to all consumers. It also suggests the need for service providers to develop support processes that can facilitate the exercise of legal capacity of consumers with cognitive disabilities without violating their rights to privacy and non-discrimination. This may require, for instance, implementing 'disability neutral' processes for identifying consumers' requirements and preferences for support, ensuring that all consumers can avail themselves of supported decision-making regardless of their disability status and clearly communicating to consumers that any disclosure for the purposes of accessing or using support will not be used for any other purpose (including denial of access to the service).

¹⁰⁶ *Equitable Support Models Study*, above n 66, 34.

¹⁰⁷ *Ibid* 37.

¹⁰⁸ *Ibid* 38–9.

D Human Rights Implications: The Provision of Support

Accessibility of information and services, and protecting the privacy of persons with disabilities, are key to ensuring rights-compliant access to basic and essential services. However, these measures will not be sufficient on their own. In addition, consumers and advocates interviewed for the pilot study reported that fluctuations in mental health, such as periods of mania or depression, can lead consumers to make decisions that have a negative impact on their wellbeing or financial circumstances. As some consumers explained:

I've had problems with depression, and you get caught in this situation where if technology's failing and you have to [—] and I've got friends like this too [—] if you have to make critical decisions and you've got depression, you tend to slip up. (Consumer 5)¹⁰⁹

As far as barriers, if you were unwell that could be a moment there where you just sign something and you're not with it, you're just not with it mentally. That's where the challenge is there. (Consumer 9)¹¹⁰

Some people may require a support person to assist them to interpret easy-to-read information or to weigh up the information and make a decision. Other consumers may experience difficulties making decisions, communicating with providers, or exercising their consumer rights due to their impairment, low literacy, or for a variety of other reasons. In these circumstances, support for decision-making must be available and legally recognised in order to ensure that persons with disabilities can engage in consumer transactions in a manner that realises their human rights and complies with art 12(3) of the *CRPD*.

The pilot study findings indicated a need to develop support across four domains: providers of essential or basic services; disability or mental health services; consumers themselves and their families and supporters; and community legal centres and consumer advocacy organisations. Companies that offer basic or essential services could improve their provision and recognition of support by developing processes or establishing teams to facilitate supported decision-making, and improve training of staff, including front line workers and 'hardship' teams.¹¹¹ Support provided by disability and mental health service providers could be developed through, for instance, employing a dedicated consumer support person or team within the service, or building the capacity of existing staff to provide support for consumer transactions. The capacity of persons with cognitive disabilities and their informal or individual supporters (like family and carers) could be built through education and training that develops their knowledge and skills about consumer rights, transaction processes and supported decision-making. Finally, advocate-led support, or support based at community legal centres or consumer advocacy organisations, could be developed through training existing staff or employing a dedicated staff member to provide support to clients with cognitive disabilities.

As the preceding discussion indicates, these support models must have several features in order to be compatible with the *CRPD*. First, they must be non-

¹⁰⁹ Ibid 29.

¹¹⁰ Ibid 33.

¹¹¹ Ibid 48.

discriminatory, in line with art 5 of the *CRPD*; this means that a referral for support or determination that someone does not have the capacity to enter a contract must not be based on an assessment of actual or perceived disability or ‘mental capacity’, nor have a different impact on consumers with cognitive disabilities.¹¹² Secondly, the support provided must be consistent with the requirements of art 12, protecting and advancing the right to legal capacity and equal recognition before the law.¹¹³ This means, for instance, the support must be chosen by the individual (rather than being imposed on them), must ‘respect the[ir] rights, will and preferences’ and must be provided at little or no cost.¹¹⁴ It also means implementing safeguards against undue influence and exploitation in supported decision-making relationships.¹¹⁵ Finally, the development of accessible information and support models, and their effective implementation, requires the active involvement of persons with disabilities and their representative organisations.¹¹⁶ This requirement, emphasised in art 4(3) of the *CRPD*,¹¹⁷ will ensure that the outcomes are relevant to persons with cognitive disabilities and consistent with their experiences and views about how their rights should be protected and realised.

E *Law Reform Implications and Future Directions*

The approach to support proposed above has the potential to enhance consumers’ understanding of product features, contract terms and conditions and other information relevant and necessary for them (where appropriate, and potentially with the assistance of a support person) to make decisions in contracting for goods and services. The implementation of such measures would reduce the likelihood that consumers will enter contracts that do not meet their needs and also enhance the security of transactions from the perspective of suppliers of goods and services by reducing the risk of subsequent legal challenge on the basis of vitiated consent. Better understanding of the role of supported decision-making may therefore reduce the prevalence of market conduct that avoids or discriminates consumers on the basis of their perceived legal capacity.

Nevertheless, the analysis of the common law and statutory consumer protections presented above suggest the need to revisit and reform the existing legal protections for consumers in contracting to ensure compliance with the *CRPD*. This includes, for instance, a detailed assessment of whether the principles and facts used to determine capacity to contract are discriminatory in purpose or effect against persons with cognitive disabilities,¹¹⁸ and whether consumer protection measures offer sufficient ‘safeguards’ and, moreover,

¹¹² *CRPD* art 5.

¹¹³ *Ibid* art 12.

¹¹⁴ *General Comment No 1*, UN Doc CRPD/C/GC/1, paras 12, 29.

¹¹⁵ *Ibid* para 22. Cf Eileen Webb, ‘Papering over the Void — Could (or Should) Consumer Law Be Used as a Response to Elder Abuse?’ (2016) 24 *Competition and Consumer Law Journal* 101.

¹¹⁶ *CRPD* art 4.

¹¹⁷ *Ibid*.

¹¹⁸ *Ibid* arts 5(2), 12(2).

facilitate strategies to support individuals' right to legal capacity.¹¹⁹ This requires, for example, that they 'respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, [and] are proportional and tailored to the person's circumstances'.¹²⁰

The Australian Law Reform Commission ('ALRC') 2014 review of Commonwealth laws and legislative frameworks that 'deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity' did highlight some consumer-specific issues associated with legal capacity and the implementation of the *CRPD*.¹²¹ This comprehensive review of Australia's approach to legal capacity and supported decision-making touched on many areas of law, including guardianship and administration, access to justice, electoral matters and the use of restrictive practices. The report only briefly addressed contract and consumer protection law.¹²² The ALRC declined to make consumer protection-related recommendations in its final report, in consideration of the possible impacts of changes to persons with disabilities who do not have 'decision-making vulnerabilities'.¹²³ It did, however, note a number of recommendations from respondents including the National Association of Community Legal Centres,¹²⁴ Legal Aid NSW¹²⁵ and the Public Interest Advocacy Centre.¹²⁶ These recommendations included the introduction of standard contract clauses, accessible communication tools, and more stringent standards for high-risk contracts.¹²⁷

The ALRC review could provide a starting point for further analysis of the extent to which the consumer protection system is currently accessible to, and working for, consumers with cognitive disabilities. This would include, in particular, assessing the effectiveness of the regulation of door-to-door sales and telemarketing in protecting the rights of consumers with cognitive disabilities,¹²⁸ considering the interaction of supported decision-making processes and existing consumer protection requirements (for example, clarifying how support can be recognised while still ensuring against undue influence and exploitation)¹²⁹ and

¹¹⁹ *Ibid* art 12(3).

¹²⁰ *Ibid*.

¹²¹ *Equality, Capacity and Disability Report*, above n 81, 5.

¹²² *Ibid* 291–3.

¹²³ *Ibid* 293.

¹²⁴ National Association of Community Legal Centres, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (June 2014) 16.

¹²⁵ Legal Aid NSW, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (July 2014) 5.

¹²⁶ Public Interest Advocacy Centre, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (20 January 2014) 29–30.

¹²⁷ *Equality, Capacity and Disability Report*, above n 81, 292–3.

¹²⁸ See, eg, *ACL* pt 3–2 div 2.

¹²⁹ *Equality, Capacity and Disability Report*, above n 81, 151.

examining whether people with cognitive disabilities have access to information and justice processes for exercising their consumer rights.¹³⁰

V CONCLUSION

The *CRPD* obliges states party to promote and protect human rights that are fundamental to the exercise of consumer rights by persons with cognitive disabilities. The ability to enter contracts for basic and essential services (and all other goods and services) is necessary for the full and equal recognition of the legal capacity of persons with disabilities. It is also crucial to facilitate individuals' social and economic participation. However, legal systems around the world — including Australia's — question individuals' capacity to act as consumers and enter contracts for goods or services. This is often based on an assessment or assumption of a lack of mental capacity. In the Australian context, consumer protection and contract law may offer some protections for consumers who enter contracts without knowledge or understanding of their implications. However, these laws risk being applied in a way that is discriminatory towards people on the basis of disability. Further, they largely fail to offer solutions that would enable consumers with cognitive disabilities to find and enter appropriate and desired contracts, and to overcome the many practical barriers to transacting reported by participants in the pilot study.

The study also pointed to a range of supports that could be implemented to address some of the gaps in the system and produce more equitable outcomes. Further research is necessary to develop and test models of support in various domains, including providers of basic and essential services, disability or mental health services, individual consumers and their families and supporters and community legal centres and advocates. These models must incorporate the provision of accessible information in multiple formats, respect for individuals' privacy and avoidance of discrimination, and — perhaps most importantly — the provision of support that respects the consumer's rights, will and preferences. This support is likely to reduce the need to resort to legal action under contract or consumer protection law and may contribute to a wider shift in how the right of persons with cognitive disabilities to act as legal decision-makers is addressed in law and practice. It must, however, be accompanied by review and, if necessary, reform of existing contract and consumer protections law to ensure that the legal capacity of persons with cognitive disabilities is recognised on an equal basis with others.

¹³⁰ *CRPD* art 13. See, eg, Consumer Affairs Victoria, 'Door to Door Sales Easy English Factsheet' (Factsheet, January 2011) <<https://www.consumer.vic.gov.au/library/publications/resources-and-education/consumers-with-a-disability/easy-english-factsheet-door-to-door-sales.doc?la=en>>; Australian Competition and Consumer Commission, 'Your Rights When You Buy Something' (Booklet, 2016) <https://www.accc.gov.au/system/files/1099_ACL%20Easy%20English_Your%20rights%20when%20you%20buy%20something_FA_web_0.pdf> archived at <<https://perma.cc/WZB5-QQS2>>.