



Submission to the Australian Law Reform  
Commission (ALRC) on the Equality, Capacity  
and Disability in Commonwealth Laws  
Discussion Paper

30 June 2014

## INTRODUCTION

The National Mental Health Consumer and Carer Forum (NMHCCF) is a combined national voice for consumers and carers participating in the development of mental health policy and sector development in Australia. Through its membership, the NMHCCF gives mental health consumers and carers the opportunity to meet, form partnerships and be involved in the development and implementation of mental health reform.

Thank you for the opportunity to respond to the Discussion Paper, *Equality, Capacity and Disability in Commonwealth Laws*. We have focused our response on the following chapters and their impact on mental health consumers and carers:

- Chapter 6 - Supporters and Representative in Other Areas of Commonwealth Law
- Chapter 7 – Access to Justice
- Chapter 8 – Restrictive Practices
- Chapter 9 – Electoral Matters
- Chapter 10 – Review of State and Territory Legislation
- Chapter 11 – Other Issues.

These chapters are significant for mental health reform as they address the complexities of the issues that consumers and carers face in exercising their human rights in the decision-making and restrictive practices areas of the Commonwealth laws. Reform in these areas will assist in Australia's compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles.

## CHAPTER 6: SUPPORTERS AND REPRESENTATIVES IN OTHER AREAS OF COMMONWEALTH LAW

In Chapter 4 of this discussion paper a new model is proposed for supported and fully supported decision-making. Chapter 6 concerns the application of the ALRC's proposed new model for supported and fully supported decision-making in a number of other Commonwealth decision-making contexts; including social security, aged cared and e-health records.

The NMHCCF supports the proposal that in most areas the legislation should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

### Social Security Law

There are three key decision-making mechanisms in social security law:

- autonomous – by social security recipients
- informal supported decision-making
- substitute decision-making.

With informal supported decision-making, family members, friends and others may 'informally support' a person with a disability to make social-security related decisions without formal recognition or appointment.

There are more formal substituted decision-making arrangements under the *Social Security (Administration) Act 1999* which involves a nominee scheme. It provides that the person with a disability can authorise another person, or organisation, to enquire or act on the person's behalf when dealing with the Australian Government Department of Human Services.

There are two types of arrangements for substitute decision making:

- correspondence nominees—can act and make changes on the person's behalf
- payment nominees—can receive a person's payment into an account controlled by the nominee.

Only one nominee can be appointed for each arrangement; however, the same person can be appointed as both correspondence and payment nominee. Nominees have a duty to 'act at all times in the best interests of the person with a disability'. When it comes to liability, the person with a disability is protected against liability for the actions of their correspondence nominee.

Correspondence nominees are not subject to any criminal liability under the social security law for any act or omission of the person with a disability or anything done, in good faith, by the nominee. If a correspondence nominee fails to satisfy a particular requirement, the person with a disability is taken to have failed to comply with that requirement.

The NMHCCF supports the proposal that the *Social Security (Administration) Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model. This will aid Australia's compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles.

As advocates for mental health consumers and carers, the NMHCCF is pleased to note that the application of the Commonwealth decision-making model in social security law would contribute to the development of consistent decision-making structures across key Commonwealth areas of law.

The NMHCCF note that there are no principles that relate to decision-making in Section 8 of the *Social Security (Administration) Act*. In the discussion paper, the ALRC suggests that Section 8 could be amended to incorporate principles relating to decision-making and supported decision-making, or that principles could be inserted into the part of the Act which will contain provisions relating to supporters and representatives. The NMHCCF supports this proposal.

## Supporters

The Commonwealth decision-making model would provide the person with a disability to appoint one or more supporters to support them to make social security-related decisions. Ultimate decision-making power and responsibility would remain with the person with a disability. The person with a disability may appoint whomever they wish as their supporter, including for example a family member, friend or carer. In the context of social security, the ability to appoint a supporter may also allow advocacy organisations to support people with disability.

The discussion paper notes that current ‘correspondence nominees’ could reflect the role potentially played by a supporter, including making enquiries and obtaining information to assist the person with a disability, completing forms, and receiving mail. The key difference under the model would be that the person with a disability formally retains ultimate decision-making responsibility. The role of a supporter is to support the principal to make a decision, rather than the supporter themselves making a decision.

The goal of supporters under the proposed changes would be to assist the person with a disability to express their will and preferences and, amongst other things, to develop the capacity of the person with a disability to make their own decisions.

## Representatives

Representatives are appointed by people who need fully supported decision-making. The representative can be appointed by the person with a disability. Alternatively, representatives can be appointed by a court, tribunal or other body at a Commonwealth level.

The ALRC notes that the key amendment to the *Social Security (Administration) Act*, applying the Commonwealth decision-making model with respect to representatives, would be to provide representatives that have a duty to consider the will, preferences and rights of the principal. This would replace the current duty of nominees to act in the best interests of the principal.

Safeguards are proposed in relation to the appointment of a representative. These safeguards might include: mechanisms for review and appeal of the appointment of representatives; potential monitoring or auditing of representatives by Centrelink.

The NMHCCF supports this approach.

## The Commonwealth model and the *Privacy Act*

The *Privacy Act 1988* does not prevent a supporter from providing assistance to the individual where this is done with the consent of the individual.

Proposal 6-4 recommends that the *Privacy Act* should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model. The NMHCCF supports the approach that The *Privacy Act* allow the establishment of a supporters and representatives scheme, but that it not be made mandatory.

At the least, supporters should be recognised and be made subject to a duty to support an individual’s will and preferences in relation to the handling of their personal information.

The discussion paper notes that there may be some circumstances which will require a more rigorous process for appointment and verification than others and that different considerations may apply to banking institutions. The NMHCCF is supportive of this approach and believes this process may act as an important safeguard.

## CHAPTER 7: ACCESS TO JUSTICE

The NMHCCF supports the proposition that the tests of a person’s capacity to exercise legal rights or participate in legal processes should be reformed consistently with the Commonwealth decision-making principles based on Article 12 of the UN Convention on the Rights of Persons with Disabilities (equal recognition before the law).

The NMHCCF endorses the concept of ‘procedural and age appropriate accommodations’ to facilitate their role as direct and indirect participants and the appropriate training for staff working in the justice administration sector.

The NMHCCF supports the recommendation arising from the ALRC’s Report *Equal before the Law: Towards Disability Justice Strategies* that each jurisdiction in Australia develop a Disability Justice Strategy.

The ALRC has made it clear that the terms of reference for this inquiry are narrower than the *Equal before the Law* report and are directed at ‘laws and legal frameworks’ affecting people who need decision-making support.

In 7.8, the ALRC draws out the tension between the law as a ‘protective’ mechanism and demands for equal participation in legal processes.

Further in this chapter (from 7.20 – 7.22), the ALRC has examined a range of jurisdictions’ law reform proposals including the Victorian Law Reform Commission’s enunciation of the *Presser* considerations. It has examined the Law Commission of England and Wales’ (UK Law Commission) Consultation Paper *Unfitness to Plead* (2010). The UK Law Commission has devised a new legal test which assesses “whether the defendant ‘has decision-making capacity for trial’ and takes into account all the requirements for meaningful participation in the criminal proceedings”.

This approach necessarily imports notions of complexity and gravity of the matters alleged into the equation. These approaches seem grounded in commonsense and appear to strike the balance between ‘protection’ and ‘equal participation’, although it is clear that a person may need appropriate decision-making support through the court process, and this support must be permitted.

The NMHCCF agrees with the ALRC that a test for unfitness to stand trial should be based on a person’s decision-making ability in the context of the particular criminal proceedings he or she faces (7.37).

With regard to modelling in Commonwealth law (7.47), the NMHCCF supports the proposal to model a revised unfitness for trial’ test in legislation at Commonwealth level in order for it to be touchstone of best practice for other jurisdictions.

*Question 7-2: Should the Australian Solicitors’ Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors’ duties of confidentiality where:*

- (a) The solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and*
- (b) The disclosure is for the purpose of assessing the client’s ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client’s ability to instruct; or seeking the appointment of a litigation representative?*

In response to this question, the NMHCCF has grave concerns in respect of the proposal to amend the rules applying to solicitor’s duties and impliedly, legal professional privilege.

Whilst the intention of the proposal is to help the client, we submit that it in fact undermines the relationship between client and solicitor. It creates a paternalistic second-guessing relationship which is not an appropriate basis on which to ground the professional relationship and is not best practice.

If the client is so unwell that their instructions are unclear, then it is likely that this would have been ascertainable well before a scenario of a person being on trial.

The NMHCCF considers that any proposed reform in respect of solicitor's duties and privilege be carefully consulted upon with each State and Territory Law Society to ensure that any unintended negative consequences are carefully identified.

## CHAPTER 8: RESTRICTIVE PRACTICES

Restrictive practices involve the use of interventions and practices that have the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.

8.5 of the discussion paper notes that while restrictive practices may be used in some circumstances there are concerns that such practices can also be imposed as a '*means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support*'.

The use of restrictive practices and seclusion in Australia is of great concern to the NMHCCF, as detailed in the NMHCCF position statement, *Ending Seclusion and Restraint in Australian Mental Health Services* (2009) and advocacy brief, *Seclusion and Restraint in Mental Health Services* (May 2012) which can be found on the NMHCCF website, [www.nmhccf.org.au](http://www.nmhccf.org.au).

'The Australian Civil Society Parallel Report Group Response to the List of Issues as part of Australia's appearance before the UNCRPD in 2013 expressed concern that people with disability, especially cognitive impairment and psychosocial disability, are 'routinely subjected to unregulated and under-regulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion' (8.6 of the discussion paper).

The lack of transparency around the use of restrictive practices identified above is a key concern for the NMHCCF. The NMHCCF supports the notion that recourse to restrictive practices should be reduced, with the ultimate goal of elimination of restrictive practices, as set out in the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector* (2014).

The NMHCCF agrees with the Disability Discrimination Legal Service that it would be insufficient to have a framework and merely trust that organisations will comply with those guidelines.

One suggestion, identified in 8.23 is that a national framework or approach be included in service agreements for those organisations receiving federal funding. The issue with this is the question around enforcing this. The NMCHCF questions the benefit in having a service agreement that cannot be enforced but gives the illusion of compliance.

The NMHCCF suggests that considerable thought be given to how individual services packages will be managed with the implementation of the National Disability Insurance Scheme (NDIS). Where will the onus lie to enforce service quality and standards? If this were to be the responsibility of the NDIS participant, then it is a situation which may be ripe for abuse.

In the NMHCCF's view, the key touchstones for monitoring the use of restrictive practices and seclusion are:

- accuracy of recording of instances
- veracity and honesty in staff recognition and recording of instances
- clear data collection principles.

### Mandatory Anti-Smoking for Involuntary Patients

People with a mental illness are significantly more likely to smoke tobacco than the general population; an estimated 32% of people with a mental illness smoke tobacco compared to 18% of the general population (SANE Australia, 2012). The introduction of smoke-free policies in health facilities and hospitals, including mental health units is an example of mainstream policies having a differential impact on vulnerable groups and is another form of restrictive practice.

As highlighted in the NMHCCF *Smoking and Mental Health* Advocacy Brief (February 2014), the NMHCCF believe that to force someone to cease smoking at a time when they are so unwell that they meet all the criteria under the various Mental Health Acts for involuntary treatment, is cruel and inhumane and reflects an intolerable indifference to emotional pain. Non-compliance by patients of anti-smoking policies appears to trigger the use of restrictive practices, and possibly increased rates of seclusion.

In the ACT, it has been interesting to note an apparent correlation between the increase in reported seclusion and restraint rates and the introduction of a mandatory anti-smoking policy. Prior to the introduction of the anti-smoking policy in 2013 the use of seclusion and restraint had significantly reduced in the ACT, but is now on the rise.

## CHAPTER 9: ELECTORAL MATTERS

Chapter 9 of the ALRC Discussion Paper focuses on three aspects of electoral law in Australia, the aspects of the *Commonwealth Electoral Act 1918* (Cth) which cover entitlement to enrol and vote, and objections to enrolment.

1. Supported decision-making and voting – proposal to amend Section 234(1) of the *Commonwealth Electoral Act 1918* to allow for supported decision-making.
2. Compulsory voting and fines for failure to vote.
3. Removal from the Electoral Roll.

As noted in 9.12, the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD) has recommended that Australia enact legislation restoring the presumption of capacity for persons with disabilities to vote and exercise choice. In 9.27, the ALRC notes that currently, there is no statutory test for determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

This seems to be an extraordinary basis on which to deprive someone of their voting rights.

As indicated in Proposal 9-1, criterion for removal of a person from the electoral roll is covered by the rather antiquated expression being of “unsound mind”.

9.9 and 9.10 of the discussion paper states that... *To remove a person from the electoral roll based on this provision there are a number of steps:*

- *a written objection must be lodged by an enrolled elector;*<sup>[2]</sup>
- *the objection must be supported by a medical certificate;*<sup>[3]</sup>



- *the AEC must give the individual an opportunity to respond to the written objection;*<sup>[4]</sup> and
- *the Electoral Commissioner will determine the objection.*<sup>[5]</sup>

*There are a variety of avenues to challenge a decision to remove a person's name from the electoral roll.*<sup>[6]</sup>

From the perspective of the UNCRPD and the National Decision-Making Principles, the NMHCCF would prefer an approach that:

- removes the “*unsound mind*” component of s93(8); and
- makes provision for impaired decision-making ability to be considered as a valid and sufficient reason for failure to vote under s 245(4) of the Commonwealth Electoral Act, and for waiver of the associated fine.

However, the NMHCCF understands that countervailing concerns in respect of the “protection and integrity of the electoral process” prevent this being an option.

In the ALRC's view, there should be a statutory test and that test should be based on a person's decision-making ability in the context of the relevant election and the available decision-making assistance and support.

The NMHCCF supports the better articulation of grounds for the incursion on a person's citizenship rights.

The NMHCCF strongly agrees with the Public Interest Advocacy Centre (identified in 9.20) *that ‘any determination as to whether a person lacks capacity to vote should be decision-specific and only apply to voting in a particular election as opposed to a blanket disqualification from the electoral process’.*

## CHAPTER 10: REVIEW OF STATE AND TERRITORY LEGISLATION

Chapter 10 of the discussion paper examines the impact of state and territory laws on legal capacity. In 10.2 it is noted that ‘modelling a new approach to individual decision-making at the Commonwealth level provides an opportunity to guide law reform at the state and territory level’.

The ALRC's approach harnesses the proposed National Decision-Making Principles and the Commonwealth decision-making model. The paper proposes that state and territory laws be carefully reviewed to see that decision-making support options are encapsulated for people *who need* decision-making support.

The NMHCCF supports this approach and the collection of consistent data, across jurisdictions, in relation to substitute decision-making.

### Review of the Law

In exercising their powers, substitute decision-makers are required to adopt one of two tests (or a combination of both in some jurisdictions) in reaching their decision for the person with impaired decision-making capacity.

The tests are:

- the best interests test, which requires a balancing of the benefit to the patient against the risks of the proposed treatment; and



- the substituted judgment test, which involves making a decision which is consistent with what the person would have decided if they had the capacity to do so.

Supporting evidence for the person's 'interests' can also be provided by advance care directives, religious beliefs and previous history of treatment.

The NMHCCF notes with approval the provisions in the Mental Health Bill 2013 (WA). Under the proposed legislation, mental health services are obliged to comply with a charter of mental health care principles. The charter recognises the involvement of other people such as family members and carers. In addition, the WA Bill would give effect to a carers' charter provided for in the *Carers Recognition Act 2004* (WA).

The WA Bill introduces the notion of the 'nominated person' - someone chosen by the person with mental illness to assist them in ensuring their rights under the Act are observed and their interests and wishes are taken into account by medical practitioners and mental health workers.

A nominated person is entitled to 'uncensored' communication with the person with mental illness, and to receive information related to the person's treatment and care.

In all relevant legislation and/or regulations the NMHCCF recommends that a general statement be included such as this one used in the proposed WA Bill, "an adult is presumed to have the capacity to make a decision about a matter relating to himself or herself unless the adult is shown not to have that capacity". The level of capacity depends upon the nature of the decision to be made but in all things it must be one made in the best interests of the individual.

In the discussion paper, the ALRC proposes that state and territory governments review mental health legislation, with a view to reform that is consistent with the National Decision-Making Principles and the Commonwealth decision-making model. This might involve, for example, moving towards supported decision-making models similar to those contained in the Victorian legislation and in the WA Bill.

The NMHCCF supports this approach.

## CHAPTER 11: OTHER ISSUES

Chapter 11 deals with a range of other issues that are relevant to the focus of the Inquiry. In the main they deal with the exercise of legal capacity. These involve:

- the common law relating to incapacity to contract;
- consumer protection laws;
- consent to marriage;
- the nomination of superannuation beneficiaries; and
- acting as a member of a board and in other corporate roles.

### Contract Law

As outlined in 11.3, the assumption underlying any contract is that each party has freely entered into a binding agreement, having assessed whether or not the terms are in their best interests. Some categories of person—including minors and people with impaired mental capacity—have traditionally been regarded by the law as being incapable of looking after their own interests, and through various rules, a 'legal disability' has been imposed on them.

In general, if people under a legal disability attempt to make a contract, that contract can be declared ineffective or unlawful.

In practice, the existing law of contract probably strikes the correct balance for ordinary consumers and consumers who may have impaired decision-making ability. A contract may be avoided on the ground that a person lacked the capacity to understand the consequences of entering into it. It has been said that:

*... mental incapacity has a wide variety of forms with very different degrees of impairment. The idea that people should be presumed to be capable unless shown to be otherwise enhances their dignity and capacity to manage their affairs. The treatment of contracts as binding unless avoided complements this approach.*

The ALRC discussion paper notes that the common law presumes capacity and treats contracts as binding unless avoided.

### Consumer Law

The Australian Consumer Law has a range of requirements in respect of unconscionable conduct, merchantable quality, fitness for purpose, accuracy of product descriptions and safety. There are also various provisions in respect of “cooling-off periods”. These provisions aim to protect the consumer.

The person with a disability – with the aid of a supporter and/or representative under the National Decision-Making Principles should be no worse-off than an ordinary consumer in this scenario.

Legal Aid Queensland submitted that the consumer credit provisions offer ‘adequate protections for people with disabilities without the need to adopt an overarching definition of capacity or disability in the legislation’.

The introduction of additional test of capacity and understanding for persons with disability *could* be counter-productive in application and have a discriminatory effect.

The NMHCCF supports the approach set out by Legal Aid Queensland and prefers an assumption of capacity in respect of consumer contracts.

### Marriage

The NMHCCF endorses the proposal 11-1 that the *Guidelines on the Marriage Act 1961 for Marriage Celebrants* be amended to ensure they are consistent with the National Decision-Making Principles. This will ensure that people who may have impaired decision-making ability are not unnecessarily prevented from entering a marriage.

### Superannuation

The discussion paper notes in 11.49 that superannuation is generally provided through a trust structure in which trustees hold the funds on behalf of members. The *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) provide mechanisms to allow superannuation fund rules to permit a member of the superannuation fund to complete a binding notice nominating a beneficiary.

A member can nominate a legal personal representative, or a dependent or dependents as their beneficiary. Nominations are generally only binding for three years, but can be renewed. Individual superannuation funds are also governed by their trust deeds and governing rules.

The ALRC report poses these two questions:

1. Whether the *Superannuation Industry (Supervision) Act 1993* and Regulations should be amended to provide for supported decision-making when a member of a superannuation fund nominates a beneficiary?
2. When a member of a superannuation fund has appointed a state or territory decision-maker, should that decision-maker be able to nominate a beneficiary on behalf of the member?

#### Current arrangements under the *Superannuation Industry (Supervision) Act 1993* and Regulations

The SIS Regulations require that the notice nominating a beneficiary must:

- be in writing;
- be signed and dated by the member in the presence of two witnesses, each of whom have turned 18 and *neither of whom is mentioned in the nomination*; and
- contains a declaration signed and dated by the witness stating that the notice was signed by the member.

The discussion paper refers to a submission by the Law Council of Australia. The practices of funds are divided – some funds will accept nomination by a person holding an enduring power of attorney, and some will not.

The NMHCCF notes the submission of the Law Council of Australia, which suggests that superannuation funds would adopt a more consistent approach if there were greater clarity in legislative provisions governing superannuation death benefits.

Whilst this is a complex issue, the NMHCCF would tend to support the approach of the Law Council of Australia on this matter.

#### Board membership and other corporate roles

The NMHCCF supports an enhanced role for mental health consumers and carers across all areas of public life. Submissions to the Inquiry indicate that there is under-representation of people with disability on corporate, government and non-government boards.

The removal of directors or board members on the grounds of intellectual disability or mental illness needs to be scrutinised through a number of lenses. The legal process around the removal of directors or board members would need to take account of the protection of the interests of the governed and an underlying goal of enhancing diverse representation of boards.

In conclusion, the NMHCCF supports this review and the approach of the Australian Law Reform Commission. The proposed reforms will ensure Australia's compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles.