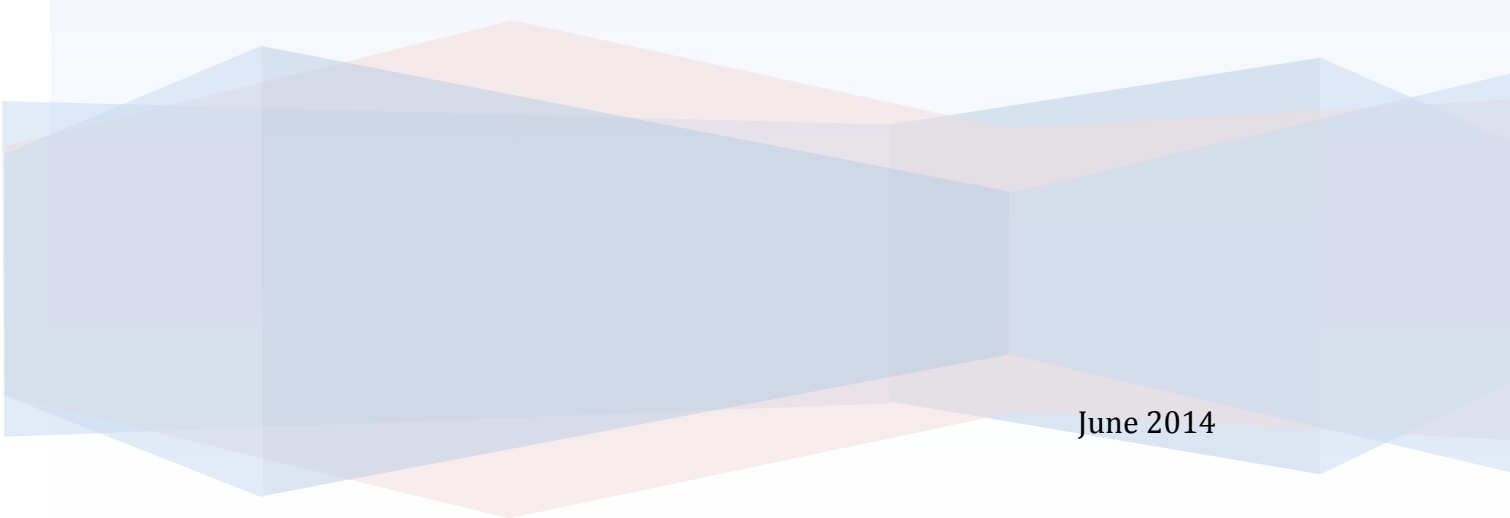


# **Decision-making and the Law.**

**Reality and choice versus ideology  
and confusion**

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**A response to the Australian Law Reform Commission's  
Discussion Paper – Equality, Capacity and Disability in  
Commonwealth Laws**



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## Abstract

This paper challenges the promotion of the proposed reconfiguration of legal decision-making options that would see substitute decision-making erased from the statutes.

The paper challenges the appropriateness of the proposal, which would see individuals denied their current legal right to have another person representing them in relation to decisions that affect the individual. Where, although it is either not realistically possible for the individual to make particular decision on his or her own behalf, or where the individual may want to personally elect to have a person of his or her choice represent them, these options would be denied to them.

This response challenges the legal, ethical and ideological concepts that underpin the proposal to replace substitute decision making with supported decision-making only and hence the paper's title – *Decision-making and the Law. Reality and Choice versus Ideology and Confusion*. The writers contend that rather than facilitate an individual's freedom to choose which exists within the current legal framework, the provision of supported decision-making only would actually undermine this right and create a confusion driven by restrictive ideology alone. Additionally, the response details practical issues that would be associated with the complete erosion of a substituted decision option in favour of supported decision-making only.

Apart from the obliteration of substitute decision-making totally contradicting the concept of choice, it also, in reality, places the decision-making for many individuals in the hands, and through the mouths of, self-appointed or formally appointed 'articulates'<sup>1</sup>. An approach, the writers detail in this paper, as being a total contradiction, where, in the case of an individual who does not have the capacity to choose his or her support person, then who does this and how?

This paper urges all Australians to reject the so-called expert panels, the 'iso-ideologues'<sup>2</sup> the legal purists and the disability engineers<sup>3</sup> and their lofty pronouncements. The Australian Law Reform Commission's proposal to bring about the demise of substitute decision-making, in all its forms, must be called for what it represents: an ideologically driven attempt to deny Australians their right to choose.

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1. **Articulates:** Are defined as those individuals who have the ability and the platform to be heard above all others and in so doing reflect and articulate their own ideology and tend to represent it as though it is the choice of those they purport to represent.
2. **Iso-ideologues:** Are defined as those individuals who have established their ideology based on research, often undertaken by other iso-ideologues, who are isolated from the practicalities and realities that face those they seek to make decisions about.
3. **Disability Engineers:** Are those individuals who, for example, are usually ensconced in positions of power and influence such as the usual suspects who are invited onto key committees and advisory panels, policy and planning bureaucrats and funded advocates. Through their positions they seek to engineer changes to disability policy and legislation based purely on their own narrow beliefs or how the changes may promote their own cause. Persons who disagree with their pronouncements may find themselves depicted as being opposed to reform.

**The Discussion Paper – Equality, Capacity and Disability in Commonwealth Laws**

The writers note that the review, as established by the former Attorney-General, was entitled – Review of Equal Recognition before the Law and Legal Capacity for People with Disability. Yet, despite this title, the Australian Law Reform Commission (the Commission) has chosen to entitle their discussion paper – Equality, capacity and disability in Commonwealth laws. While this may well be simply a case of rephrasing of the original title, the writers express some concern that when considered in the context of the contents of the discussion paper this change actually represents a subtle change in intent and focus. By replacing the words "equal recognition" and the words "legal capacity" with the words "equality" and "capacity", the writer suggest that what the Commission seems to be doing by using the terms equality and capacity is emphasising an ideological position. That being that "equality" equates to "equal" in every aspect and that "capacity" is the same as "ability". The writers submit that this is a significant shift from the concept of what can reasonably be assumed to have been the intent behind the use of the words "equal" and "legal capacity". As such, the writers therefore query as to whether or not the Commission may not, through their title, be attempting to shift the focus and the debate in order to support their position.

Notwithstanding the above, the writers also note the significance placed on the United Nations (UN) Convention on the Rights of Persons With Disabilities. And, while the writers acknowledge the importance of this Convention, nonetheless, they argue that the position taken in relation to the issue of equal recognition and legal capacity depends very much on the interpretation given to the Convention. In the case of the Commission it also seems reasonable to conclude that they have clearly established a position that is driven by current disability ideology as opposed to the legal implications of such ideology.

While the writers fully acknowledge that recent decades have seen major shifts in attitudes towards people with disabilities and as a result changes to legislation and service delivery, nonetheless, they also submit that at times ideology has overridden practical considerations associated with the capacity and abilities able to be exercised by some individuals with impairment. The significance of this is that no amount of ideology and high sounding philosophical positioning changes this reality. While it is one thing to think in the context of aspirations and desires it is entirely another to recognise that, at times, an individual's impairment will restrict his or her opportunity and ability to fulfill such aspirations. This does not of course mean that an individual with impairment cannot, and should not, have equal recognition before the law. Equally, it does not mean that appropriate legal mechanisms cannot exist whereby such equal recognition is fully acknowledged.

Within the context of this paper the writers argue that in Australia the law generally strikes a reasonable and sensible balance between the concept of equality, or in other words rights, and that of capacity, or in other words an ability to self-determine. As such, the writers submit that the existing laws, which, for example, provide for guardianship, Power of Attorney and financial administration, while possibly open to some revision, should not be tampered with to the degree that they are excised from the statutes. This being particularly so where the desire to do so is based on a current ideological trend, rather than seeking to examine the framework in which those laws were established in the first place. Therefore, although the writers do not deny the importance of undertaking a review of particular laws from time to time, equally they deplore any attempt to seek to simply change a law on the basis of ideology alone, rather than a common sense understanding of the practical realities that exist in relation to that law and how it might be practised.

**1. Decision Making Principles in Context**

The authors of this response acknowledge that the Terms of Reference provided to the Commission required the Commission to address a range of complex legal and associated issues. As such, the discussion paper provides a detailed, and at times complex set of information. The paper's outcome statements therefore include a number of proposals, which are held to be associated with the Terms of Reference. Despite this, however, the authors of this response contend that the platform issue to be addressed is that of whether substitute decision-making should be retained as a separate legal concept.

While the discussion paper provides what it terms as the need for "a paradigm shift in approaches to persons with disabilities" it then makes a quantum leap by arguing that it is necessary to embrace supported decision-making as the legal framework to provide equal recognition before the law and legal capacity for people with disability. In promoting this approach the Commission therefore, in effect, is also promoting the abolition of substitute decision-making as such, and instead legalising what they describe as "supporters" and "representatives".

The writers of this submission challenge the Commission's adoption of the abolition of substitute decision-making. They argue it is flawed because it adopts a singular view in relation to the concept of rights and choice and the suggestion that the current arrangements are outmoded. Indeed, the Commission's paper gives rise to significant concern that the major driver for the proposed change appears to be what might be termed ideological purity only.

The Commission's approach is founded on the considerations of the United Nations Committee on the Rights of Persons with Disabilities. This Committee, in a General Comment on article 12 of the Convention, argued that what is required is a parallel action of the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. As such, it is therefore critical to recognise article 12 as the key determinant in the promotion of any proposed change. While the Commission appears to have accepted uncritically the Committee's comments in relation to article 12, the writers note that other nations have challenged such comments. Given this, the writers therefore make the following comments in relation to article 12. The significance of Australia's interpretive declaration regarding article 12 is that the first proposal in the Commission's report is that the Australian government should review the interpretive declaration in relation to article 12 of the United Nations Convention on the Rights of Persons with Disabilities with a view to withdrawing it. The unequivocal outcome of this is to clear the way to excise substitute decision making from the statutes and replace it with supported decision making only.

The writers decry the Law Reform Commission's apparent unquestioning acceptance of the UN General Comment on article 12. In so doing this acceptance is in contrast to the views expressed by other countries including New Zealand, Norway, Denmark and Germany. The writers highlight the comment as submitted by the Federal Republic of Germany and while the writers note that the German response was in relation to the draft general comment, nonetheless it is considered equally applicable to the final comment.

The writers note the comment made in the German paper that General Comments, "can neither extend the scope of the respective treaty obligation nor do they have binding effect on the contracting states". The writers submit that this statement has significance because, in the case of Australia adopting the UN's General Comment, this would effectively extend the scope of our treaty obligation and accept the

general comment as having a binding effect. The Commission's position is also one that, because the UN comment on article 12 exists, the Commission should automatically adopt that position. As noted in the German response there is no binding obligation for this to occur. Yet, that Commission, by adopting the UN's General Comment, has accepted the response as binding.

The writers provide the following extracts from the paper as submitted by the Federal Republic of Germany, and in so doing they submit that these comments have import for this submission.

..."It is, in the view of the German government, also obvious that the provision of an adequate network of support for decision-making will present many difficulties, not least financial, for many States Parties. It seems, therefore, that the Committee's interpretation is not shared by the State Parties in general; not even by a substantial minority. Germany doubts that it is appropriate to call an understanding of Article 12 common to the States Parties a "misunderstanding"...

"Germany does not share the Committee's basic assumption that Art. 12 of the Convention affords unlimited capacity to exercise legal rights and duties to all persons with disabilities. All persons have, as affirmed by Art. 12 para 1 of the Convention, legal capacity in the sense of legal standing. But not all persons can exercise those rights and duties"...

"While sharing the view the provision of support for persons with disabilities is the best possible way to help them exercise their rights, Germany remains convinced that there are situations in which persons with disabilities simply are not able to make decisions even with the best support available ... the Convention could not and in Germany's view does not rule out the possibility of substitute decision-making in some cases."

<http://www.ohchr.org/EN/HRBodies/CRPD/Pages/DGCArticles12And9.aspx>

### **3. Language and Decision Making in Context**

In the context of the law the writers acknowledge the necessity of using precise language. Despite this, however, the writers also acknowledge that in the case of legal capacity it is necessary to consider language often associated with people who do have the ability of making an informed decision. While the Commission seems to be of a similar view, they argue that what is required is a new lexicon, but a lexicon that is clearly driven by ideology. The focus of the reform directions, which is towards supported decision-making, is therefore in effect predetermined by a theoretical construct rather than giving legitimate account to the realities associated with people with disabilities and the concept of legal capacity as it relates to mental capacity.

The writers argue that the Commission in seeking to establish a new lexicon has muddled the waters in relation to this debate by framing its deliberations on their use of the word 'ability'. They appear to have done this because they consider that capacity is often confused with the concept of 'legal capacity' and in turn legal capacity is regularly conflated with 'mental capacity'. Therefore, they argue that to avoid this confusion the use of the word ability is more appropriate.

The writers accept that in terms of the traditional meaning of legal capacity, all people are, or should be equal in the eyes of the law. Notwithstanding the concept of equality, however, the practical reality is that not all people are treated equally in the eyes of the law when it comes to exercising their individual legal capacity, for example, if deemed unfit to plead. Given the Commission's position in relation to promoting supported decision-making only, this therefore suggests that the concept of fitness to plead would no longer apply. Interestingly, if viewed from the other side of the coin, this should also then be taken to assume that such an individual has the right and potential to be sworn in as a juror. In the event of such circumstances arising the writers therefore challenge the independence of an individual who may undertake a jury service, but in so doing, requires a support person or even a representative to facilitate his or her participation on the jury. Clearly, not only does such a scenario contradict the whole notion of the independence of the individual juror, but also brings into doubt the confidentiality processes imposed on a jury.

In essence, what this means, is that legal capacity goes beyond the concept of equality and rights. Thus, the critical question is then one of - Why are some groups or individuals treated differently in the eyes of the law? The writers argue that it is reasonable to contend that this is because the law realistically recognises that there are some people who, for a range of reasons, are unable to exercise legal capacity. Therefore, legal capacity goes beyond the traditional meaning by taking account of an individual's mental capacity where mental capacity equates to whether or not the individual is capable of making and communicating an informed decision. The Australian Constitution recognises the significance of capacity by providing for the removal of a judge on the grounds of proven incapacity. Apart from the fact that it is nothing less than the Australian Constitution that recognises the practical application of incapacity, any suggestion that this provision might be changed to allow for a judge to be supported in his or her decision-making would clearly bring into question the independence of the judiciary and the exercising of responsibility. If this were to occur it would be obviously nonsensical by undermining the whole concept of responsibilities and independence.

The Commission's focus on promoting the concept of ability in the context of the legal environment in effect ignores the concept of inability. The writers argue that to deny the reality that there are some people whose ability level does not equip them with the necessary functions to make an informed decision, no matter what level of support is provided, represents a clear case of iso-ideology thinking, where the thinking is driven by an ideology that is totally removed from reality. Indeed, in considering the link between rights and responsibilities the writers highlight the law's current recognition of individuals having the right to make a decision to appoint a Power of Attorney based on the individual's recognition that there may come a time when the individual is not capable of making an informed decision.

The Commission, in detailing that there is a continuum in terms of supported decision-making, as part of the new lexicon has introduced the concept of 'fully supported' decision-making. What this really means is that, at the end of the continuum it is in fact another person who actually makes the decision for the 'supported' person. Given that current laws provide for substitute decision-making in the form of guardianship, financial administration and Power of Attorney the writers query why the Commission would seek to introduce a new term when there already exists appropriate terminology and processes that allow for 'fully supported' decision-making.

It is clear that the Commission is not only seeking to do away with the terms 'guardian', 'financial administrator' and 'Power of Attorney' but replace them with the term 'representative decision maker'. Therefore, in so doing 'supporters' and



'representatives' in effect would become the substitute decision-makers. The writers argue that this is a form of legal-social engineering in the sense that this could lead to an engineering of the law that could provide legal legitimacy to individuals who themselves self-select as being a supporter or representative of the person who requires support. Alternatively, if the Commission's view is pursued, the law would provide for an unrealistic option of requiring those actually without the capacity to select or nominate a supporter or representative to be required, in law, to select or nominate a supporter or representative.

While the Commission has been quick to point out alleged tensions that may arise between a family providing support to family members with disability, they neglected to make any such reference to the potential of so-called independent individuals, including funded advocates, to operate entirely without tension. The writers argue that it stands to reason that in the event of a support person or representative holding a particular ideological view, then this view will be expressed in the provision of their support to the individual with a disability. As such, the writers submit that to assume that because a person is not a family member that person will maintain a level of independence and be without bias is naïve. The significance of this lies in the Commission's proposal to replace "best interests" as the test for decisions with the "will and preferences" test.

By contrast, the current law provides an unequivocal legal base for either a guardian to be appointed, or in the case of Power of Attorney, for the individual him or herself to nominate. While the Commission suggests that the person who requires support would nominate their support, this totally ignores those circumstances when the individual does not have the capacity to do so. As such, it therefore seems reasonable to suggest that this is open to manipulation because an individual who becomes the person's supporter or representative will without question influence the outcome. Again, while the Commission argues that an individual could make their nomination as to the person they want to be their supporter or representative in anticipation of losing the ability to make such a decision, clearly this begs the question as to how this differs from the existing Power of Attorney provision? Given that is reasonable to argue that it does not, then again the question must be asked - Why make the change?

#### **4. The Practical Landscape in Context**

Although sections of the Commission's discussion paper seeks to address the requirement of identifying what changes might be required to Commonwealth laws and legal frameworks, the writers argue that what the Commission's commentary highlights is a situation that would really require significant changes to a broad range of existing laws, including the Commonwealth Electoral Act. Given the comments made above that the current provisions for Power of Attorney and guardianship legislation, which exists across various jurisdictions, already provide an appropriate legal framework, the writers again emphasise their claim that what the Commission is seeking to do is engineer the legal framework to meet what is essentially an *a priori* argument. The writers further submit that the discussion paper goes well beyond that of discussion and instead provides an unequivocal position being presented by the Commission. As such, the writers condemn the Commission's obvious bias.

As already noted above a number of countries, including Germany, made submissions to the UN Committee expressing their concerns that consideration did not appear to have been given to what the writers call the practical considerations in relation to supported decision-making versus substitute decision-making. It is within this context that the writers make the following comments.

**Persons on life support** – the ongoing and significant developments occurring in medical science has provided the medical profession with the option of keeping people alive even though the individual would die without the support of a life-support system. It is not uncommon in such circumstances for the individual who has been placed on life support to have no recognisable cognitive ability to express his or her feelings, wants or desires.

**The case of dementia** – again in our world where people are living longer but at the same time conditions including dementia are becoming increasingly evident, the practical reality of this is that the person who suffers with a condition such as profound dementia does not have the cognitive ability to make his or her own rational decisions. Noting, that this also applies to the person not being able to nominate another individual to act as a supporter or representatives.

**Mental capacity** – the Commission seems to have studiously denied the relevance of this concept, and instead have created a substitute term in the form of “decision-making ability” thereby taking an ideological stance. The writers argue that in so doing the Commission seems to want to ignore the reality that there are people in our society who do, for whatever reason, lack mental capacity, and by virtue of their reduced capacity do not have the ability to process information and make high-level informed rational decisions that may affect their lives.

**Mental impairment** – our legal system already recognises that from time-to time there are individuals who, because of mental impairment, and this may be for any one of a number of reasons, is assessed as being unfit to plead or to stand trial in a case before the courts. Under the proposal being put forward by the Commission it seems reasonable to conclude that a person currently in this category would not be given the current protection that the law provides, and instead either through the provision of a supporter or a representative be able to be judged as being fit to plead and being fit to stand trial.

There are of course many instances already existing within the law and commercial frameworks that recognise that incapacity disqualifies an individual from, for example, operating as a licensed financial services adviser, sitting on a jury or even something as commonplace as obtaining a driver’s licence. The writers argue that it seems reasonable to conclude that those who framed these particular legislative provisions recognised, and accepted, that incapacity could not be ignored. By seeking to turn this around and focus on the concept of ability or in other words capacity, the writers submit that the Commission seems to be more concerned with the ideology of rights, even if the rights may be compromised, as opposed to good law making.

Associated with the matter of the identification or nomination of a supporter or a representative is a matter of the – How, Who and When. That is how, or what process, is to be established to identify how a supporter or representative may be chosen. Again, while the writers note the Commission’s call for submissions on such matters, this seems to suggest that in flying the flag for supported decision-making via supporters and representatives the Commission is bereft of practical solutions to this matter and has, instead, taken the easy option rather than suggest the possibility which could highlight the weakness of the supported decision-making paradigm. On the matter of who might become, or nominate him or herself to act as a supporter or representative, or alternatively how such people might be nominated, again the Commission is silent on this issue. In terms of when a supporter or representative might be nominated the discussion paper makes no comment. The writers submit that this failure highlights what can only be described as the tenuous relationship between ideology and reality.



**5. Ideology in context**

The discussion paper makes reference to a number of terms that appear to be strategic in their intent in that they seem to be used to provide a rationale for the underlying ideology that underpins proposal 2-1 and those that follow from it and as established by the Commission. The ideology appears to be based on what is now commonly referred to as the social model or social approach to disability. This approach as it is being articulated in effect denies the existence of impairment, although impairment is an essential element in the World Health Organisation classification of functioning, disability and health. Instead, it purports that it is purely the environment that creates limitations on an individual. The ideology therefore promotes the notion that with the right level of support an individual can function to a level as though the person does not have impairment. While the writers acknowledge that an individual's functioning can be enhanced if the right levels and types of support are provided, they also argue that there are persons where the level of impairment is so pronounced no amount or type of support will compensate. Not to accept this reality and instead seek to manufacture an arrangement that satisfies the ideology is nothing short of disability engineering.

By way of illustrating the Commission's attempt to support their ideological stance, which must again be emphasised as being one of replacing substitute decision-making with supported decision-making, the writers note that the Commission has applied particular terminology that has, over recent years, become the bywords for disability reform. This terminology includes words and concepts such as inclusion, participation, rights, dignity and autonomy. The writers argue that while each of these words and concepts are now part of the disability lexicon, nonetheless it is a bridge too far to suggest they should be seen in isolation from the context in which they are used. In other words, the writers submit that to use such terminology and concepts as though they apply equally to all situations requires an all-encompassing interpretation. As an example, the writers suggest that inclusion and participation cannot be simply taken to mean that this is a one-way process and therefore by simply being provided with the opportunity to access the community, whatever indeed that may mean, that inclusion and participation will automatically occur. Differing environments may lead to differing levels and types of inclusion and participation.

If inclusion and participation is such an easy process to activate then clearly our society would not have the problems that occur in relation to the inclusion and participation of, for example, our aged, new arrivals from overseas, or individuals that may have a particular religious persuasion. Clearly, it is the context and the role that individuals play within the community which determine inclusion and participation. The writers argue that, notwithstanding the Commission's use of the above terms, that the significant terms and concepts applicable to the discussion paper, and hence the question of supported decision-making or substitute decision making, are the terms and concepts "ability" and "capacity".

The Commission has sought to largely ignore, or replace, the concept of capacity with that of ability. The writers argue that this is a false dichotomy in that, when used in the context of an individual's mental or cognitive level of functioning to understand and enact a decision, the ability or capacity to do so is paramount. By seeking to enshrine in law the concept of supported decision making, noting that this is on a continuum from the most minimal level of support to the maximum level whereby the support is in effect a form of substitute decision making, the Commission has virtually ignored the necessity of an individual's ability or capacity to understand to make an informed decision or choice.

As if to strengthen their argument seeking supported decision-making to be enshrined in legislation and the discontinuation of substitute decision-making, the Commission has then resorted to applying a number of other terms that, whilst conveying a level of appropriateness when used in the broader context, as used by the Commission they tend to convey an emotive argument as to why supported decision-making should replace substitute decision-making. The writers submit that this is both misleading and in essence dishonest. Words used by the Commission in this context include equality, paternalism and protection. The intent of the Commission's use of such terminology seems to suggest that what they are seeking to convey is that unless supported decision-making is enshrined in legislation and substitute decision-making deleted from the statute, then individuals who do not have the ability or capacity to understand and make informed decisions or choice will be treated as lesser individuals in the eyes of the law.

Again, the writers argue that to seek to impose on individuals who do not have the ability or capacity to understand and make informed decisions or choice, by virtue of their not having access to substitute decision-making, guardianship, or Power of Attorney will, in reality, be denied the very things that the Commission seems to be suggesting that supported decision-making only will provide for them. Given this, the writers further submit that what the Commission is supporting is likely to have the unintended consequence of actually denying many individuals their right to choose to either be supported or to have a substitute decision-maker.

## **6. Concluding Comment**

This submission concludes by contending that the Commission's discussion paper represents a biased commentary in supporting the establishment, in law, of supported decision-making and the exclusion, from law, of substitute decision making. As a discussion paper, the writers are of the view that the Commission had a responsibility to not present a one-sided argument, but instead to present cases for and against the alternatives. By presenting the discussion paper in the way that they have, the Commission has in effect not only pre-empted possible responses to their paper but have sought to influence those responses.

What the Commission is proposing represents a significant and far-reaching potential set of changes to laws across Australia. Indeed, the writers of this response contend that what has not been given account is the concept of unintended consequences. Significantly, included in such possible consequences are, as indicated further above, the prospects of actually denying an individual his or her right of choice. Therefore, by excluding substitute decision making this means this option would no longer be available to an individual who may have chosen it, had it been available. Additionally, of course, and of equal significance, is that by legislating supported decision making the Commission is potentially giving rise to the advocacy industry becoming the supporters and representatives of choice, not necessarily by the individual seeking such support, but because of the way the law may determine who may be deemed to be a supporter or a representative.

It is unfortunate, in the view of the writers, that over recent years the disability sector has been commandeered by a small number of individuals and entities who presume to speak on behalf of all persons with disabilities and in particular persons with an intellectual disability, and by virtue of association, their families. This has had the effect of sidelining intellectual disability. Increasingly, account has been given to what the writers called the "articulates", being individuals who tend to represent people who do not necessarily have a cognitive or intellectual impairment but whose impairment is of a physical or sensory nature. Some of these articulates, along with the usual suspects who are selected to go on working parties, advisory committees and the like, have tended to drive the disability agenda. Because of

their particular focus on concepts such as rights, inclusion and a denial that some persons with disabilities do not have the same cognitive function as they have, these individuals have tended to use ideological arguments to persuade the policy and law makers. Unfortunately, because these people do not represent, and essentially do not have an intimate understanding of the impact of cognitive impairment, they therefore push the barrow that all persons with disabilities have the same desires, abilities and ideology that drive them.

Whatever the outcomes of the responses to Commission's discussion paper, the writers urge that substitute decision-making is not consigned to yesterday's law and that supported decision-making is not enshrined in tomorrow's law.

This submission therefore does not support the Commission's Proposal 2-1 that "The Australian Government should review the Interpretative Declaration in relation to art 12 of the United Nations Convention on the Rights of Persons with Disabilities with a view to withdrawing it."

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