

Name of organisation: Australian Research Network on Law and Ageing

Proposal 2–1:

Proposal 3–1:

Proposal 3–2 National Decision-Making Principle 1:

Proposal 3–3 National Decision-Making Principle 2:

Proposal 3–4 Support Guidelines:

Proposal 3–5 National Decision-Making Principle 3:

ARNLA welcomes the emphasis of the Principles on the human rights of the person to whom the decision relates. In particular we note the importance of looking beyond the concept of promoting the personal autonomy of persons, to include the wider right of respect for the person's dignity. It has been recognized that dignity is a wider concept than autonomy, and a universal value to which all persons are entitled. It therefore has special relevance for those whose capacity is compromised, either because of conditions producing fluctuating capacity, or for more chronic situations.[\[1\]](#)

ARNLA suggests that it is therefore worth emphasising the value of personal dignity in those situations where the decision is being taken by a representative in circumstances the representative is not aware of the person's wills and preferences, and should seek to make the decision on the basis of what the person would have wanted. It is therefore suggested that this be made explicit in 3.69(c)(ii) and (iii).

ARNLA is also of the view that it is important that the Principles reflect the reality that decisions may include those about the ending-of-life. It has been acknowledged by the European Court of Human Rights, for example, that Article 8 of the European Convention, in respecting the right to private life, protects the right to make decisions about the timing and manner of one's death.[\[2\]](#) Therefore it is suggested that this is made explicit in 3.57.

[\[1\]](#) For example see E Pellegrino, *Humanism and the Physician*, University of Tennessee Press, Knoxville, 1979, at p6. Also see C Gastmans and J De Lepeleire, 'Living to the Bitter End? A Personalist Approach to Euthanasia in Persons with Severe Dementia', *Bioethics*, Vol 24, No. 2 (2010), pp 78-86 at 84. who argue that the tendency of Western Societies to view cognition as integral to dignity tends to exclude those who lack cognitive capacity from the sphere of human dignity.

[\[2\]](#) *Pretty v United Kingdom* [2002] ECHR 427 at [65]

Proposal 3–6 Will, Preferences and Rights Guidelines:

Proposal 3–7 Representative Decision-Making Guidelines:

Proposal 3–8 National Decision-Making Principle 4:

Proposal 3–9 Safeguards Guidelines:

Proposal 4–1:

Question 4–1:

Question 4–2:

Proposal 4–2:

Proposal 4–3:

Proposal 4–4:

Proposal 4–5:

Question 4–3:

Question 4–4:

Proposal 4–6:

Question 4–5:

Proposal 4–7:

Proposal 4–8:

Proposal 4–9:

Question 4–6:

Proposal 4–10:

Proposal 4–11:

Proposal 4–12:

Proposal 5–1:

Proposal 5–2:

Proposal 5–3:

Question 5–1:

Question 5–2:

Proposal 6–1:

Proposal 6–2:

Proposal 6–3:

Proposal 6–4:

Proposal 6–5:

Proposal 7–1:

Proposal 7–2:

Question 7–1:

Proposal 7–3:

Proposal 7–4:

Proposal 7–5:

Proposal 7–6:

ARNLA welcomes the proposals to support access to justice for persons with

disabilities. In particular we support proposals 7.6 and 7.7 that litigation guardians should support the person represented to express their will and preferences in making decisions in relation to litigation.

Proposal 7-7:

Question 7-2:

No – the Australian Solicitors’ Conduct Rules should not be amended to provide a new exception to the duty of confidentiality.

ARNLA believes this would infringe upon the rights of people with a disability to fully exercise their legal agency. ARNLA is concerned that lawyers might too readily raise capacity issues without the requisite consideration of the supports necessary for a person to exercise their decision making rights. A similar concern was raised by Dr Linda Haller of Melbourne Law School in her presentation to the Civil Justice Conference of Victoria Legal Aid in 2013.^[1] Dr Haller stated “[t]alk of ‘clear and unambiguous duties to raise issues of a client’s capacity’ may lead less experienced lawyers to look too readily for capacity issues, overlook critical issues around client autonomy and issue capacity proceedings prematurely.” ARNLA shares these concerns.

Solicitors should raise capacity concerns with their clients and be encouraged to robustly discuss the benefits (if any) of an assessment of the client’s decision making abilities and required supports. A change to the Solicitor’s rules might have the effect of lawyers instead seeking the ruling of a court unnecessarily and of disclosing the client’s confidential information in the process.

ARNLA would advocate for an approach that promotes the human rights of older people in line with Art 12 of the Convention on the Rights of Persons With Disabilities.^[2] Applying a human rights approach, lawyers should be encouraged to provide accommodations and support for a person experiencing decision making disabilities, rather than being encouraged to breach their confidences.

A further concern exists in relation to the current rules and commentary. The Australian rules and commentary on client capacity are exemplary of a system based on competing understandings of capacity and the functional approach. The commentary to rule eight reads:

It is a presumption at common law that every adult person is competent to make their own decisions. Characteristics which may displace the presumption include old age, incapacity, mental infirmity, suspicion of undue influence or of fraud, or where the client is unable to communicate. Accordingly, while a presumption of legal capacity lies at the heart of the solicitor-client relationship, solicitors must be reasonably satisfied that their client has the mental capacity to give instructions, and if not so satisfied, must not act for or represent the client. A failure to be alert to issues of incapacity has the potential to generate liability in negligence.

Complex issues can arise when a solicitor has reason to doubt a client’s capacity to give competent instructions. A number of Law Societies have issued guidance on the ethical responsibilities of practitioners when faced with such questions. Where a solicitor is unsure about the appropriate response in a situation where the client’s capacity is in doubt, the solicitor

can, pursuant to Rule 9.2.3, seek confidential advice on his or her legal or ethical obligations.^[3]

There are clear contradictions inherent in this commentary. On the one hand, the commentary promotes a status based approach to capacity in arguing “*Characteristics which may displace the presumption include old age..*” This statement is contrary to a human rights approach to legal capacity and harks back to ageist assumptions about a person’s decision making ability.

If the ARLC was to support a change to the Australian Solicitors’ Conduct Rules, then the commentary to rule 8 should be amended to delete the sentence “*Characteristics which may displace the presumption include old age, incapacity, mental infirmity, suspicion of undue influence or of fraud, or where the client is unable to communicate.*” This could remove a potential encouragement or over reliance on any exception to the rule of confidentiality.

According to *Riley*,^[4] the duty of confidentiality is already qualified in the form of an implied consent permitting a lawyer to act in a manner necessary to properly carry out the terms of the retainer.^[5] This would include the disclosure of confidential information to the limited extent required to enable an application for a litigation guardian. The Honourable Justice Brereton has similarly argued, “On the question of confidential information to the extent that it is absolutely necessary to enable the problem of capacity to be dealt with by the court, then that operates as an exception to the obligation of confidentiality.”^[6] *Riley* suggests that such disclosures would be made to a friend, relative or trustee of the client.^[7] In the 2012 Victorian decision *Goddard Elliott v Fritsch* [2012] VSC 87, a case that concerned the “capacity negligence” of a firm that took instructions to settle from a person with a debilitating depressive illness, Justice Bell’s clear decision was that where lawyers are in any doubt about the decision making capacity of their client, they must bring the matter to the court’s attention for a ruling.^[8]

ARNLA believes the common law already provides an exception to the rule of confidentiality that should not be given any further weight by being enshrined in the rules.

^[1] Linda Haller, ‘Ethical Issues for Administrative Law Practitioners’, paper presented to the *Civil Justice Conference*, (8 November 2013) Victoria Legal Aid,

^[2] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 12.

^[3] Law Council of Australia, *Australian Solicitors’ Conduct Rules 2011 and Commentary*, (2013) commentary to rule 8, 7.

^[4] *Riley Solicitors’ Manual*, LexisNexis, Chapter 8, para [8055.10].

^[5] *R v P* [2001] NSWCA 473

[6] Brereton PLG, 'Acting for the Incapable – A Delicate Balance', Address to the Law Society of NSW and Carers NSW (2011).

[7] *Riley Solicitors' Manual*, LexisNexis, Chapter 8, para [8055.10].

[8] *Goddard Elliott v Fritsch* [2012] VSC 87, par 562; see also *R v P* [2001] NSWCA 473, [64]. 'It is therefore preferable, if possible, if a family or health care professional makes the application [for the appointment of a substitute decision - maker]':

Proposal 7–8:

Proposal 7–9:

Proposal 7–10:

Proposal 7–11:

Question 7–3:

Proposal 7–12:

Proposal 7–13:

Proposal 7–14:

Proposal 7–15:

Proposal 8–1:

Proposal 9–1:

ARNLA supports the proposed changes to the wording of s 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth), removing the reference to persons of unsound mind and replacing it with the following wording: 'does not have decision-making ability with respect to enrolment and voting at the relevant election'. This proposed change ensures that a blanket approach to decision-making ability at elections is avoided, recognizing that mental cognition may fluctuate over time and between elections.

With respect to Question 9-1, ARNLA has serious reservations in relation to making changes to those persons qualified to issue a certificate under s 118(4) of the Act, thereby triggering the removal of a person from the electoral roll. Removal of a person's right to vote involves the removal of a fundamental right of citizenship. It thus requires sufficient safeguards and we believe that requiring a medical practitioner to issue certificates under this section provides an adequate safeguard for protecting such an important right.

Proposal 9–2:

ARNLA also supports Proposal 9-2, regarding the insertion of clearer criteria for determining whether a person has decision-making ability at elections, as well as the consideration of assistance and support mechanisms when determining whether a person has decision-making ability (Proposal 9-3). However, we do not support the breadth of the first-mentioned criterion – that a person 'understand the information relevant to decisions that they will have to make associated with enrolment and voting at the relevant election'. This criterion is too broadly framed and would permit a large degree of subjective assessment upon the part of the persons assessing decision-making ability, particularly with respect to what 'information' is relevant.

When exercising choice at elections, different people will consider different information to be relevant. What is more important is that the person understands the *nature* of the decision being made – that they are making a decision as to their preferred representatives in federal parliament. Thus, this criterion should be more tightly worded to refer to the ‘nature’ of the decision being made, rather than the information deemed by another to be relevant.

With regard to Question 9-2, ARNLA would like to highlight the potential for undue influence to occur in electoral decision-making where assistance is provided, together with the fact that the secrecy of ballots will often be severely undermined. In this respect, there would be benefit in the Australian Electoral Commission investigating international best practice, where technology is used to facilitate the exercise of the right to vote for older Australians and persons with disabilities, in particular. A review of current Senate ballots would also be welcome, given the increased complexity in voting below the line and the personal distribution of preferences. One option might be to expressly permit a limited distribution of preferences below the line, rather than requiring voters to number all boxes.

Proposal 9-3:

Proposal 9-4:

Question 9-1:

With respect to Question 9-1, ARNLA has serious reservations in relation to making changes to those persons qualified to issue a certificate under s 118(4) of the Act, thereby triggering the removal of a person from the electoral roll. Removal of a person’s right to vote involves the removal of a fundamental right of citizenship. It thus requires sufficient safeguards and we believe that requiring a medical practitioner to issue certificates under this section provides an adequate safeguard for protecting such an important right.

Proposal 9-5:

ARNLA would like to draw attention to a practice referred to by Karlawish and Bonnie,^[1] whereby the person who is the subject of a removal process is not informed of that fact, by virtue of family members requesting that a letter not be sent in case it causes distress to the person. In our view, this practice is both ageist and paternalistic. The right of every Australian to vote should not be eroded by the exercise of a subjective discretion which is based on the paternalistic assumptions of family members or carers. To this end, we support Proposal 9-5, which would ensure that data is collected and made publicly available on the operation of s 93(8)(a).

[1] J Karlawish and RJ Bonnie, *Voting by Elderly Persons with Cognitive Impairment: Lessons From Other Democratic Nations* (2007) 38 *McGeorge Law Review* 1 at 13.

Proposal 9-6:

ARNLA further supports Proposals 9-6 and 9-7.

Question 9-2:

Proposal 9-7:

ARNLA further supports Proposals 9-6 and 9-7.

Proposal 10-1:

Question 11-1:

Question 11-2:

Proposal 11-1:

Question 11-3:

Question 11-4:

Proposal 11-2:

Other comments?:

File 1:

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File 2: