

30 June 2014

Our ref H&D – 1

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
Sydney NSW 2001

By Post and Email to: [disability@alrc.gov.au](mailto:disability@alrc.gov.au)

Dear Executive Director

### **Equality, Capacity and Disability in Commonwealth Laws**

Thank you for the opportunity to comment on the Issues Paper, *Equality, Capacity and Disability in Commonwealth Laws* (the Discussion Paper). We commend the Australian Law Reform Commission for its work in preparing a comprehensive Discussion Paper on these very important areas.

We provide our feedback in the **attached** submission. Please note that in the time available to the Society and the commitments of our committee members, this submission is not intended to be an exhaustive review. We refer to our earlier submission of 21 January 2014 (**attached**), particularly in reference to proposal 2-1, chapter 7, chapter 8, chapter 9 and capacity.

We are happy for the submission to be published and would be pleased to be involved in any public forums, conferences and consultations with respect to the discussion paper.

Thank you for the opportunity to provide comments on these issues. Please contact our Senior Policy Solicitor, Ms Binny De Saram on (07) 3842 5885 or [b.desaram@qls.com.au](mailto:b.desaram@qls.com.au); Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or [r.dacruz@qls.com.au](mailto:r.dacruz@qls.com.au); or Ms Louise Pennisi on (07) 3842 5872 or [l.pennisi@qls.com.au](mailto:l.pennisi@qls.com.au) for further inquiries.

Yours faithfully



Ian Brown  
President

**Enc:** Submission 21 January 2014

# Submission

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*Equality, Capacity and Disability in Commonwealth Laws*

*Discussion Paper*

*Australian Law Reform Commission*

*A Submission of the  
Queensland Law Society*

30 June 2014

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### 3. National Decision-Making Principles

#### National Decision-Making Principle 1

**Proposal 3–2 Every adult has the right to make decisions that affect their life and to have those decisions respected.**

The Society considers this to be a fundamental right which needs to be reflected in every step of the decision-making process. Queensland’s guardianship laws have well drafted general principles that reflect a human rights approach, but too often a “protection” philosophy is employed. This proposal should be the fundamental principle underlying all decision-making processes. The Society considers that proposals 3-2 and 3-3 should not be separated, but rather be considered at the same time throughout the decision making process.

#### National Decision-Making Principle 2

**Proposal 3–3 Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.**

The Society is supportive of this principle as too often guardianship processes and orders are used as a case management tool by services, resulting in a “most-restrictive” approach.<sup>1</sup>

We also refer to our commentary above at proposal 3-2.

#### Support Guidelines

**Proposal 3–4 (a) Persons who may require decision-making support should be supported to participate in and contribute to all aspects of life. (b) Persons who may require decision-making support should be supported in making decisions. (c) The role of families, carers and other significant persons in supporting persons who may require decision-making support should be acknowledged and respected.**

The Society supports this proposal and refers to the Queensland *Carers (Recognition) Act 2008* (Qld). Where possible commonwealth principles should align with state based legislation.

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<sup>1</sup> See Office of the Public Advocate’s Report: Profile of OAG clients.

## Will, Preferences and Rights Guidelines

**Proposal 3–6 (a) Threshold: The appointment of a representative decision-maker should be a last resort and not as a substitute for appropriate support. (b) Appointment: The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time. (c) Supporting decision-making: (i) a person’s will and preferences, so far as they can be determined, must be given effect; (ii) where the person’s will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and (iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person’s human rights and act in the way least restrictive of those rights.**

In Queensland it is possible for an Administrator to be appointed for an unspecified/ongoing period (For example the Public Trustee of Queensland may be appointed for an indeterminate time). This conflicts with the least restrictive principle and the objective of appointments for a minimum time-period.

The Society is supportive of finite time-period orders, that is orders that have a built in review mechanism in place and/or are in place for a finite period.

## 4. Supported Decision-Making in Commonwealth Laws

**Question 4–1 In what areas of Commonwealth law, aside from the National Disability Insurance Scheme, social security, aged care, eHealth and privacy law, should the Commonwealth decision-making model apply?**

The Society considers that the Commonwealth decision-making model should apply in the banking and finance sector. This would ensure consistency and homogeneity for persons liaising with the banks and financial institution either directly or through a substituted decision-maker.

Family law is another area of which the Commonwealth decision-making model should apply as with the ageing population and increasing divorce rate there are more instances of litigation with respect to a person’s capacity to marry and involving people with impaired capacity to undertake property settlements and parenting plans. We also refer to *Price & Underwood (Divorce Appeal)* [2009] FamCAFC 127 where the daughter, who held an enduring power of attorney for her father, was successful in obtaining a divorce for her father. These cases are increasing and it would assist if the Commonwealth decision-making model applies to these areas.

**Question 4–2 Are the terms ‘supporter’ and ‘representative’ the most appropriate to use in the Commonwealth decision-making model? If not, what are the most appropriate terms?**

The Society has no objection to the terms suggested above. The Society notes that national consistency for terms is helpful for all parties.

**Proposal 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a ‘supporter’ and provide that an agency, body or organisation may establish supporter arrangements. In particular, laws and legal frameworks should reflect the National Decision-Making Principles and provide that: (a) a person who requires decision-making support should be able to appoint a supporter or supporters at any time; (b) where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support; (c) any decision made with the assistance of a supporter should be recognised as the decision of the person who requires decision-making support; and (d) a person should be able to revoke the appointment of a supporter at any time, for any reason.**

The Society is generally supportive of this proposal but stresses the importance of setting out the legal frameworks in easy to read, plain English. To that end, the Society notes and commends the ALRC’s Easy English guide with regard to this Inquiry.

In addition to the above, the Society notes that there should be consideration as to how a supporter would work with a statutory appointment decision-maker or nominated person. For example, consider Centrelink clients - what information would the ‘supporter’ be entitled to?

To assist all parties it would be of assistance to have a register or identity/form requirements which set out who an individual’s supporter may be. It is possible that multiple parties may claim to be a person’s supporter, so clearly identifying the person/s authorised would greatly assist in that regard.

A further item for consideration is to mitigate against the risk of undue influence and conflict of interest when an individual is working with a supporter or in an agency arrangement.

Lastly, consideration should be given to what sanctions (if any) would apply if a supporter misuses personal information of the individual.

**Proposal 4–4 A Commonwealth supporter may perform the following functions: (a) assist the person who requires decision-making support to make decisions; (b) handle the relevant personal information of the person; (c) obtain or receive information on behalf of the person and assist the person to understand information; (d) communicate, or assist the person to communicate, decisions to third parties; (e) provide advice to the person about the decisions they might make; and (f) endeavour to ensure the decisions of the person are given effect.**

The Society has previously raised its concerns with financial abuse for elderly persons. This applies equally to those with impaired capacity or with a disability. We refer to our joint

issues paper with the Queensland Office of the Public Advocate “Elder abuse: How well does the law in Queensland cope?”<sup>2</sup> and QLS’ Critical Report.<sup>3</sup>

**Proposal 4–5 Relevant Commonwealth laws and legal frameworks should provide that Commonwealth supporters must: (a) support the person requiring decision-making support to make the decision or decisions in relation to which they were appointed; (b) support the person requiring decision-making support to express their will and preferences in making a decision or decisions; (c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person who requires decision-making support; (d) act honestly, diligently and in good faith; (e) support the person requiring decision-making support to consult with ‘existing appointees’, family members, carers and other significant people in their life in making a decision; and (f) assist the person requiring support to develop their own decision-making ability. For the purposes of paragraph (e), ‘existing appointee’ should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.**

QLS considers that when supporters are consulting with existing appointees (see 4-5 (e) above) there needs to be some consideration as to the information that can be shared with the supporter. For example, State and Commonwealth privacy legislation provides limits as to what information can be shared with third parties. Statutory agencies in Queensland (such as the Adult Guardian and Public Trustee) have strict guidelines as to what client information can be shared with third parties. The appointment of a supporter would not negate such legislative requirements and agency policies.

**Question 4–3 In the Commonwealth decision-making model, should the relationship of supporter to the person who requires support be regarded as a fiduciary one?**

A guardian (including an appointed guardian) has a fiduciary duty when they make decisions on behalf of an individual.<sup>4</sup> The fiduciary obligation may arise when there is a relationship of trust or confidence between two parties. In general terms a fiduciary agrees to support or act in the interest of another person in a legal or practical sense.<sup>5</sup> It may be argued that such obligations still exist within informal arrangements where there is a level of trust or confidence.

Whilst it is acknowledged that the relationship with a supporter is an informal one, there is nevertheless an agreement that certain duties or actions will be undertaken on behalf and in consultation with the adult. For example, a supporter may assist an adult when sourcing supported accommodation, such as nursing home care. If the adult makes a decision, with

<sup>2</sup> [http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse\\_issues-paper\\_v6.pdf](http://www.qls.com.au/files/d04c1d3a-0fc1-4e2b-87e1-a08200f16913/elder-abuse_issues-paper_v6.pdf)

<sup>3</sup> [http://www.qls.com.au/About\\_QLS/News\\_media/News/Headlines/Elder\\_abuse\\_concerns\\_highlight\\_a\\_growing\\_problem](http://www.qls.com.au/About_QLS/News_media/News/Headlines/Elder_abuse_concerns_highlight_a_growing_problem)

<sup>4</sup> *Bennett v Minister of Community Welfare* (1992) 176 CLR 408

<sup>5</sup> *Hospital Products Lt v United States Surgical Corp* (1984) 156 CLR 41

the assistance of the supporter, that the adult will enter a particular accommodation facility and it later becomes apparent that the adult cannot afford the accommodation and financial loss is incurred, then there is the potential for the supporter to be liable (or partly liable) for the loss incurred.

It is important to note that a supporter or representative agrees to assist a person who, by virtue of their decision-making capacity, may be vulnerable to undue influence or exploitation. Even though a decision is made by the adult, there needs to be safeguards in place that protect the adult's personal and real interests.

**Proposal 4–6 Relevant Commonwealth legislation should include the concept of a 'representative' and provide that an agency, body or organisation may establish representative arrangements. In particular, legislation should contain consistent provisions for the appointment, role and duties of representatives, and associated safeguards, and reflect the National Decision-Making Principles.**

The Society notes that this relationship is a complex one. It should also be noted that many state appointed administrators are appointed solely to manage a person's pension.

The Society is supportive of detailed and clear terms set out for the provision of appointment, the role and duties. The Society supports a "least restrictive" approach, therefore a representative should only be appointed when informal arrangements are clearly inappropriate.

**Proposal 4–7 A Commonwealth representative may perform the following functions: (a) assist the person who requires decision-making support to make decisions; (b) handle the relevant personal information of the person; (c) obtain or receive information on behalf of the person and assist the person to understand information; (d) communicate, or assist the person to communicate, decisions to third parties; (e) provide advice to the person about the decision they might make; and (f) endeavour to ensure the decisions of the person are given effect.**

The Society considers that if the representative liaises with a service provider then mechanisms must be established to identify and avoid conflict of interests.



**Proposal 4–8 Relevant Commonwealth laws and legal frameworks should provide that Commonwealth representatives must: (a) support the person requiring decision-making support to express their will and preferences in making decisions; (b) where it is not possible to determine the wishes of the person who requires decision-making support, determine what the person would likely want based on all the information available; (c) where (a) and (b) are not possible, consider the human rights relevant to the situation; (d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support; (e) support the person who requires decision-making support to consult with ‘existing appointees’, family members, carers and other significant people in their life when making a decision; and (f) assist the person who requires support to develop their own decision-making ability. For the purposes of paragraph (e), ‘existing appointee’ should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.**

The Society notes that there is a need to avoid confusion when dealing with multiple interested parties. Multiple parties may include an individual’s appointed decision-maker, supporter and representative. This may be a combination of statutory, professional and lay persons who are acting as informal decision-makers, for different areas that require decisions. Again, mechanisms need to be established that would avoid confusion and the transfer of information that is not relevant to all parties.

**Question 4–6 How should supporters and representatives under the Commonwealth decision-making model interact with state or territory appointed decision-makers?**

The Society is supportive of a document or register of supporters and representatives for each individual. This would allow clarity as to who is the appropriate person/agency working with the individual. Agencies in Queensland, such as the Office of the Adult Guardian or the Public Trustee, might be appropriate organisations to hold such information.

**Proposal 4–10 The Australian Government should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication in appointments.**

The Society supports proposals 4-10 to 4-12.

The Society also considers that the strategies should also include a register of decision-makers under state-based laws (i.e. Enduring Powers of Attorney, Advanced Health Directives).

**Proposal 4–11 The Australian Government should ensure that people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) are provided with information and advice to enable them to understand their roles and duties.**

The Society recommends that consideration be given to the establishment of an advisory service (internet and telephone based) that can assist parties in gaining information as to the role of a supporter and representative. This service could be based within an existing Commonwealth or State based agency and be modelled on the various guardianship advisory services available in a number of states and including formal training models as stated in proposal 4-12 below.

**Proposal 4–12 The Australian Government should ensure that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives.**

The Society is supportive of ongoing and formal training to assist supporters and representatives.

## 5. The National Disability Insurance Scheme

**Question 5–2 In what ways should the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules in relation to managing the funding for supports under a participant’s plan be amended to: (a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and (b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?**

The Society is supportive of 5-2(b): clarifying the interaction between Commonwealth and state parties. With two sets of bodies fees will apply and decrease funds available to most vulnerable clients. Setting out the interaction may assist in reducing this cost.

## 7. Access to Justice

**Proposal 7–1 The Crimes Act 1914 (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot: (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings; (b) retain that information to the extent necessary to make decisions in the course of the proceedings; (c) use or weigh that information as part of the process of making decisions; and (d) communicate decisions in some way.**

The Society considers that the basic definition of capacity should remain, with any evidence of diagnosis and the impact on the person’s understanding, memory and reasoning process to be used as evidence.

**Proposal 7–4 The rules of federal courts should provide that a person needs a litigation representative if the person cannot: (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings; (b) retain that information to the extent necessary to make the decisions; (c) use or weigh that information as part of a decision-making process; and (d) communicate the decisions in some way.**

The Society considers that this should be amended, consistent with the aim of minimising the litigation guardian’s exposure to costs. To that end we refer to the Queensland Law Reform Commission’s Guardianship Laws Report and Recommendations.