



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

Springvale Monash Legal Service Inc.

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

30 June 2014

### **About Springvale Monash Legal Service**

Springvale Monash Legal Service Inc ('SMLS') is a community legal centre that has operated within a diverse community for 40 years. For all of our operation, we have been co-located with the Springvale Community Aid and Advice Bureau within the Local Government Area of the City of Greater Dandenong. We have been addressing the needs of marginalised community members, including persons with a disability. SMLS has also been offering an outreach legal service at the psychiatric unit at Dandenong Hospital.

For most of its 40 years in operation, SMLS has been running a clinical legal education program in conjunction with Monash University's Faculty of Law, whereby law students undertake practical placement at the legal service as part of their undergraduate degree.

As a community legal centre, we offer legal assistance as well as an extensive community legal education program that is developed in response to feedback from the range of community engagement and community development activities that we are and have been involved in.

SMLS has provided legal assistance to clients in relation to both supported and substituted decision-making matters. This has taken the form of assisting clients with drafting powers of attorney, providing assistance with guardianship and administration orders and matters involving involuntary psychiatric treatment under the *Mental Health Act 1986*. Through our casework, we have gained experience assisting the represented person as well as the representative. As such, we have acquired some insight into different perspectives.

Our casework predominantly relates to Victorian rather than Commonwealth laws. Nevertheless, we see that our observations at the Victorian level are relevant to the Commonwealth context.

### **Our submissions**

In response to the discussion paper, we make the following submissions.

Broadly speaking, we support any legislative measures which prioritise the principles outlined in the UN Convention of the Rights of Persons with Disabilities ('CRPD'). We support any measures which seek to optimise the individual liberty of the represented person and maximise the accountability of the representative.

The following outlines our responses to the specific questions outlined in the discussion paper.

#### **Question 4-1: Application of model**

We see no reason why the Commonwealth Decision making model should not apply to all areas of Commonwealth law.

### **Questions 4-3 and 4-4: Fiduciary relationship and safeguards**

To ensure that the rights arising from the CRPD are rigorously guarded, we support the inclusion of effective and low-cost mechanisms for represented persons to access remedies in the case of any breaches of the representative's obligations and duties.

We consider that the relationship between the representative and the represented person as fiduciary reflects the power and responsibilities conferred on the representative. This also usefully adds another layer of accountability on the representative, which is particularly important where the representative is remunerated for its role. We highlight that, in Victoria, State Trustees may be permitted to take remuneration from the estate of the represented person for performing its role as an administrator. This may create a conflict of between the interests of the administrator and the represented person.

We do acknowledge that the creation of fiduciary duties may create disincentives for family members to assume the role of the representative. We are also mindful that our clients are largely low income earners and in any event, may not be able to afford instituting legal proceedings to recover losses arising from any breach of their fiduciary duties.

We suggest then that a low cost, alternative dispute resolution scheme may usefully complement any court action that may be made available to the represented persons in instances where there are claims of breaches of the duties of the representative.

### **Question 4-5: Appointment of representative**

Drawing from our casework at the Victorian level in relation to the appointment of substituted decision makers, we make the following submissions.

We agree that focussing on capacity as the test for appointing a substituted decision maker alleviates the risk of discriminating against persons with disability.

Given the imposition on the individual liberty of the represented person, the appointment of a substituted-decision maker should ideally be made by a tribunal or a court, as is the case with the appointment of a guardian or administrator in Victoria.

The duration of the appointment of a substituted decision maker should be capped so that the appointment does not operate indefinitely. The appointment should be regularly reviewed and monitored by an independent body, such as a tribunal or a court. Again, this mirrors the practice that occurs with the appointment of a guardian or administrator in Victoria.

### **Question 4-6: Interaction between Commonwealth and State or Territory appointed decision-makers**

We agree that the powers of the substituted decision maker should minimally interfere with the individual liberty of the represented person. Careful consideration should then be made to tailor the powers of the substituted decision maker to the particular needs of the represented person at that particular time. Accordingly, we agree that the appointment of a representative at the state or

territory level should not automatically give power to the representative over Commonwealth matters.

We do see the benefit of creating an integrated and uniform national system in relation to substituted decision-making to avoid duplication of powers and minimise confusion.