



Response to the Australian Law Reform  
Commission: Equality, Capacity and  
Disability in Commonwealth Laws  
Discussion Paper

2 July 2014

## About Queenslanders with Disability Network (QDN)

QDN has been established as a network of, for and with, people with disability for eleven years. The Network regularly brings members together to campaign on issues that impact upon their lives. From such gatherings, and through input from Local Area Networks, members determine the focus of the Network and the activities to be undertaken.

QDN has over 600 members across Queensland. All of QDN's members are people with disability.

## Value Statement on People with Disability

Since its inception, QDN has spent considerable energies clarifying the values that underpin its way of working and interacting with other agencies. The following statements articulate the values of QDN, in relation to the place of people with disability in an inclusive Australian society.

QDN believes that:

- All people with disability have a right to a place in the community and contributions to make to community. This is as empowered, free citizens who are valued, present, participating and welcomed as members of any dynamic and diverse society.
- The place of people with disability in the community is not just about people with disability having a house in the community. The crux of the issue is that they are welcomed in the community as ordinary citizens where they are genuinely given opportunities to contribute and actively participate. People with disability need to be in communities where their individuality, their talents, and their lived experiences of disability are recognised and acknowledged.
- Culturally and historically, people with disability are not afforded the same value, opportunities or access to community life as the rest of the population.
- Any inclusion in community for people with disability is conditional and vulnerable to withdrawal.

*An example of this is "forced co-tenancy", where people with disability are forced to share public housing and supports with other people with disability ?not of their choosing or risk having both housing and supports withdrawn.*

- Many people with disability in Queensland are excluded from the most basic experiences of ordinary lives.
- Current exclusionary practices are unacceptable and must be challenged.
- These issues affect not only people with disability but the whole community.
- The responsibility is shared. It lies within government (federal, state and local) and the community at large, to ensure that people with disability have a place and are resourced to belong in community.

## Introduction

Queenslanders with Disability Network (QDN) commends the Australian Law Reform Commission (ALRC) for the thorough Discussion Paper detailing so many complex issues faced by the disability sector in relation to Commonwealth laws. The National Decision-Making Principles and Guidelines developed by the ALRC is a major step forward in creating a unified, progressive approach to empowering people with disability.

The interaction between Federal and State and Territory Legislation creates further levels of complexity, in an already complicated space. QDN commends the ALRC for not shying away from many of the contentious and controversial issues associated with people with disability and their rights in the legal and guardianship system.

QDN members have provided their views in response to proposals and questions asked in the *Equality, Capacity and Disability in Commonwealth Laws* Discussion Paper. This submission reflects the views of the network across a number of issues.

## National Decision-Making Principles

### Proposal 3–5 National Decision-Making Principle 3

**The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.**

The National Decision-Making Principles and Guidelines proposed by the ALRC are strongly supported by Queenslanders with Disability Network (QDN). The proposed principles are a significant step towards the widespread use and acceptance of supported decision making in the disability sector. QDN welcomes a national approach to issues of this importance.

QDN supports the use of a person’s “will and preferences” rather than their “best interests” as a basis for a representative to make decisions. This is an important development in acknowledging the rights of an individual who is unable to make a decision independently.

### Proposal 3–6 Will, Preferences and Rights Guidelines

**(a) *Threshold*: The appointment of a representative decision-maker should be a last resort and not 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.**

QDN strongly supports this proposal. It is critical that appointments of representatives and supporters be time and task specific. When considering the will and preferences of the individual, consideration must be given to the social, cultural and life stage of the person. This is an area of great concern for people with disability, and QDN supports this important proposal.

## **Supported Decision-Making in Commonwealth Laws**

**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?**

QDN supports the use of universal language to describe the roles in the supported decision-making process. The use of universal language is essential for people to develop confidence in a system. Familiar language will allow people to feel comfortable in the roles across different scenarios and settings.

The terms “supporter” and “representative” are appropriate and reflect the central role that the person with disability plays in the decision-making process.

## **The National Disability Insurance Scheme**

**Proposal 5–1 The objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles.**

**Proposal 5–2 The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include supporter provisions consistent with the Commonwealth decision-making model.**

**Proposal 5–3 The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include representative provisions consistent with the Commonwealth decision-making model.**

The amendments of the National Disability Insurance Scheme Act 2013 (Cth) and NDIS Rules proposed are necessary in employing a national approach to supported decision-making. As the focal point of national disability service provision, the NDIS should be seen as the leader in providing supported decision-making for people with

disability. Amendments to this legislation will send a strong message to state and territories to review their relevant legislation. This will reinforce one of the central principles of the NDIS: Choice and Control.

As so many people with disability engage with the NDIS for the first time, the NDIS can play a leading role in demonstrating to people with disability and their families, how supported decision-making can lead to better outcomes. This will create an expectation that will drive demand for reform in other jurisdictions to adopt a uniform supported decision-making framework.

**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?**

QDN not only supports the proposed amendments to the NDIS legislation, but encourages the NDIA to facilitate the implementation of these principles at a practical level. This can be achieved by including (as part of the participant’s package of supports) support to allow a participant to make supported decisions in the management of their own funds.

In many cases, the capacity to manage their own funds, also allows participants to recruit their own staff. Many people with disability identify this as being one of the most influential elements in achieving “choice and control” in their lives. By facilitating a participant’s capacity to manage their own funds through the use of supported decision-making, people with disability (who in many cases will spend extended periods of time with paid support workers) will be empowered to recruit the support workers that best suit their needs. This could be the catalyst for major improvements in many aspects of a participant’s life.

When the NDIA does harbour concern, safeguards such as trial periods may be used to ensure that any problems that may arise are not multiplied over the course of time. This is an example of how “the dignity of risk” that is much talked about, can be put into practice.

## **Access to Justice**

**Proposal 7–8 The *Evidence Act 1995* (Cth) should be amended to provide that, in assessing whether a witness is competent to give evidence under Section 13, the court may take the availability of communication and other support into account.**

**Proposal 7–9 The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support is entitled to give evidence in any appropriate way that enables them to understand questions and communicate answers; and that the court may give directions with regard to this.**

**Proposal 7–10 The *Crimes Act 1914* (Cth) should be amended to provide that a witness who needs support has the right to have a support person present while giving evidence, who may act as a communication assistant; assist the person with any difficulty in giving evidence, or provide the person with other support. The court should be empowered to give directions with regard to the provision of support.**

QDN supports Proposals 7-8, 7-9 and 7-10 as they will all improve the capacity of people with disability to provide evidence and improve their access to justice. A common theme from QDN members is the lack of weight given to their evidence or account of an event, starting at the police and finishing in the court.

These proposed amendments will give people with disability improved access to the justice system, and will also serve to increase confidence in the system. People with disability may choose not to engage with the Criminal Justice system for fear of humiliation as a witness. While many people in the broader community may also harbour those fears, any amendments that will assist in reducing those concerns will encourage more people with disability to report crime, and therefore create a safer community.

**Proposal 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may help to assist and support people with disability in giving evidence.**

Any bench book developed should include indicators of disability that aren't obvious. Signs of intellectual disability or psychosocial disability should be detailed so that legal professionals are assisted to recognise a person's disability, and refer on for assessment in the appropriate manner.

The Administrative Appeals Tribunal (in preparation for its new National Disability Insurance Scheme Appeals jurisdiction) recently undertook broad disability awareness training for many of its staff. This type of disability awareness training should become a regular aspect of professional development for the legal fraternity.

As communication options expand for people with disability, so too does the likelihood of judicial staff's contact with diverse communication strategies. Matters involving people with disability are also likely to grow as a consequence of the collective empowerment of the disability sector in the community. The NDIS will empower people socially and economically, and this is likely to manifest as greater participation in the legal system.

Investment in the professional development of legal professionals of the broad range of types of disability, and their implications for people engaging in the legal system, will further improve outcomes for people with disability in their access to justice.

**Proposal 7–12** The *Federal Court of Australia Act 1976* (Cth) should provide that a person is qualified to serve on a jury if the person can, in the circumstances of the trial for which that person is summoned:

**(a)** understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;

**(b)** retain that information to the extent necessary to make these decisions;

**(c)** use or weigh that information as part of the jury’s decision-making process; and

**(d)** communicate the person’s decisions to the other members of the jury and to the court.

**Proposal 7–13** The *Federal Court of Australia Act 1976* (Cth) should provide that decision-making support should be taken into account in determining whether a person is qualified to serve on a jury.

**Proposal 7–14** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that the trial judge may order that a communication assistant be allowed to assist a juror to understand the proceedings and jury deliberations.

**Proposal 7–15** The *Federal Court of Australia Act 1976* (Cth) should be amended to provide:

**(a)** that communication assistants allowed by the trial judge to assist a juror should swear an oath faithfully to communicate the proceedings or jury deliberations;

**(b)** that communication assistants allowed by the trial judge to assist a juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements for the secrecy of jury deliberations; and

**(c)** for offences, in similar terms to those arising under Sections 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

QDN supports the proposals made by the ALRC in relation to jury service. Juries are intended to reflect our society, and it is counter-intuitive to have exclusions from the

jury based on disability, without regard given to the individual's capacity to fulfil the role of a juror. As the proportion of people with disability in our society grows, it is important that our juries reflect the diversity in our society.

The safeguards suggested in the Discussion Paper are appropriate in ensuring that jurors are able to fulfil their role effectively. It is important that any amendments to legislation are supported with funding that will allow such changes to have real change in our legal system. That said, legislative change is a welcome first step in the process of equal participation in the legal process.

## **Electoral Matters**

**Question 9–1 Section 118(4) of the *Commonwealth Electoral Act 1918 (Cth)* provides that a person's name cannot be removed from the electoral roll unless an objection is accompanied by a certificate of a medical practitioner. Should this be amended to provide that an objection may also be accompanied by a statement from a range of qualified persons, including a psychologist or social worker, concerning an elector's decision-making ability with respect to enrolment and voting?**

The right to vote is one that is highly valued by most Australians. This is particularly the case for many people with disability. QDN members always respond strongly when asked about any issue regarding the electoral process. There are many aspects a person with disability's life that are beyond their control, but the capacity to have a say in the electoral process is one aspect of life that is still entirely their decision.

Given the significance of being removed from the electoral roll, QDN is concerned about any amendments that will make this process easier. By allowing a range of qualified persons to provide a supporting statement to an objection, this will only make the process easier. QDN strongly believes that an individual's right to be on an electoral roll should not be diminished by any amendment, and that by facilitating the process of removal, the amendment proposed in Question 9-1 would do just that.

QDN harbours concern for people with disability who are removed from the electoral roll and then regain the capacity to participate in the electoral process. It is important that there is provision in the legislation for a review process for people with disability who have been removed from the electoral roll, to allow them to be assessed at a later date.

**Question 9–2 What further changes, if any, are required to the *Commonwealth Electoral Act 1918 (Cth)* or relevant legal frameworks to facilitate the provision of assistance and support to people who require decision-making support to vote, including by secret ballot?**

There are many barriers for people with disability in the electoral process. Many people with disability are not able to cast a vote without the assistance of others, and therefore not able to exercise their right to a secret ballot.

Electronic voting will allow some people to use their established communication system at home to cast a vote without requiring assistance. This should be the ultimate aim in improving accessibility in the electoral system.

Electronic voting should be provided in addition to existing systems, not at the expense of current voting options. This will increase the options for people to vote, and will increase accessibility for all Australians.

With advances in modern technology, the number of people with disability who are able to use technology to communicate will increase in the future. While this will allow more Australians to communicate their voting preference, it will only be able to be a secret ballot when electronic voting is introduced. Systemic change will improve accessibility for a growing number of people with disability in the future.

## Other Issues

**Question 11–1 Should provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act 2009 (Cth)* apply to other consumer contracts? That is, should businesses have obligations to ensure that a consumer contract is suitable for the consumer, including making all reasonable inquiries and ensuring that the consumer fully understands the contract terms?**

Consumer rights are a very complex issue for people with disability. QDN commends the Australian Law Reform Commission for raising such an important issue.

A balance must be struck between consumer protection and the potential for legislation to impinge on people's rights.

The potential for some people with disability to sign a contract that is unsuitable for their needs is high, and QDN welcomes any attempt to protect consumers from financial commitments that they may not fully understand.

QDN is concerned, however, that any amendments to legislation in this area will lead to an overly conservative approach in the offering of services to people with disability.

Currently, occupational health and safety standards often impede the delivery of support services for people with disability. In a similar way, some QDN members are concerned that businesses may react to any legislative amendment by adopting a conservative approach to their offering of products and services to people with disability. Many people with disability have only recently been able to participate

economically in society. It would be a terrible shame for their economic participation to be hampered by the threat of litigation (even if only perceived by proprietors).

Any amendments to legislation in this area must be very carefully considered with regard to unintended consequences. QDN supports the protection of vulnerable consumers in principle, but is cautious in supporting such an amendment without further consideration of the possible ramifications for those people with disability without such vulnerabilities.