

Submission to Australian Law Reform
Commission

Equality, Capacity and Disability: Discussion Paper

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COMMUNITY
LEGAL CENTRES
TASMANIA



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Executive Summary

This submission has been prepared by the National Association of Community Legal Centres Inc (NACLC),¹ the peak national body of Australia's community legal centres, jointly with state and territory community legal centre associations in the Australian Capital Territory, New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia² in response to the Australian Law Reform Commission's Discussion Paper, *Equality, Capacity and Disability*, released on 22 May 2014.

NACLC and its member organisations welcome the opportunity to respond to the Discussion Paper. While this is a joint submission of NACLC and all the state and territory associations, for ease of reference we use 'NACLC' in this submission. NACLC is the peak national organisation representing Community Legal Centres (CLCs) in Australia. Its members are the state and territory associations of CLCs that represent around 200 legal assistance services across Australia. CLCs are community-based, independent not-for-profit organisations that provide a range of legal and related assistance services to disadvantaged and vulnerable members of the Australian community.

By way of background, there are a mix of generalist and specialist CLCs across Australia. In the 2013 NACLC Census, of the 115 CLCs around Australia who responded to the census and who offer specialist services, 18 offered services targeted at people with disability.³ In 2012-2013, of clients assisted by CLCs funded by the Community Legal Services Program, 15.9% (32,240) reported having a disability.⁴

At a broad level, NACLC welcomes the Australian Law Reform Commission's (ALRC) approach in this Inquiry. The ALRC's work represents an important contribution to discussion about the rights of people with disability in Australia, against the backdrop of the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).

In particular, the ALRC proposes a model of decision-making that reflects the necessary focus on supported rather than substitute decision-making, and where fully supported decision-making is necessary, the shift from consideration of the 'best interests' of a person with disability to one that emphasises the primacy of an individual's will, preferences and rights. It also acknowledges the important distinction between mental and legal capacity. While supportive of the high-level approach taken by the ALRC, NACLC suggests that there is also a need to consider how any such model would operate in practice.

There are a number of issues raised by the ALRC in the Issues Paper that were not subsequently considered in the Discussion Paper. While NACLC appreciates the breadth of the Terms of Reference for this Inquiry and the need to focus on decision-making, NACLC notes that issues relating to people with disability in areas such as employment, anti-discrimination law, parenthood and family law continue to exist and have a significant impact on CLC clients with disability and people with disability more broadly.⁵

The focus of NACLC's submission is on the high-level National Decision-Making Principles and Commonwealth decision-making model (Chapters 3 and 4), the review of state and territory legislation

¹ NACLC's members are the eight State and Territory Associations of Community Legal Centres.

² The State and Territory Associations are: ACT Association of Community Legal Centres, Community Legal Centres NSW, Queensland Association of Independent Legal Services, South Australian Council of Community Legal Centres, Community Legal Centres Tasmania, Federation of Community Legal Centres Victoria, and Community Legal Centres Association WA.

³ NACLC, *National Census of Community Legal Centres* (2013), [4.1.4].

⁴ NACLC, *The Work and Clients of CLSP CLCs in Numbers* (February 2014).

⁵ See, eg, submissions from Cairns Community Legal Centre, Queensland Advocacy Incorporated, Redfern Legal Centre, Central Australian Aboriginal Legal Aid Service, the Human Rights Law Centre, Disability Discrimination Legal Service, Australian Centre for Disability Law, Caxton Legal Centre, Women's Legal Services Australia, and Women's Legal Services NSW.

(Chapter 10), as well as specific areas of law that relate directly to issues affecting many CLC clients, including: social security, restrictive practices, electoral matters, and consumer protection laws.

This submission is made in addition to NACLCL's submission to the ALRC's Issues Paper which was also made jointly with the State and Territory CLC Associations.⁶ NACLCL and People with Disability Australia will be making a separate joint submission in response to Chapter 7 of the Report, Access to Justice.

In addition to contributions from the state and territory associations, the following individual CLCs have contributed content for this submission:

- Financial Rights Legal Service (NSW)
- Townsville Community Legal Service (Qld)
- Caxton Legal Centre (Qld)
- Human Rights Law Centre (Vic)
- Welfare Rights Legal Centre (NSW)

NACLCL is pleased to note that in addition to NACLCL's submissions, a number of individual CLCs have made, or intend to make, submissions to this Inquiry.

NACLCL would be pleased to participate in a consultation or provide any further information on the matters in this submission should the ALRC require.

⁶ NACLCL, Submission No 78 to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper 44 (2014).

National Decision-Making Principles

Overall, NACLCLC supports Proposal 3-1 that reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require decision-making support should be guided by a set of National Decision-Making Principles (NDMP) and Guidelines. The development of clear principles for reform that provide a conceptual basis for the Commonwealth decision-making model and review of relevant laws and legal frameworks is an important aspect of the ALRC's contribution in this Inquiry. NACLCLC generally also supports Proposals 3-2 to 3-9, but makes a number of comments in relation to these proposals below.

The right to make decisions

In its submission to the ALRC's Issues Paper, NACLCLC emphasised the need for a presumption of capacity and the rejection of any status based approach to disability. NDMP 1 (Proposal 3-2), which acknowledges that every adult has the right to make decisions that affect their life and have those decisions respected, is a fundamental principle that rightly guides the approach in this Inquiry.

However, NACLCLC notes that NDMP 1 is limited to adults. While this may be appropriate in the context of the NDMPs, NACLCLC suggests that the ALRC give further consideration in the Final Report to the rights of children and young people with disability, including examination of Commonwealth laws and legal frameworks to ensure that the 'will and preferences of children with disabilities are respected on an equal basis with other children'.⁷

Support

While supportive of NDMP 2 and Proposal 3-4 (Support Guideline), NACLCLC emphasises that the key issue in a practical sense, and for CLCs and their clients in many instances, is what constitutes the 'support necessary' for people with disability to make, communicate, and participate in decision-making. This includes, for example, the adequacy of and funding basis for support people and mechanisms as well as consideration of both individual and system-wide support mechanisms.

In relation to NDMP 2, NACLCLC suggests that in order to recognise the importance of people with disability choosing what, if any, support they receive, the wording would more appropriately be 'must have access to', rather than 'must be provided' the support necessary for them to make, communicate and participate in decisions that affect their lives. Similarly, Proposal 3-4(b) should be amended to 'should have access to support in making decisions' rather than 'should be supported in making decisions'.

NDMP 2 also raises a broader point relating to support that arises in the Discussion Paper. There are a number of proposals relating to support, for example:

- NDMP 2 proposes that persons who may require decision-making support be provided the support necessary for them to make, communicate and participate in decisions that affect their lives
- Proposal 7-2 is that the *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial, and
- Proposal 9-3 is that the *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that decision-making assistance and support be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

⁷ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [36].

These three proposals reflect different conceptions of support. It is essential to consider and resolve who owes an obligation to provide support; the difference between consideration of ‘available’ supports and the suggestions by some that a more appropriate formulation might be ‘supports that should reasonably be provided’.

NDMP 2 reflects an approach that suggests there is an obligation to provide people who require decision-making support with necessary support without clarifying who owes this obligation. The UNCRPD considers that the CRPD imposes this obligation on state parties such as the Australian Government.⁸ NACLC suggests that the ALRC should clarify that it is government owes this obligation to provide supports for the purposes of decision-making, as this will have significant resource implications and is an important component of translating the ALRC’s approach into practice.

The proposals relating to unfitness to stand trial and enrolment and voting relate to assessment of the capability of an individual person who requires decision-making support by reference to supports. On one hand it is important to consider the supports available to a person with disability to assist them to make a particular decision, particularly if this would empower them to make decisions that they may not otherwise be in a position to make. It is also important to ensure that the failure of a government department or agency or a third party to provide necessary supports due to funding or related decisions, or the existence of any other limitation on the supports actually available, should not impact on whether a person is assessed as having capacity to make a particular decision. Accordingly, NACLC would be concerned about the inclusion of the requirement of ‘reasonable supports’ in this context, but submits that the impetus for the provision of supports created by such wording should and can be reflected elsewhere without potentially disadvantaging individuals. Importantly, the UNCRPD has expressed the view that support must be available at nominal or no cost and that lack of financial resources should not be a barrier to accessing support in the exercise of legal capacity.⁹ NACLC suggests that the ALRC needs to consider these issues and the impact this may have on the wording of the support-related proposals identified.

Will, preferences and rights

NACLC considers that where people with disability require decision-making support, their will, preferences and rights must direct decisions that affect their lives and therefore supports NDMP 3 (Proposal 3-5).

The emphasis on will, preferences and rights represents a welcome shift away from the ‘best interests’ standard current underlying substitute decision-making regimes. It appropriately emphasises that where a person’s will and preferences cannot be determined, as is likely to be the case in some circumstances, the human rights relevant to the situation must direct decision-making. The ALRC may wish to consider the ‘best interpretation of will and preferences’ formulation suggested by the UN Committee on the Rights of Persons with Disabilities (UNCRPD).¹⁰

NACLC supports the Will, Preferences and Rights Guidelines (Proposal 3-6), but notes that the use of the phrase ‘representative decision-maker’ has the potential to undermine the ALRC’s attempt to present representatives as providing fully supported decision-making. NACLC suggests that the term ‘representative’ is preferable to ‘representative decision-maker’. The term ‘representative’ more appropriately conveys the idea that while a person with disability may require fully supported decision-making, this is different from substitute decision-making in which decision-making authority rests with the substitute decision-maker.

⁸ Ibid, [16].

⁹ Ibid, [29(e)].

¹⁰ Ibid, [21].

Further, while NACLCL supports a representative acting to promote and safeguard a person's human rights in making a decision and acting in the way that is least restrictive of those rights, as articulated in Proposal 3-6(c)(iii), NACLCL suggests that the ALRC articulate how this might operate in practice in more detail.

NACLCL supports the Representative Decision-Making Guidelines (Proposal 3-7) to the extent that they reflect and will facilitate a nationally consistent approach to defining and assessing capacity. In particular, as noted in NACLCL's submission in response to the Issues Paper, NACLCL supports the shift away from a status-based assessment to one that is tailored to the particular context, person and decision, and suggests that the NSW Capacity Toolkit and the Queensland Capacity Handbook¹¹ reflect an appropriate approach to such assessment. However, NACLCL notes that the UNCRPD has expressed the view that functional approaches, potentially like the one suggested by the ALRC, are 'flawed' and so NACLCL suggests further consideration of this proposed approach.¹² In relation to Proposal 3-7(g), NACLCL notes the comments made above in relation to supports.

NACLCL also supports NDMP 4 (Proposal 3-8) and the Safeguards Guidelines (Proposal 3-9).

Supported Decision-Making in Commonwealth Laws

NACLCL is generally supportive of the ALRC's proposed Commonwealth decision-making model and therefore Proposal 4-1 that Commonwealth laws and legal frameworks should encourage supported decision-making, including by adopting the ALRC's Commonwealth decision-making model. Importantly, the ALRC's model complies with many of the criteria outlined by the UNCRPD as necessary in a supported decision-making regime.¹³

NACLCL also considers Proposal 4-2, in relation to ensuring the objects and principles provisions reflect the NDMP, is appropriate and necessary. This proposal is particularly important as objects and principles provisions not only act as a guide for those using the legislation as to the purpose of the legislation and the objects it is designed to achieve, but also to the purposes of interpretation of legislation in line with a purposive approach to legislative interpretation and construction.

The introduction of statutory mechanisms for formal supported decision-making at a Commonwealth level is an important first step in the reform of laws and legal frameworks to ensure people with disability in Australia enjoy equal recognition before the law and recognition of their right to legal capacity on an equal basis with others. However, significant challenges remain in developing and implementing the Commonwealth decision-making model. In addition to political and resource-related challenges, the integration of supported decision-making also requires cultural and attitudinal change, as well as significant education and training. The amendment of relevant state and territory legislation and similar shifts in culture and attitude at a state and territory level, potentially facilitated by Proposal 10-1, are also of enormous importance in ensuring a consistent and national shift towards supported decision-making for people with disability.

While the ALRC's model provides a high-level blueprint for the development of a supported decision-making regime at a Commonwealth level, NACLCL makes a number of suggestions below that the ALRC may wish to consider in preparing the Final Report.

¹¹ The Queensland Capacity Handbook is currently being developed by Queensland Advocacy Inc with pro bono legal assistance from Allens Linklaters.

¹² Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [15].

¹³ *Ibid*, [29].

NACLC considers that an illustration of how the Commonwealth decision-making model might operate in practice for individual people with disability may be a useful inclusion in the Final Report. NACLC includes a brief case study at pages 9-10 below that illustrates some of the key questions that may arise in applying the model to the particular circumstances of a person with disability. The use of case studies may also be useful throughout the Final Report to illustrate the ALRC's approach.

An issue not addressed in the Discussion Paper in any great detail relates to review and appeal aspects of the Commonwealth decision-making model. The complexity of existing review and appeal mechanisms significantly affects the ability of some people with disability to seek review of government and substitute decision-maker decisions. NACLC suggests that the ALRC consider the review and appeal mechanisms available to people with disability with respect to: the appointment of supporters and representatives; the decisions of representatives; and the operation of courts and tribunals with relevant jurisdiction to hear such reviews and appeals. It is also important to consider how such Commonwealth review mechanisms might interact with state and territory review mechanisms, and the need for legal assistance for people seeking to access these mechanisms. This is consistent with the view expressed by the UNCRPD that supported decision-making regimes must include mechanisms for third parties to 'challenge the action of a support person if they believe that the support person is not acting in accordance with the will and preferences of the person concerned'.¹⁴

The ALRC indicated in the Discussion Paper that it intends that 'a supporter and representative scheme would be provided for in particular areas of Commonwealth law, tailored to suit the legislative context'.¹⁵ NACLC emphasises that in implementing the ALRC's proposed Commonwealth decision-making model, it is important that people with disability and their representatives and relevant civil society representatives are consulted by government as part of the design and implementation process. This reflects the UNCRPD's view that state parties such as Australia should 'closely consult with and actively involve persons with disability ... in the development and implementation of legislation, policies and other decision-making processes that give effect to article 12'.¹⁶

In addition, to date there has been a 'distinct lack of evidence-based evaluations' of supported decision-making trials and mechanisms.¹⁷ As Terry Carney and Fleur Beupart have noted, 'supported decision-making, in its various social, quasi-legal and legal forms, warrants careful empirical research and pilot programs to guide legislative and social policy reform'.¹⁸ Similarly, there is a need to consider the effectiveness and appropriateness of existing models to determine what, if any, aspects might be usefully transplanted into any new model. Accordingly, NACLC suggests that the ALRC include recommendations in the Final Report relating to the need for additional research and, in a specified time, an evidence-based evaluation of any Commonwealth decision-making model.

Supporters

Appointment, role and duties

NACLC supports Proposals 4-3 and 4-4 which relate to the appointment, recognition and potential roles of a supporter under the ALRC's proposed Commonwealth decision-making model.

The introduction of the 'supporters' under Commonwealth law to provide people with disability with support in relation to decisions in a particular area is an important development. As the ALRC has

¹⁴ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [29(d)].

¹⁵ ALRC, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (June 2014), [4.16].

¹⁶ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [50(c)].

¹⁷ T Carney and F Beupert, 'Public and Private Bricolage- Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36(1) *UNSW Law Journal* 175, 199.

¹⁸ *Ibid*, 200.

recognised, it is vital that where a supporter is appointed, ultimate decision-making authority remains with the person with disability and that any decision made with the assistance of a supporter is recognised as the decision of the person with disability.

The ability of a person with disability to appoint or revoke the appointment of a supporter at any time is an important component of the scheme and it may be useful for the ALRC to provide further detail about the way in which it envisages supporters being appointed and having their appointment revoked.

In some circumstances, a person with disability may appoint more than one supporter. However, in the experience of many CLCs, many people do not have the extended support networks to draw upon for the purposes of appointing their own Commonwealth supporter, or indeed at all. As a result, consideration must be given to other ways in which people who require decision-making support may find an appropriate supporter who is willing to act as a formal Commonwealth supporter. The ALRC's suggestion that a supporter need not necessarily be unpaid is an important one, provided there are appropriate safeguards in place.

For example, from a CLC perspective NACLC foresees circumstances in which a person with disability may wish to appoint their lawyer, social worker or other CLC worker as a supporter. Such appointment may for example, facilitate the lawyer obtaining or receiving information on behalf of their clients, or interacting with the relevant Commonwealth department or agency on behalf of the client. However, NACLC suggests that the ALRC give further thought as to how 'professional supporters' might operate in practice, and the interaction of any duties owed by a supporter under the relevant piece of Commonwealth legislation and any other duties or obligations they owe (such as under professional conduct rules and regulations, or other relevant legislation) and the potential for conflict of interest. Some duties, such as the duty to develop the capacity of the person with disability to make their own decisions, extend beyond the role played by a CLC lawyer.

In relation to the proposed duty to facilitate consultation under Proposal 4-5 (e), while supporters rightly owe a duty to facilitate consultation, this duty should be distinguished from the duty of a representative. In the case of supporters, ultimate decision-making authority remains with the person with disability, as does the decision whether or not to consult certain people in making a decision, and any duty should be considered in that context.

With respect to the proposed duty to develop the decision-making ability of the person with disability under Proposal 4-5(f), NACLC notes that any such duty must be considered within the broader context of state parties having an 'obligation to provide training for persons receiving support so that they can decide when less support is needed or when they no longer require support in the exercise of their legal capacity'.¹⁹

Safeguards

With respect to Question 4-4 and the issue of safeguards, as the ALRC acknowledges, there is a need to ensure adequate safeguards are in place to protect people who require decision-making support from exploitation, abuse or undue influence. It is also important to ensure that any decision made using supported decision-making arrangements, including an appointed supporter, truly expresses the will and preferences of the person with disability. Ensuring support provided is culturally sensitive, safe and appropriate is also vital, and the education, training and guidance proposed by the ALRC may assist to a certain extent in this regard.

There is a need to balance the need to encourage people to agree to be appointed as someone's supporter, with the need to impose administrative requirements and adequate safeguard mechanisms,

¹⁹ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [24].

even though these may discourage people from acting as a supporter. It is also important to ensure that safeguards also respect the dignity of risk.

Further, recognising the significant difference in the roles of supporters and representatives, the level of safeguards, oversight and monitoring of supporters is likely to differ significantly from that required in relation to representatives.

Representatives

NACLC supports Proposals 4-6 to 4-9.

Importantly, the ALRC's Commonwealth decision-making model meets the key provisions that the UNCRPD has highlighted as being required under art 12 of the CRPD for any supported decision-making regime.²⁰ As outlined above, NACLC supports the shift evident in the role and duties of representatives from consideration of the 'best interests' of a person with disability to will, preferences and rights. The representative system is a new one under Commonwealth law and constitutes a fully supported rather than substitute decision-making model. NACLC emphasises that an important distinction is that a representative should only be appointed as a last resort.

Appointment

In response to Question 4-5 about the mechanisms for the appointment of a representative, it is not appropriate to permit the head of a government department or agency, or their delegate, to appoint a representative for a person with disability. The current provisions under social security law and the *National Disability Insurance Scheme Act 2013* (Cth) and *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) which provide, for example, that nominees may be appointed on the initiative of a delegate, as distinct from at the request of the participant,²¹ are of concern. Such provisions give the department considerable power to appoint a nominee for a person with disability and do not require consideration or facilitation of the decision-making capability of the person with disability. NACLC considers that such provisions should not be replicated under any Commonwealth decision-making model.

As a result, for circumstances in which a person is not able to appoint their own supporter or representative it may be necessary to establish some form of Commonwealth mechanism for the appointment of representatives for people who require full decision-making support, which may operate similarly to existing state and territory guardianship tribunals, but within the proposed Commonwealth framework. While NACLC does not express a concluded view on the appointment mechanism, we note the following:

- in considering the appropriate mechanism, the UNCRPD has expressed the view that under supported decision-making a person must have the right to refuse support and terminate or change the support relationship at any time, and that one of the characteristics of substitute decision-making is that a substitute decision-maker can be appointed by someone else²²
- there would need to be provision of funding for legal assistance to ensure people who are affected are able to access legal advice in relation to making applications to, and appearing before, any such body, and

²⁰ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [29].

²¹ See, eg, *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.4, pt 3.14; Department of Social Services, *Guide to Social Security Law* (2014) [8.5.1], [8.5.2].

²² Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [27], [29(g)].

- the operation of any such body would need to address the criticisms of existing courts and tribunals with respect to people with disabilities, including in relation to accessibility and communication.²³

Safeguards

NACLC supports Proposal 4-9 that the appointment and conduct of Commonwealth representatives be subject to appropriate and effective safeguards. NACLC refers to its comments made above in relation to the need for more detailed discussion in the Final Report about mechanisms for review and appeal. In addition to mechanisms for review and appeal, NACLC encourages consideration of additional safeguards including reporting obligations and some form of monitoring or auditing process as important components of an effective system of safeguards.

Interaction with other appointed decision-makers

CLCs employ a holistic model of service delivery and therefore recognise the importance of decision-makers interacting with other decision-makers and relevant people in the life of the person with disability.

The interaction between Commonwealth, state and territory decision-makers is crucial and perhaps the most important element of the model in a practical sense. NACLC acknowledges that it may be more administratively convenient for one person or organisation to act as an individual's state or territory guardian or administrator and Commonwealth supporter or representative. However, as the ALRC has acknowledged, there also needs to be flexibility to allow different people or organisations to act where appropriate or necessary. Further, in circumstances where there is a separate supporter or representative and state and territory guardian or administrator, each with responsibility over a particular area of decision-making, given the often broad scope of state and territory appointments, this is likely to operate with some difficulty in practice. Interaction may also be difficult in practice if the Commonwealth Government were to adopt the ALRC's proposed Commonwealth decision-making model, but states and territories retained existing decision-making systems, particularly given the substitute decision-making nature of many such systems.

NACLC suggests that consideration of the interaction points might be clearer through examination of how the proposed Commonwealth decision-making model might operate in a practical sense for an individual. To assist, NACLC includes a brief case study below and then highlights some of the key questions that arise about how the model might operate for the individual.

Case Study

Susan is 25 years old and has an intellectual disability. She has some difficulty understanding things and making decisions. She is able to make many everyday decisions, but finds it difficult to make decisions about issues such as managing her disability supports and her finances. Susan lives in shared accommodation and has a close relationship with her sister and her paid carer.

Susan receives the Disability Support Pension. Susan lives in the Barwon region of Victoria, which is a trial site for the National Disability Insurance Scheme (NDIS), and has recently become a participant under the NDIS.

The Victorian Civil and Administrative Tribunal appointed the Office of the Public Advocate as Susan's guardian. State Trustees were appointed as Susan's administrator. The guardianship and administration orders are expressed very broadly.

²³ See, eg, Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies* (February 2014); DLA Piper, *Background Paper on Access to Justice in the Criminal Justice System for People with Disability* (2013).

Following the first few meetings with the National Disability Insurance Agency (NDIA), Susan has decided she wants to make some of the decisions about her disability services and supports and considers that she is able to do so provided she has decision-making support. Susan decides she wants to appoint her sister as a supporter under the NDIS and to self-manage her NDIS funds.

There are a number of key issues that require further consideration arising from the case study in applying the Commonwealth decision-making model. These include:

- what happens if Susan doesn't want to collaborate or communicate with State Trustees in relation to her NDIS package funds and that affects the administration of Susan's affairs more generally?
- what happens if State Trustees disagree with a decision Susan makes in relation to NDIS funded supports?
- what options, if any, should be available to an NDIA employee who is concerned about Susan's decision-making and considers that she needs a representative?
- in circumstances where State Trustees or the Office of the Public Advocate were appointed as a NDIS representative in addition to being guardian and administrator, what would happen where the obligations or duties owed by them as a representative conflict with those owed as a guardian or administrator?
- which body would have jurisdiction to hear and resolve disputes of the type identified? If this is a quasi-judicial body, what type of legal assistance will be available?

Information sharing

While NACLC supports Proposal 4-10 that the Australian Government develop mechanisms for sharing information about the appointment of supporters and representatives, we suggest the words 'including to avoid duplication of appointments' be removed from the proposal. Inclusion of the wording relating to duplication confuses the purpose of the proposal, which is to ensure sharing of information, with issues relating to the interaction of decision-makers.

On one hand information sharing between government agencies and departments is important and facilitates the engagement of people with disability with such bodies. This may, for example, reduce the need for a person with disability to share the same information multiple times or undergo multiple assessments. However, care needs to be given to ensuring the confidentiality of information and safeguarding inappropriate sharing of information to the detriment of a person with disability.

Education, training and guidance

NACLC strongly supports Proposal 4-11 and 4-12 and emphasises the need for consistent information and advice, and targeted training and guidance for all parties involved in any Commonwealth decision-making model, as well as more broadly.

The UNCRPD commented that there is a need to:

provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.²⁴

As reflected in Proposal 4-11, specific education, training and guidance material for people with disability, supporters and representatives and potential supporters and representatives is vital in

²⁴ Committee on the Rights of Persons with Disabilities, 'Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session (2-13 September 2013)' (United Nations, 4 October 2013) 26.

assisting them to understand their roles and duties and to the operation of the model. However, there is also a need to ensure that Commonwealth, state and territory government employees who interact with people with disability are provided with the necessary education, training and guidance material. As a result, NACLCL suggests that Proposal 4-12 be broadened to apply beyond the Australian Public Service, at a minimum to all government employees, statutory appointments, as well as Non-Government Organisations and legal assistance providers which receive government funding and provide services to people with disability.

Importantly however, the development and integration of supported decision-making systems and mechanisms will require significant cultural and attitudinal change within the broader community. Education, training and the development of guidance material are central to encouraging such change. As a result, NACLCL suggests that the ALRC recommend a national community awareness and education campaign that complements education and training provided in line with Proposals 4-11 and 4-12 as amended as part of the introduction of any Commonwealth decision-making model, and parallel changes in states and territories.

Finally, NACLCL emphasises the importance of ensuring education, training and material is provided in an accessible and culturally appropriate way and that people with disability, their representatives and disability organisations are involved in the development of education, training and guidance material and any national campaign.

Social Security

Overall, NACLCL supports the application of the Commonwealth decision-making model under the *Social Security (Administration) Act 1999* (Cth) (SSA Act) and therefore Proposal 6-1.

However, NACLCL also notes the importance of informal arrangements in the context of social security. In the experience of CLCs, many clients with disability have a preference for informal arrangements. Often, people are apprehensive about invoking more formal, costly and potentially disempowering personal decision-making systems that involve state and territory guardians and administrators. While supportive of the Commonwealth decision-making model, NACLCL suggests that the ALRC needs to consider ways in which to ensure that the application of the Commonwealth decision-making model will not have unintended consequences such as the over-formalisation of arrangements and could more fully articulate how the provision of statutory supported decision-making mechanisms can co-exist with informal support arrangements, including in relation to decision-making.

Briefly, consistent with NACLCL's support of Proposal 4-2, in relation to the ALRC's comments with respect to social security NACLCL makes the following points:

- The inclusion of principles relating to supported decision-making under the SSA Act whether under s 8 or any new part containing provisions relating to supporters and representatives is important in guiding the interpretation and application of the Act.
- NACLCL welcomes the removal of the power of the Department of Human Services (DHS) to appoint a 'nominee' for a person with disability and supports the proposed application of the Commonwealth decision-making model with respect to the appointment of supporters and representatives.
- Enabling people with disability to appoint or revoke the appointment of a supporter at any time is important, particularly in light of current arrangements under s 123E of the SSA Act which makes no provision for a principal to suspend or revoke a nominee appointment.

- The ALRC’s acknowledgement that the appointment and conduct of supporters and representatives should be subject to appropriate and effective safeguards is an important one. Safeguards could include registration of such arrangements with DHS, the provision of statements by representatives, and monitoring or audit mechanisms. These could be combined with better engagement by DHS with the banking, financial advice and related sectors on processes for identifying and dealing with potential cases of abuse or neglect. However, while ensuring any new arrangements protect individuals’ rights and ensure engagement in decision-making, it is important they are not so onerous as to deter potential supporters or representatives from providing necessary support.
- In the Discussion Paper, the ALRC acknowledges the importance of consistent, regular and targeted education, training and guidance for all parties involved in decision-making under social security law. In addition to the groups nominated at paragraph 6.32 of the Discussion Paper, NACLC suggests that these measures should also encompass peak community bodies; carer and disability organisations, including community legal centres; and retiree and pensioner organisations. It is important that any education and training be culturally safe and appropriate, accessible in a range of formats and made available through a range of forums as well as adequately and appropriately resourced.

Restrictive Practices

As NACLC and others have emphasised in submissions to this Inquiry and other inquiries, there are significant concerns about the use of restrictive practices in Australia.²⁵

NACLC supports Proposal 8-1 that the Australian Government and Council of Australian Governments facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices and that the objective underlying any such approach should be to reduce, and where possible, eliminate the use of restrictive practices. The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* provides a useful starting point for the development of any such approach.

Need for broad application of national approach

One of the key limitations of the current Framework is that it is restricted to the disability service sector. Consistent with Proposal 8-1(a), it is important that any national or nationally consistent approach has broad application and covers the use of restrictive practices in a range of settings beyond disability services, including for example schools and residential aged care facilities.

Application of NDMP

In its submission to the Issues Paper released as part of this Inquiry, NACLC expressed support for the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*. However, NACLC submitted that the Framework could have been strengthened by setting out a minimum standard approach for the use of restrictive practices, including that restrictive practices should be a last resort, be the least restrictive alternative, and only be used to prevent harm to the relevant adult or others.

²⁵ See, eg, submissions in response to Issues Paper: NACLC, Submission 78; Disability Discrimination Legal Service, Submission 55; Queensland Advocacy Inc, Submission 45. See also: Federation of Community Legal Centres, *Submission on the Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector*, (June 2013); UNCRPD, ‘Concluding Observations on the Initial Report of Australia’, Adopted by the Committee at its Tenth Session (2-13 September 2013), UN, 4 October 2013; Disability Rights Now, *Australian Civil Society Parallel Group Response to List of Issues*, CRPD, 10th Session Dialogue with Australia, (September 2013).

To a certain extent Proposal 8-1(b), that in developing a national or nationally consistent approach the application of the NDMP should be considered, reflects NACLC's suggestions. In particular, NDMP 4 states that 'decisions, arrangements and interventions for persons who may require decision-making support must protect their human rights' and the Safeguards Guidelines contained in Proposal 3-9. However, NACLC also suggests that the ALRC include additional guidance as to the factors that should be incorporated into a national or nationally consistent approach, including those suggested by NACLC.

Need for binding mechanism

Finally, while the mechanisms through which a national or nationally consistent approach is developed will affect whether it is binding, NACLC's view, as outlined in NACLC's initial submission, is that it is crucial that any national or nationally consistent approach to restrictive practices be binding on organisations that receive Commonwealth funding, including for example, through service agreements.²⁶

Electoral Matters

The proposals made by the ALRC in the Discussion Paper with respect to electoral matters, taken together would result in important amendments to the *Commonwealth Electoral Act 1918* (Cth) of benefit to people with disability.

NACLC considers that s 93(8)(a) of the *Commonwealth Electoral Act*, often referred to as the 'unsound mind' provision, is inappropriate in its current form and violates the right of people with disability to equality before the law and their rights to freedom from discrimination.

Some CLCs consider that the most appropriate approach, and one consistent with international law, is to repeal s 93(8)(a) in its entirety and remove any restriction on eligibility for electoral enrolment connected to capability.²⁷ For example, this view is articulated in the submission made by the Human Rights Law Centre. However, NACLC notes that other CLCs or direct service providers may have concerns about how this might operate in practice.

If the ALRC takes the view that amendment of s 93(8)(a) is the preferable approach to repealing the section in its entirety, NACLC supports the general approach taken by the ALRC and makes a number of comments below in relation to some of the ALRC's proposals.

Threshold

As outlined above, if the ALRC ultimately recommends that s 93(8)(a) should be amended but not repealed, NACLC supports the threshold proposed in Proposal 9-1. In particular, the inclusion of an election-specific requirement is an important development and reflects the need to consider the decision-making capability of a person with disability in the relevant context and at the relevant time, recognising that decision-making ability may fluctuate.

²⁶ See, eg, NACLC, Submission 78; Disability Discrimination Legal Service, Submission 55; Federation of Community Legal Centres, *Submission on the Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector*, (June 2013).

²⁷ See, eg, Human Rights Law Centre, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (June 2014).

With respect to Proposal 9-2, as NACLC noted earlier in this submission, the UNCRPD has expressed the view that functional approaches, potentially like the one in this proposal, are ‘flawed’ and so NACLC suggests further consideration of this proposed approach.²⁸

With respect to Proposal 9-3, while NACLC supports provision of support by the Australian Electoral Commission to people with disability to assist them to vote, NACLC reiterates its comments made earlier in this submission in relation to the NDMP with respect to support.

NACLC supports Proposal 9-4 that recognises the need for the development of guidance material to assist in determining whether a person is able to meet the relevant threshold. NACLC suggests that the AEC should develop such guidance material in consultation with people with disability, their representatives, and relevant disability organisations.

Evidence

Some CLCs have suggested that there is a need to review the objection process to, for example, provide for judicial determination of whether a person meets the relevant threshold, rather than decision-making by the Electoral Commissioner, as is currently the case.²⁹

If the ALRC does not ultimately recommend review of the objection process as a whole, at a minimum NACLC suggests that the ALRC should recommend training and education of AEC decision-makers and consider ways in which people with disability could be provided with fairer and more accessible opportunities to respond to any objection to having their name placed or retained on the electoral roll.

On one hand broadening the categories of acceptable evidence reflects the shift away from a medical model of disability and the relationships people with disability may have with medical and other professionals who are in a position to assess decision-making ability. On the other hand, the decision to remove a person from the electoral roll is a significant one and there is therefore the need for a high evidentiary threshold.

Research and data collection

NACLC supports Proposal 9-5 that the AEC should collect and make publicly available, information about the operation of s 93(8)(a) of the *Commonwealth Electoral Act*, including the number of people removed from the electoral roll, the reason, and whether they responded to the objection to their name being placed or retained on the electoral roll.

Supported decision-making and voting

NACLC also supports Proposal 9-6, that s 234(1) of the *Commonwealth Electoral Act* be amended to update the wording of the provision and ensure people with disability are able to access support in voting. It is important that AEC presiding officers, who must be satisfied that a voter is unable to vote without assistance for the purposes of the provision, are provided with appropriate education, training and guidance material to assist them in making such a decision.

Fines for failure to vote

Finally, in light of concerns about people with disability being fined disproportionately for failure to vote, NACLC supports Proposal 9-7. In particular, NACLC considers the development of guidance for

²⁸ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [15].

²⁹ See, eg, Human Rights Law Centre, Submission to Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper 81 (June 2014).

AEC Divisional Returning Officers to assist them to determine if a valid or sufficient reason for failing to vote exists in circumstances where an elector is a person with disability is a more appropriate approach than specifying disability as a category under s 245(4) of the *Commonwealth Electoral Act*.

Review of State and Territory Legislation

NACLC strongly supports Proposal 10-1, that state and territory governments should facilitate review of legislation that deals with decision-making by people who need decision-making support to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model.

This proposal is an important component of the ALRC's suite of proposals for a number of reasons. First, in the experience of CLCs, issues of concern relating to people with disability often arise in the context of guardianship and related legislation at a state and territory level. Secondly, the UNCRPD has expressed the view that discriminatory substitute decision-making regimes such as guardianship and mental health laws must be abolished and that the 'development of support decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with Article 12 of the Convention',³⁰ which necessitates the review of state and territory legislation.

In light of this, NACLC suggests that the ALRC make further comment on an approach to implementation of the ALRC's proposals (and eventual recommendations), including for example by outlining a phased approach to reform as articulated by the ALRC in Chapter 15 of *Family Violence and Commonwealth Laws-Improving Legal Frameworks* (ALRC Report 117, 2011). While any such guidance as to possible approaches to implementation would need to be at a high-level, it may assist Commonwealth, state and territory governments in approaching implementation in a strategic and considered way, and in a way that is consistent with the CRPD.

Guardianship and administration

The extent to which the CRPD permits guardianship and administration is contentious, depending on how such decision-making regimes are characterised. It is clear however, that the Commonwealth decision-making model provides a useful blueprint for reform of state and territory guardianship laws that is more likely to satisfy Australia's obligations under the CRPD than existing laws and legal frameworks. While review and amendment of state and territory guardianship laws is likely to have its challenges and will differ between jurisdictions, the ALRC's attempt to encourage a national shift towards supported decision-making is an important one.

NACLC suggests that it may be useful for the ALRC to include a recommendation in the Final Report that recognises the role of state and territory bodies such as Public Advocates, Public and Adult Guardians, and Public or State Trustees and their equivalents and encourages their involvement in and leadership of reform. This could, for example, be targeted at the Australian Guardianship and Administration Council, the national forum for state and territory agencies that protect adults with a decision-making disability through adult guardianship and administration.

Mental health legislation

Briefly, in the Discussion Paper the ALRC acknowledges the need for review of state and territory mental health legislation relating to involuntary detention and treatment of people with mental illness. However, it is also important to ensure that any such review considers the interaction of state and

³⁰ Committee on the Rights of Persons with Disabilities, *General Comment No 1: Article 12: Equal Recognition Before the Law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014), [28].

territory mental health legislation and frameworks with any national or nationally consistent approach to restrictive practices.

Consumer Protection Laws

In the experience of CLCs, some people with disability experience difficulty understanding the terms of contracts, their rights under consumer protection laws, and the mechanisms available to enforce those rights. NACLC provided a number of case studies in its initial submission to this Inquiry.

In Question 11-1 of the Discussion Paper, the ALRC asked whether provisions similar to those requiring responsible lending conduct should apply to other consumer contracts, such as telephone or door-to-door sales. The ALRC suggested that this may mean, for example, that businesses would 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.

In response the Issues Paper, NACLC submitted that, to improve protection for people with disability entering into contracts, companies and retailers should be subject to regulations requiring them to 'ensure that consumers have the capacity to understand and fulfil the terms of contracts'—for example, through asking a 'mandatory list of questions to ensure that a consumer has understood the contract'.

While NACLC considers that the responsible lending provisions play an important role in requiring credit providers to assess the capability of consumers and to understand the products being offered, wholesale extension of these provisions may not be the most appropriate approach to addressing the concerns of stakeholders. In many categories of simple contract such requirements may be too onerous. Such provisions may also have the unintended consequence of preventing people with disability from accessing certain products where the requirement or test is applied too strictly or cautiously.

The introduction of very targeted and basic suitability requirements only in certain high-risk consumer contracts may be a preferable approach. This could, for example, apply to contracts such as purchasing a car without finance, high value phone contracts, and other high value consumer contracts and require a basic consideration of affordability and suitability.

Importantly however, NACLC suggests that prior to any change further research needs to be done into approaches to improving disclosure about the key provisions of any consumer contract to establish the most effective way of disclosing information. There is also a need for further research to determine which types of consumer contracts may cause serious financial detriment for consumers with disability. This work is vital and should guide any legislative change designed to provide greater consumer protection for consumers with disability.

