

Geoff Bowyer
T 03 9607 9497
F 03 9607 5270
president@liv.asn.au

7 July 2014

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

By email to: disability@alrc.gov.au

Dear Ms Wynn

Inquiry into Equality, Capacity and Disability in Commonwealth Laws

The Law Institute of Victoria (LIV) welcomes the opportunity to provide comment on the Equality, Capacity and Disability in Commonwealth Laws Discussion Paper 81.

Please find attached our submission.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact me or Courtney Guilliat, Policy Adviser for the Administrative Law and Human Rights Section, on (03) 9607 9375 or cguilliat@liv.asn.au.

Yours sincerely



Geoff Bowyer
President
Law Institute of Victoria

Equality, Capacity and Disability in Commonwealth Laws

To: Australian Law Reform Commission

Date: 7 July 2014



*Queries regarding this submission
should be directed to:*

Courtney Guillatt

Ph: (03) 9607 9375

Email: cguiliatt@liv.asn.au

TABLE OF CONTENTS

- Introduction 2
- National Decision Making Principles..... 3
- Supported Decision Making in Commonwealth Laws 4
- Access to Justice 6
- Review of State and Territory legislation 10

INTRODUCTION

The Law Institute of Victoria (LIV) welcomes the opportunity to make this submission in response to the Australian Law Reform Commission (ALRC) discussion paper 'Equality, Capacity and Disability in Commonwealth Law'.

The LIV has long been active in advocating for policy and law reform in areas relating to equality, capacity and disability through its Elder, Disability, Health and Succession Law Committees. The LIV has made numerous submissions relevant to the ALRC discussion paper including:

- LIV submission to the Issues Paper for this inquiry (24 December 2013);
- LIV Response to Guardianship Final Report (10 December 2012);
- LIV submissions to the Victorian Law Reform Commission Review of Guardianship Laws (May 2010, June 2011 and September 2011);
- LIV submission to Geoff Bloom, ACD Framework Consultation Project on *A National Framework for Advance Care Directives – Consultation Draft 2010* (20 October 2010)
- LIV submission to Department of Justice, Government Response to Law Reform Committee – Powers of Attorney Report (13 December 2010);
- LIV submission to Victorian Parliament Law Reform Committee Inquiry into powers of attorney (4 August 2009); and
- LIV submission to House Standing Committee on Legal and Constitutional Affairs, *Inquiry into Older People and the Law* (13 December 2006) and supplementary submissions of 21 March 2007 and 30 August 2007).¹

The LIV has responded to select questions in the Discussion Paper.

¹ LIV submissions are available on our website at <http://liv.asn.au/For-Lawyers/Submissions-and-LIV-projects>.

3. National Decision Making Principles

Proposal 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines, set out in Proposals 3–2 to 3–9.

The LIV supports proposals that encourage moves towards national consistency of laws concerning decision-making by persons who may require support in making decisions.

In past submissions, the LIV has noted that current laws on capacity are fragmented and overly complex and has advocated for:

- a single, comprehensive law to provide a principled framework for substitute decision-making, with one test for assessment of capacity; and;
- implementation of a national, uniform system of powers of attorney with one statute applying to all jurisdictions.

National Decision Making Principles (Principles) could play an important role in creating a framework for reform of Commonwealth, state and territory laws concerning decision making by persons who may require support in making decisions. Principles could go a long way to developing a common language to guide policy makers towards national harmonisation of legislation, policy and practice. Adoption of Principles will only be successful, however, where this leads to a nationally consistent legal framework.

We note that the National Framework for Advance Care Planning (The ACP Framework), released in September 2011, seeks to provide a national policy framework for use and application of advance care directives in the context of end of life decision-making. The ACP Framework acknowledges the challenges posed by divergent laws and it states that the Framework is intended to be “aspirational”, by describing the goals for which policy and practice should aim. While the LIV considers that the Framework goes a long way to developing a common language to guide policy makers towards national harmonisation of legislation, policy and practice for Advance Care Directives over time, we have previously argued that the Framework will only be successful where it leads to nationally consistent regulation of substitute-decision-making.

The discussion paper states that the Principles “provide a conceptual overlay at a high level”.² It is unclear how the Principles will interact, for example, with laws currently in place that provide for substitute rather than supportive decision-making.

The LIV considers that a system of guardianship and administration (ie substitute decision-making) as measures of last resort is a necessary part of a broader system that aims to ensure that the needs of people with impaired decision-making ability are met and their rights are protected. In submissions to the Victorian Law Reform Commission (VLRC) and the Victorian Government we have recommended reform of Victorian laws to ensure a comprehensive and integrated system that promotes advance planning (including enduring powers of attorney and advance directives) and provides for tribunal made orders (such as guardianship and administration) only as a measure of last resort where all other less restrictive options have been exhausted.

The LIV would like to see greater promotion of supported decision-making, which provides autonomy for people with impaired decision-making ability and is consistent with Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities* (the Disabilities Convention). The LIV agrees with the

² At [at 3.5].

underlying principle of supportive decision making arrangements, which is to provide autonomy for people with impaired decision-making ability, consistent with article 12.

In its submissions to the VLRC, the LIV argued that legal recognition of supportive decision making is unnecessary and that so-called 'informal' supportive decision-making can be strengthened through education, resources and the promotion of general powers of attorney as mechanisms to access and communicate information with third parties.

The LIV's arguments against legislating for supportive decision making can be summarised as follows:

- Formalising supportive decision making arrangements adds another layer of complexity to a system that already contains many different personal and substitute decision-making arrangements;
- Legal change is likely to introduce significant practical problems without increasing support for people with impaired decision-making ability to make their own decision;
- Informal supportive decision-making arrangements can be promoted by the provision of education and resources to family members and carers;
- Formal supportive decision making arrangements might facilitate undue influence by legitimising the role of an overbearing family member and giving them access to sensitive personal information that could be used to perpetrate financial or other abuse.

The discussion paper is based on the premise that, at an international level, it is recognised that States should be moving away from protection based policies to human rights based policies that emphasise participation by people with disabilities in all aspects of life, as reflected in article 12 of the Disabilities Convention. We are aware that the Committee on the Rights of Persons with Disabilities has recently called on state parties to take further action in developing supportive decision making models.

The LIV is concerned to ensure that legislative implementation of supportive decision-making does not add to complexity of the law in this area and inadvertently deter participation by people with impaired decision-making ability.

The LIV generally supports the proposed content of the National Decision Making Principles in Proposals 3-2 – 3-8. The LIV recommends, however, that the ALRC further consider the legal status of the proposed Principles and how this will interact with laws currently in place that provide for substitute rather than supportive decision-making.

4. Supported decision-making in Commonwealth laws

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.**

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.

Powers or functions of a supporter should be clear and precise. We suggest that the legal framework providing for the duties of the supporter be fully and clearly detailed. The framework must clearly articulate how the supporter arrangement will operate in practice, with a clear indication of the actions a supporter is empowered to undertake. This clarification is essential for persons seeking to make supporter appointments and for practitioners when advising clients on the meaning and intended operation of the role of supporter.

Further, we consider that the powers should be expressed to authorise the supporter to undertake specific activities, which they would otherwise be precluded from undertaking by law. Powers should not contain subjective instructions (such as to discuss information 'in a way the person can understand'), as this appears to impose an obligation on supporters, rather than authorise specific action. Any obligations on supporters, including regarding how a power should be exercised, should lie within a section of the legal framework dealing with 'responsibilities' and not within the power itself.

The LIV has previously been concerned about the question of consent by the supported person, to ensure that the autonomy of the supported person is maintained and respected, given that supported persons continue to have full legal capacity under law. One issue for consideration is whether the supporter should act only on instructions from the supported person. We consider that the proposed powers of supporters should expressly state that they can be exercised only with the knowledge and consent of the supported person, or on instructions from the supported person.

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?

The LIV does not consider that supporters should be bound by fiduciary duties. It is difficult to know what the scope of fiduciary duties might be in the context of supporters. The role of supporter is akin to the role of an attorney at some level and also to an adviser, such as a lawyer, at another level. According to Halsbury's Laws of Australia, the fiduciary duties owed by attorneys include:

- a) to follow the principal's instructions;
- b) to exercise care skill and diligence;
- c) to avoid conflicts of interest and duty not to profit from position; and
- d) to keep accounts.

The fiduciary duties of a lawyer, again according to Halsbury's Laws of Australia, include:

- a) to act in good faith;
- b) to exercise skill and care;

- c) absolute fairness and openness to the client in matters within the lawyer's retainer;
- d) to avoid conflicts of interest;
- e) to not disclose confidential information; and
- f) loyalty.³

We are concerned that imposition of fiduciary duties might discourage people from accepting the role of supporter, especially if the duty results in supporters needing to take out insurance. If low take up were to occur, it seems likely that informal supported decision making arrangements, which are not protected by the safeguards recommended in the report, would continue. This would frustrate the purpose of the recommendations.

The LIV considers that the supporter role is less formal than that of a substitute decision-maker and as such a lesser duty than a fiduciary duty should be imposed on supporters in order to distinguish between the roles.

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 LIV has previously supported information sharing by way of a national register for powers of attorney documents. We suggested that registration of powers of attorney could potentially lead to a reduction in the extent of abuse of these instruments and would increase certainty for third parties about whether an enduring power is current and valid. Similarly, the LIV would support the development of mechanisms for sharing information about supporter and representative appointments. In developing information sharing mechanisms, we suggest that the government consider which agency would be responsible for administering and maintaining the register, funding arrangements, the use and accessibility of the register, and privacy issues of such a register.

7. Access to Justice

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.

Proposal 7–5: The rules of federal courts should provide that available decision-making support must be taken into account in determining whether a person needs a litigation representative.

Proposal 7–6 The rules of federal courts should provide that litigation representatives:

- a) must support the person represented to express their will and preferences in making decisions;
- b) where it is not possible to determine what are the wishes of the person, must determine what the person would likely want based on all the information available;
- c) where (a) and (b) are not possible, the litigation representative must consider the human rights relevant to the situation; and

³ Lexis Nexis, *Halsbury's Laws of Australia*, (current at 28 August 2002)250 Legal Practitioners, "7 – Duty to clients" [250-545].

d) must act in a manner promoting the personal, social and financial and cultural wellbeing of the person represented.

The LIV has previously argued that legislation should enable people with a disability to pursue civil litigation to protect their rights and to ensure that their best interests are served.⁴ Litigation guardians play a crucial role in fulfilling the rights of people with impaired decision making ability, by enabling them to bring and defend legal proceedings and therefore have access to justice on an equal basis with others in the community.⁵

In September 2013, the LIV took part in a roundtable hosted jointly with the Office of the Public Advocate Victoria (OPA) and (then) Public Interest Law Clearing House (now Justice Connect). The September roundtable was attended by representatives from Justice Connect, OPA, the LIV, government departments, statutory bodies, the judiciary and trustee services, amongst others.⁶

While not the focus of this inquiry, the LIV notes that a number of concerns relating to litigation guardians were raised at the September 2013 roundtable, including the litigation guardian's liability for costs and the process for appointment of a litigation guardian. We refer the Commission to the discussion paper prepared by Justice Connect for the September 2013 roundtable for further detailed information on the costs liability of litigation guardians and the process for the appointment of litigation guardians and whether the current system adequately protects and promotes the interests of those with diminished legal capacity.

We note that participants at the September 2013 queried whether specialist bodies with expertise in undertaking assessments of a person's capacity are best placed to make decisions about the appointment of a litigation guardian. At present, litigation guardians are appointed under court rules for the relevant court in which proceedings take place. Participants at the roundtable suggested that courts should retain the ability to appoint litigation guardians for persons who lack capacity but should also have the ability to refer to specialist bodies, such as the Victorian Civil and Administrative Tribunal. We note that some members of the LIV have expressed concern with the New South Wales approach, whereby the Director General of the Department of Attorney General and Justice is empowered to designate a person with relevant qualifications and experience as a member of the Guardian ad Litem Panel, who is then eligible for appointment as a Guardian ad Litem.

Further, the LIV notes that proposal 7-4 does not require proof of a causal connection between a person's lack of capacity and a disability in determining whether the person needs a litigation representative. The LIV has previously argued that the requirement for evidence of cognitive impairment is an important safeguard, because it requires evidence of a causal link between decision-making ability and some form of cognitive impairment.⁷ This causal link is important to protect the right of individuals with capacity to make unwise or risky decisions. The LIV considers that the test for determining whether a person needs a litigation representative should retain the connection between disability and capacity.

Proposal 7–7 Federal courts should issue practice notes explaining the duties of litigation representatives to the person they represent and to the court.

The LIV strongly supports this proposal. The LIV has previously identified that there is a lack of clarity about the scope of the role and duties of litigation guardians, with complexity arising from numerous court rules

⁴ See LIV, Submission to the Victorian Law Reform Commission Guardianship Review Consultation Paper, 8 June 2011, at p24.

⁵ See LIV, Submission on the Victorian Law Reform Commission Guardianship Review Final Report, 10 December 2012, at pg 26.

⁶ Further information is available in the discussion paper prepared by Justice Connect for the roundtable, see Justice Connect, 'Incapacity and the Justice System in Victoria: Discussion Paper', September 2013, available at: <http://www.justiceconnect.org.au/our-programs/seniors-law/law-and-policy-reform/access-justice/incapacity-and-justice-system-victoria>.

⁷ Above n3, pg 9.

which establish different requirements and processes for the appointment of litigation guardians.⁸ At the September 2013 roundtable, participants suggested that guidelines should be developed to assist litigation guardians in each jurisdiction in which they operate, with a focus on:

- What the role of litigation guardian involves;
- The extent to which the litigation guardian should actively participate in the development of the represented person's case;
- Setting out activities which a litigation guardian may undertake, for example, obtaining reports to assist with the case or making contact with service providers;
- The ability of litigation guardians to challenge their lawyer in ways that any litigant may challenge their lawyer;
- The authority of a litigation guardian to change their lawyer;
- Whether the litigation guardian needs to act through a lawyer when the litigation guardian is a lawyer; and
- Whether settlement or consent orders need to be approved by the presiding Court.

The LIV has reviewed the materials produced by the New South Wales Attorney-General's Department and recommends that these resources be adapted with care for use in both federal and state and territory jurisdictions.⁹ We consider that the guidelines should be standardised with jurisdiction-specific information included for specialist courts such as the Family and Children's Courts.

We note that at the September 2013 roundtable there was also support for tailored guidelines for lawyers acting in a matter where their client has a litigation guardian.

Question 7-2: Should the Australian Solicitors' Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors' duties of confidentiality where:

- a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and**
- b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?**

The LIV agrees that the Australian Solicitors' Conduct Rules should be amended to permit a qualification or exception to a lawyer's duty of confidentiality or loyalty to a client that permits the lawyer to seek the appointment of a guardian or administrator for the client in certain circumstances.

Attendees at the September 2013 roundtable discussed that, where a lawyer has concerns about his or her client's capacity, and the client refuses or is unable to consent to investigations in relation to their capacity, the lawyer is faced with a clash of duties – their duty of confidentiality and their duty to act in the client's best interests. The lawyer may have formed a reasonable view that the client lacks capacity to instruct a lawyer, but the client is unable or refuses to consent to an application for the appointment of a substitute decision maker. The lawyer is bound by his or her duty of confidentiality from revealing any information obtained within the context of the lawyer-client relationship to a third party without the client's consent, which prevents the lawyer from seeking to appoint a guardian or administrator for the client. On the other hand, the lawyer has a duty to advance and protect their client's interests. The clash of duties may result in the lawyer ceasing to act for the client. This raises significant concerns about the client's ability to access the justice system and equality before the law.

⁸Above n3, pg 27.

⁹See <http://www.gal.nsw.gov.au/>.

The Court has confirmed that, where proceedings are on foot, lawyers have a duty to raise the issue of the client's capacity with the court.¹⁰ However the position is not clear when proceedings have not yet commenced. In a 2008 ruling, the LIV Ethics Committee determined that, if the client refuses to consent to a medical assessment the firm may cease to act, giving reasons.¹¹ Alternatively, if the firm makes an application for the appointment of a substitute decision maker and the client objects, the Ethics Committee ruled that the firm should cease to act, giving reasons.¹²

Ceasing to act in these circumstances leaves the client vulnerable and without a means of meaningfully engaging with the justice system. Conversely, the Courts have made it clear that it is undesirable for a solicitor to be placed in an adversary position with the client by commencing proceedings for the appointment of a substitute decision maker.¹³

Reflecting on this, participants at the September 2013 roundtable agreed that the professional conduct and practice rules should be amended to permit a qualification or exception to a lawyer's duty of confidentiality or loyalty to a client that permits the lawyer to seek the appointment of a guardian or administrator where:

- (a) There are no proceedings on foot;
- (b) The lawyer has formed a reasonable view that the client lacks capacity to instruct a lawyer; and
- (c) It would be contrary to the best interests of the client if the lawyer were not to bring the application in order to secure the client's best interests.

The LIV recommends that rule 9.2 of the Australian Solicitors' Conduct Rules (the Australian Rules), which provides a number of exceptions to the duty of confidentiality, be amended to include a further exemption based on rule 1.14 of the American Bar Association Model Rules of Professional Conduct (American Bar Association rules). Subsections (a) and (b) of the American Bar Association Rules provide that:

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

In line with rule 1.14(b) of the American Bar Association Rules, the LIV recommends that Rule 9.2 of the Australian Rules be amended to include a further exception where the lawyer reasonably believes the client has diminished capacity and is at risk of substantial physical, financial or other harm and the lawyer discloses confidential client information for the purpose of taking reasonably necessary protective action. Phrased in this way, the amendment would not proscribe a set approach, but affords the solicitor the discretion to choose the most appropriate course of action in the circumstances. The commentary to the Rules should provide direction as to what protective action might be contemplated. We note that the commentary to the American Bar Association Rules contemplates that protective action could include consulting with family members, using voluntary surrogate decision making tools such as powers of attorney

¹⁰ *Pitorino v Connel & Ors* [2012] VSC 438.

¹¹ LIV, Ethics Committee Ruling, R4568, 1 July 2008, available at: <http://www.liv.asn.au/For-Lawyers/Ethics/Ethics-Committee-Rulings>.

¹² *Ibid.*

¹³ See Powell J in *McD v McD* [1983] NSWLR 81 at 84, and Hodgson JA in *R v P* [2001] NSWCA 473 at [64].

or consulting with support groups, professional services, adult protective agencies or other individuals or entities that have the ability to protect the client.

The commentary to the Australian Rules currently provides that a lawyer who relies on rule 9.2 must show that circumstances exist to justify the disclosure. We suggest that, in conjunction with the amendment to rule 9.2, the commentary should also be amended to provide guidance to solicitors as follows:

- The new exception should only be used as a last resort where no member of the client's family is available or willing to make an application for the appointment of a substitute decision maker¹⁴ and all alternative avenues have been explored; and
- In determining what protective action to take, the solicitor should be guided by the wishes and values of the client (to the extent known), the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximizing client capacities and respecting the client's family and social connections.¹⁵

10. Review of State and Territory legislation

Proposal 10–1 State and territory governments should review laws that deal with decision-making by people who need decision-making support to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In conducting such a review, regard should also be given to:

- a) interaction with any supporter and representative schemes under Commonwealth legislation;**
- b) consistency between jurisdictions, including in terminology;**
- c) maximising cross-jurisdictional recognition of arrangements; and**
- d) mechanisms for consistent and national data collection.**

Any review should include, but not be limited to, laws with respect to guardianship and administration; informed consent to medical treatment; mental health; and disability services.

The LIV notes that the Victorian government is actively reviewing its laws dealing with decision-making by people who need decision-making support. The Powers of Attorney Bill 2014 (Vic) was introduced into Victorian Parliament on 24 June 2014. The Bill consolidates certain aspects of the law as to powers of attorney and introduces supportive attorney appointments.

¹⁴ As reflected by Powell J in *McD v McD* (1983) NSWLR 81 at 84.

¹⁵ See Comment on Rule 1.14, American Bar Association Rules, para [5].