

25 June 2014

The Executive Director
Australian Law Reform Commission
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By email: disability@alrc.gov.au

Dear Colleagues

Equality, Capacity and Disability in Commonwealth Laws Discussion Paper

Thank you for the opportunity to provide a submission in relation your Discussion Paper.

Summary

- We support the introduction of the proposed National Decision-Making Principles and the Commonwealth supporter and representative scheme ('Commonwealth decision-making model'). We support reform to decision-making laws that move away from focusing on what a person with disability cannot do to focusing on the supports that should be provided to enable people to make decisions and exercise their legal capacity.
- A mechanism for appointment as well as duties and roles of supporters and representatives and the National Decision-Making Principles could be contained in Commonwealth legislation ("the Supported-Decision Making Act").
- Ideally intergovernmental cooperation will lead to the adoption of the Supported-Decision Making Act across all jurisdictions of Australia.
- Implementation of the Commonwealth decision-making model through the Supported-Decision Making Act and the development of complementary resources should augment and strengthen the efforts of families and members of the community who are supporting people with disability to make decisions.

About Pave the Way

Pave the Way works with families throughout Queensland to clarify their vision, to plan for a good life and a secure future for their relatives with disability.

One aspect of our work involves providing families with information about the law that relates to decision-making. This includes information about assisting people with disability to make decisions through the use of informal support, power of attorneys, statutory health attorneys and guardianship and administration orders.



Although not often conceptualised in terms of human rights, our observation is that families usually have a strong commitment to ensuring that their loved one's ability to make their own decisions is preserved and developed. This is the case even though they are operating in a system that continually challenges their authority and does not provide adequate recognition of their role in supporting their family member to make decisions.

It is our view that law reform is required on a Commonwealth and state and territory level to ensure that the ability of people who support people with disability to make decisions is strengthened, recognised and encouraged. We have responded to your discussion paper from this perspective.

Supported Decision-Making in Commonwealth Laws

Recognition of Supported Decision-Making

The implementation of the Commonwealth decision-making model should be as simple as possible. Ideally, people with disability, supporters and representatives should have appointments registered through a central process that is recognised by all relevant Commonwealth agencies. A single piece of legislation that deals with the appointment, role and duties of supporters and representatives, as well as including the National Decision-Making Principles may be the best way to achieve this ("the Supported Decision-Making Act"). Where necessary this Act could be referred to in other Commonwealth laws and legal frameworks so that all relevant Commonwealth agencies recognise decisions that are made with support as well as recognising the role of supporters and representatives.

Among other things, the Supported Decision-Making Act could provide for a mechanism for the appointment of a representative when the person who requires decision-making support is unable to appoint his or her own representative and requires fully supported decision-making support. An independent, impartial body should make and review appointments. This body does not necessarily need to be a court or tribunal.

Our view is that including the National Decision-Making Principles in the objects or principles provisions of relevant legislation will only be effective if it is complemented by a clear requirement that the relevant agency recognise supported decisions and supporters and representatives.

We note your intention not to outline the formal requirements that may be necessary to facilitate the appointment of a supporter. We believe that there would be benefit in you making some recommendations in relation to this issue.

Role and duties of supporters and representatives

We support the legislative recognition of the role of supporters as outlined in your proposal 4-4 and the role of representatives as outlined in proposal 4-7.

We also support the introduction of a defined set of legal duties that a supporter and a representative has in relation to the person with disability. Our view is that the relationship between the supporter or representative and the person requiring support is fiduciary in nature. However, it is not our view that a supporter should be liable for the consequences arising from any decision that



is made. Instead, the person should be liable if they breach their duty to the person requiring support and damage (including non-financial damage) is suffered. Accordingly, the focus for determining liability should be on the process rather than the outcome of the decision-making support.

It is important that the duties of supporters and representatives are not too onerous. For this reason we do not believe that the supporter or representative should have a duty to “assist the person requiring support to develop their own decision-making ability.” Our view is that, according to the Convention, the State (rather than the supporter or representative) is obligated to provide resources that aim to develop people's decision-making ability.

If the State were to make tools available to assist people to develop their decision-making capacity supporters and representatives could assist people to engage with these tools. However, rather than this being a duty that is imposed on supporters and representatives, it could form part of guidelines for supporters that are developed to assist them to understand their role and duties. These guidelines could also be one way that your proposal 4-11 could be implemented.

Agencies that the Commonwealth decision-making model should apply to

In addition to the agencies that have been identified by you in the Discussion Paper, we believe that the Commonwealth decision-making model should be applied to Medicare, the Australian Taxation Office, superannuation and, where possible, to the regulation of the banking and insurance industries.

Interaction with state and territory systems

The right of people with disability to make their own decisions and to be supported to do the same will only be properly recognised through reform of state and territory guardianship and administration laws. As you have observed, the practical outcomes of your inquiry will depend on whether it serves as a catalyst for review of state and territory laws.

While we appreciate that your inquiry relates to Commonwealth laws and legal frameworks, we believe it is essential that you consider recommending measures to maximise the potential for any Commonwealth law reform to influence relevant state and territory laws.

You have suggested that a review of laws relating to guardianship, administration, powers of attorney and consent to medical treatment be coordinated through COAG. If the Australian Law Reform Commission is able to make recommendations about how to best achieve a cohesive national approach to the implementation of Article 12 of the Convention, these recommendations could be referred to the Standing Council on Law and Justice. The Standing Council on Law and Justice can then negotiate and agree on uniform action that should be taken at a state and territory level. Ideally, this would include a referral of power so that the National Decision-Making Act is applied on a state and territory level, resulting in one national regime that relates to supported decision-making and also that there are no longer laws that permit substitute or ‘best interest’ decision-making.



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Thank you again for the opportunity to provide a submission to your inquiry, we look forward to reading your final report.

Yours faithfully

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