



National Disability Services

June 2014

## **Response to the discussion paper: Equality, Capacity and Disability in Commonwealth Laws**

NDS is pleased to provide the following comments to the Australian Law Reform Commission (the Commission) on its proposals to reform Commonwealth laws and legal frameworks to ensure people with disability can enjoy their right to equal recognition before the law.

### **Enabling legal capacity and supported decision-making**

NDS congratulates the Commission on a thorough and focused review. The analysis in the report is a useful resource for anyone exploring the legal intricacies and history of substitute and supported decision-making.

The proposals represent a reconfiguration of support for decision-making across many areas of law to put into effect the paradigm shift implicit in the United Nations Disability Rights Convention. NDS is generally supportive of the proposed directions of change. However, we note a number of practical concerns and urge caution. An evaluative approach to implementing the proposals is required as they cover uncharted territory.

### **Applying national decision-making principles**

NDS supports the establishment of clearly articulated 'national decision-making principles' to guide reform of all Commonwealth, state and territory laws and legal frameworks that affect decision-making of people with disability. This appears to be the most effective strategy for building a more coherent approach to legal capacity. It should, over time, reduce the inconsistency and unnecessary administrative hurdles across different jurisdictions or areas of life that currently face people with disability, their families and service providers.

The proposed principles should achieve a shift in practice to help embed the right of every adult to make their own decisions and to be provided with the support necessary to do so. They will also help to ensure that any decision made for a person with disability is directed by their will, preferences and rights. This shift will have different practical implications in the various relevant areas of law.

The process of change should roll out slowly, providing opportunities for learning along the way. As indicated by the Commission, the Commonwealth may put into practice the various changes prior to states and territories. This will represent a useful opportunity

to evaluate the practical ramifications. Similarly, the areas of law that have a clear role in addressing support for legal capacity, such as the National Disability Insurance Scheme (NDIS) Act, the Evidence Act and guardianship laws, may do the detailed work to develop specific legal solutions. These can then be more easily modified or adopted in other areas of law such as electoral, contract, banking and consumer protection.

## Supported decision-making in Commonwealth laws

The proposed Commonwealth model of supported decision-making is intended to impact law governing the NDIS, social security, aged-Care, eHealth records, privacy and banking. It introduces two distinct roles, 'supporters' and 'representatives.'

NDS is comfortable with the proposed terms 'supporter' and 'representative' as straightforward language that conveys the intended meaning. We also understand that it may not be helpful to continue with historic language that appears confusing and burdened by past practice. However, it is important to recognise that exchanging words that prima facie have the same meaning could be seen as window-dressing. To avoid being tarnished with historic criticisms, the changes need effective communication about the substance of the intended shift.

### The formal supporter role

NDS understands that the essential proposal is to introduce a formal 'supporter role' that is distinct from both informal support and the new 'representative role'. The most substantive difference from the representative role is that it must be appointed, and can be revoked, by the person with disability. The key difference from informal support is that the legal framework must allow for and acknowledge the role. Importantly, there is nothing to preclude a paid worker or organisation from taking the supporter role.

A number of logistical issues need to be resolved about how this role will work in each legislative area, and the details will have a critical impact. In particular, it is unclear how or what consideration will be given to quality standards and safeguards. Will there be a requirement for police checks or training? How will arrangements be monitored?

NDS broadly supports the proposed roles and duties for the 'supporter role' with a few caveats. One of the proposed duties is to 'assist the person to develop their own decision-making ability.' This duty is definitely important, but implementing it is potentially a complex and skilled task. This must be considered when applying the model to different areas of law and it is likely to have training and funding implications.

The proposed duty to act in a manner promoting the personal, social, financial, and cultural wellbeing of the person who requires decision-making support is also important. It adds 'financial and cultural' to the similar obligation provided for nominees under the NDIS Act [s80(1)]. We are unclear exactly how cultural wellbeing will be

promoted in relation to decision-making; this will require thoughtful evaluation as there are some risks of conflict between cultural considerations and individual rights.

Promotion of financial wellbeing is an appropriate addition but we do not think supporters should be regarded as having a fiduciary relationship. While there is no doubt that a formally appointed 'supporter' has a relationship of trust and confidence, it seems a step too far to hold supporters liable for the decisions of the people they support. NDS regards this as a core difference between the formal supporter role and an appointed 'representative'.

For two reasons, we do not think a lack of a fiduciary responsibility creates an unreasonable risk for people being supported. Firstly, the role of a supporter can be revoked by the person being supported. Secondly, the Commission is clear that supporters can be in paid positions, and this provides scope to hold them to account through the contractual relationship. For example, a supporter could be held liable if they are paid to manage correspondence, and negligence in this task results in financial disadvantage for the client.

It will be important to consider the difference between volunteer supporters and paid supporters when developing legislative proposals. This is partly to acknowledge the role a contractual relationship can play in protecting clients and supporters. It is also important to ensure unrealistic or unreasonable obligations do not deter people from acting as volunteer supporters.

### **The representative role for those requiring full decision-making support**

NDS supports the innovations in the duties and roles for the representative role, which are similar to those outlined for the supporter role. The changes focus on assisting people to make their own decisions and to express their will and preferences, or where this is not possible, to endeavour to find out what they most likely would want and to facilitate consultation with other significant people in the lives of those they are supporting. Other aspects of the role do not appear to significantly differ from existing nominee, guardian and administrator roles.

NDS considers it appropriate to select the least bureaucratic mechanism for appointing representatives, with the least scope for duplication of administration burdens for people with disability and their families. This will likely be an existing court or tribunal rather than the specific Commonwealth agency responsible for each affected area of law. This allows a common approach, and indeed a common representative across different areas of life and perhaps across jurisdictions. This approach also allows the chosen mechanism to build expertise and infrastructure for making good determinations, instead of spreading across several small subunits within larger agencies. This external mechanism could potentially monitor both representative and supporter arrangements.

NDS strongly supports encouraging the appointment of existing representatives, such as state-appointed guardians for Commonwealth duties, where appropriate, although we acknowledge this should not be automatic. This will clearly require provision within the legislation for effective information-sharing.

### **Guidance and training**

To effectively implement both the supporter and representative role and more broadly the national decision-making principles, there is a need for an awareness-raising and learning and development strategy. Specific guidance and training needs to be available for the decision-maker, supporters, representatives and Commonwealth agencies interacting with the decision-maker.

This is of high importance and will need a specific funding allocation. It is unclear which Commonwealth agency would be responsible for this – but it makes sense to have a collaborative effort rather than leave it to each area of government and each jurisdiction.

### **The National Disability Insurance Scheme**

As indicated above, NDS supports the application of the supported decision-making approach in Commonwealth legislation as a way of implementing the proposed national decision-making principles. This will have implications for the NDIS legislation. Some of this is not onerous, such as changing the existing obligation for nominees to consult to a duty to facilitate consultation, and adding a duty to promote financial wellbeing. Other changes are more significant. The current nominee role would be divided into two and the role of the CEO in the appointment would change. The new supporter role would only be appointed by the participant, while the representative role would perhaps involve an external appointment process.

As noted by the Commission, there are already a considerable number of completed, current and planned reviews of the scheme, which has only been in limited operation for one year. NDS is concerned that there is sufficient time for an evaluative approach to be taken that allows findings about how things are working in practice to be considered. Therefore, while NDS appreciates that these reviews provide an opportunity to take the Commission's proposals into account, we caution against ambitious timetables for major amendments. Rather we would encourage research and pilot projects to test the various proposals in the context of the evolving NDIS design.

The national approach to safeguards around the NDIS is still being developed, and informal and formal decision support will need to be an integral consideration in this design. There are a number of other aspects of the operation of the scheme that also need careful attention in considering how best to implement the supported decision model. For example: how effectively do the NDIS Planners and Local Area Coordinators interface with nominees? How are existing state-appointed representatives and the NDIS working together? How is funding for decision-making

support achieved, both within individualised NDIS packages and separately? How is tension between the wishes of family and participants managed?

The Commission asked for submissions on how to maximise the opportunities for self-management of participant funds. NDS thinks that this overstates self-management of funds as a goal in itself and as a decision capacity issue. Self-management of funds is an important option for participants. However, with or without decision capacity barriers, many participants may reasonably choose to have the NDIS or a contracted fund manager handle the administrative responsibilities of their support funds, simply because that is not how they wish to spend their time. NDS agrees that those who wish to manage their funds need to have the opportunity and support to do so, but we do not see it as a critical pathway for achieving the broader goals of economic and social participation. Perhaps there needs to be clarification about the difference between an appointed 'decision maker' and a person or organisation hired to help manage funds?

## Access to justice

NDS fully supports the proposals that will allow people with intellectual and/or communication disability to have their evidence and experience taken into account by courts, both as witnesses and as defendants. This includes consideration of decision-making ability, with access to support and adjustments, as part of the assessment of fitness to give evidence or to stand trial. For this to work, it is imperative for the justice system to draw on disability expertise in decision support and adjustments such as:

- interviewing techniques that address issues associated with recall of information or a propensity to be led by authorities;
- assistive technology and techniques that addresses communication barriers; and
- support to address circumstances where there are reduced social networks and fear of retribution if experiencing carer abuse.

Again, it will be important for these proposed innovations to be implemented with an evaluative approach where the practicalities of gaining necessary expertise and providing skilled support and adjustments are taken into consideration. NDS sees wisdom in starting the innovations in the federal court to model an approach that can be implemented in other jurisdictions at a later stage. However, NDS also hopes that states and territories will also continue to explore measures to redress the imbalance in their justice systems that currently deny people with disability access to justice.

South Australia has developed a draft set of guidelines to improve access to justice, and in particular, how investigators obtain evidence from people with intellectual disability. These could usefully be adopted in each jurisdiction in conjunction with disability awareness training for the justice sector and accompany the proposed amendments to legislation.

## **Restrictive practices**

The national decision-making principles will provide a great platform for improving regulation of restrictive practices. While current regulation primarily occurs at a state and territory level, the introduction of the NDIS makes it timely to implement a national approach. The national framework for reducing the use of restrictive practices, endorsed by COAG, offers useful guidance that NDS believes will be complemented by the national decision-making principles.

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## **About National Disability Services**

**National Disability Services** is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 950 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.