



Office of the Public Advocate



Office of the Public Advocate (South Australia) and Office of the Public Advocate (Victoria)

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

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1. About the Office of the Public Advocate

- 1.1. The Victorian Office of the Public Advocate (OPA Vic) is a statutory office independent of government, that works to protect and promote the rights, interests and dignity of people with disabilities. OPA Vic provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairment or mental illness. During 2012–2013, OPA was involved in 1,590 guardianship matters, 386 investigations and 394 cases requiring advocacy. The OPA Vic’s mission is to uphold the rights and interests of people with a disability and work to eliminate abuse, neglect and exploitation. The functions of OPA Vic are defined in the *Guardianship and Administration Act 1986* (Vic).
- 1.2. The South Australian Office of the Public Advocate (OPA SA) is an independent statutory office of the South Australian Government. The functions of the Public Advocate are determined by provisions of the *Guardianship and Administration Act 1993* (SA). The Office has advocacy, guardianship, education and investigative roles. During 2012–13, OPA SA provided guardianship services on behalf of 1162 people.
- 1.3. This submission is the independent and shared view of OPA Vic and OPA SA, unless indicated otherwise. This submission does not seek to express the position of the Victorian or South Australian Government.
- 1.4. OPA Vic and OPA SA prepared individual submissions to the ALRC Issues Paper. The two offices share similar views on many of the important issues considered in the ALRC Discussion Paper and therefore we wish to express our combined views in this submission.
- 1.5. We welcome the opportunity to address the proposals and questions contained in the ALRC Discussion Paper.



2. Conceptual Landscape—the Context for Reform

Proposal 2–1 The Australian Government should review the Interpretative Declaration in relation to art 12 of the United Nations *Convention on the Rights of Persons with Disabilities* with a view to withdrawing it.

2.1. This proposal is supported in principle, however we note the following additional remarks.

The Convention on the Rights of Persons with Disabilities

- 2.2. OPA Vic stated its position in its submission to the ALRC Issues Paper, that the Interpretative Declaration has little operational effect but is pointed to as an indication of Australia's less-than-total embrace of the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD). OPA SA stated its concerns with the wording of Australia's current declaration and questioned the need for a declaration.
- 2.3. We acknowledge and support the position expressed by the ALRC in its Discussion Paper, that the retention of the Interpretative Declaration may act as a handbrake on reform and that the CRPD allows for fully supported or substituted decision-making arrangements.
- 2.4. We base our views on our own understanding of article 12, that substitute decision-making performed as guardianship or administration, in accordance with the rule of law, is compliant with Article 12 of the CRPD.¹ We are strong in our view that guardianship, properly done, is a positive use of state power that enhances the inclusion and legal personhood of the represented person.² There are safeguards in place to prevent abuse and exploitation, including those contained in article 12(4) of the CRPD which provide for safeguards and limitations on measures that relate to the exercise of legal capacity.³
- 2.5. We acknowledge the expressed concern of the United Nations Committee on the Rights of Persons with Disabilities 'about the possibility of maintaining the regime of substitute decision-making ... that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity.'⁴ To this end we restate OPA Vic's position contained in the submission to the Parliament of Victoria *Inquiry into the social inclusion of Victorians with a disability* (2014) that:

[w]hile guardianship will continue to be of necessity for small numbers of people with disability the reach of effective supported decision-making needs to be greatly extended. Supported decision-making offers the opportunity for significant

¹ See also OPA Vic's submission to the recent Parliament of Victoria, Family and Community Development Committee *Inquiry into the social inclusion of Victorians with a disability* (2014) 10–12 for a discussion about the relationship between guardianship and the Convention.

² Office of the Public Advocate (Vic) *Submission to the Parliament of Victoria, Family and Community Development Committee Inquiry into the social inclusion of Victorians with a disability* (2014) 11–12.

³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

⁴ Committee on the Rights of Persons with Disability, '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) 9, [24] <http://www.ncid.org.au/index.php/docman-documents/reports/30-un-report-on-australia-2013/file>. See also Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 45.



improvement in the social inclusion of people with significant cognitive impairments and mental ill health.⁵

2.6. OPA SA suggested in response to the Issues Paper:

[w]e would suggest that Article 12 will only be implemented when supported decision making is available routinely to people with disabilities in Australia. No person should be subject to a substitute decision, whether it be made by an informal substitute decision maker, by a substitute decision maker appointed by an advance directive, or by a tribunal-appointed substitute decision maker, unless all practical attempts to support a person to make their own decision have been tried first.⁶

2.7. Furthermore, OPA Vic notes its response to the Victorian Law Reform Commission (VLRC) *Guardianship: Final Report* (2012) where OPA Vic supported nearly all of the Commission's 440 recommendations (some of which related to the provision for supported decision making in a new Guardianship Act). OPA Vic notes that the Victorian Government has not formally responded to the VLRC's final report, however OPA Vic continues to advocate for implementation of the vast majority of the recommendations, with some notable concerns.⁷

2.8. We wish to stress that no person should be subject to a substitute decision unless all practical attempts have been made to support the person to make their own decision first. For this to happen routinely, supported decision making needs to be provided for in key state laws that affect decision making, in particular guardianship and administration legislation, medical consent law, and laws that establish advance directives.⁸

National Disability Strategy 2010–2020

2.9. We now wish to draw attention to the terms of reference requiring the ALRC to have regard to the Australian Government's commitment to the National Disability Strategy (NDS), which includes 'rights protection, justice and legislation' as a priority area for action (policy area 2). We perceive rights protection in particular as an area where guardianship, when used appropriately, can be enabling.

2.10. The emphasis on a person's autonomy as expressed in the ALRC Discussion Paper is a positive development, however we are concerned that overemphasis may be to the detriment of protection for people who need guardianship as a rights enhancing mechanism. Guardians need to be properly resourced and the person's wishes must be paramount in all decisions.

2.11. We would like to see greater emphasis in the NDS on steps designed to address the goal of policy area 2—rights protection, justice and legislation—containing policy direction 4

⁵ Office of the Public Advocate (Vic) *Submission to the Parliament of Victoria, Family and Community Development Committee Inquiry into the social inclusion of Victorians with a disability* (2014) 12.

⁶ Office of the Public Advocate (SA), *Response to the ALRC Issues Paper: Equality, Capacity and Disability in Commonwealth Laws* (2013) 4.

⁷ See generally Office of the Public Advocate (Vic), *Response to the Victorian Law Reform Commission's Final Report on Guardianship* (2012).

⁸ Office of the Public Advocate (SA), *Response to the ALRC Issues Paper: Equality, Capacity and Disability in Commonwealth Laws* (2013) 4.



concerning people with disability being 'safe from violence, exploitation and neglect'. This is particularly in the areas of criminal justice (including victim/witness support), health, mental health, and community services where greater emphasis in the NDS is required. We note concerns about access to justice will be addressed in section seven of this submission.

- 2.12. Notably, the NDS did not assume as significant a focus in the ALRC Discussion Paper as in the Issues Paper. Given the NDS is directly referred to in the terms of reference we wish to highlight here its importance in relation to the protection of people with disability from violence, exploitation and neglect at a national policy level.

Protection of at-risk adults

- 2.13. There is currently a significant lack of adequate law and policy in the area of protection of at-risk adults.⁹ Even in strong systems of human rights protection laws and policies, such as in Victoria, gaps still exist.¹⁰ We refer particularly to the concerning gaps in relation to investigation and prosecution of abuse, neglect and exploitation of persons with disability. OPA Vic has limited remit in this area and has called for broader powers of investigation a number of times in relation to the protection of at-risk adults. We are aware of known situations where instances of abuse, neglect or exploitation have occurred that are currently unable to be investigated by appropriate statutory authorities (where emergency services are unable or unwilling to investigate). We refer the ALRC to OPA Vic's various submissions to the VLRC inquiry into guardianship laws for more detailed information.¹¹
- 2.14. A Churchill Fellowship report, written on the broad topic of adult protection by OPA (Vic)'s John Chesterman, examines a number of interventionist adult protection systems to see how Victoria might reform its adult protection system and practices.¹² The report can be found on the OPA Vic website: <http://www.publicadvocate.vic.gov.au/research/255/>.
- 2.15. The need for specific rights based adult protection policy and legislation was similarly addressed by OPA (SA) and the University of South Australia in the 2011 Report *Closing the Gaps - Enhancing South Australia's Response to the Abuse of Vulnerable Older People*.¹³ This report uses a rights based model to argue for specific adult protection legislation, that is distinct to capacity based Guardianship legislation, and therefore does not require a person to lose decision-making rights in order to access necessary help. It requires service providers to be proactive in identifying and responding to the abuse to a

⁹ Including people with cognitive impairments and mental ill health: See Dr John Chesterman, *Responding to violence, abuse, exploitation and neglect: Improving our protection of at-risk adults* (2013) <<http://www.publicadvocate.vic.gov.au/research/255/>>.

¹⁰ See, for example, the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic), the *Disability Act 2006* (Vic), the *Mental Health Act 2014* (Vic) and the remit of independent and statutory agencies like OPA Vic, the Victorian Ombudsman, the Victorian Equal Opportunity and Human Rights Commission, the Mental Health Complaints Commissioner and the Disability Services Commissioner.

¹¹ Office of the Public Advocate (Vic), *Response to the Victorian Law Reform Commission's Final Report on Guardianship* (May 2012); Office of the Public Advocate (Vic), *Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper* (May 2011), Office of the Public Advocate (Vic), *Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper* (May 2009), all available at Office of the Public Advocate (Vic), *Submissions* (2 June 2014) <<http://www.publicadvocate.vic.gov.au/research/131/>>.

¹² Including Washington State (USA), Nova Scotia (Canada), Scotland (UK) and England (UK).

¹³ Office of the Public Advocate (SA) and University of South Australia, *Closing the Gaps - Enhancing South Australia's Response to the Abuse of Vulnerable Older People* (2011) <http://www.opa.sa.gov.au/files/187_closing_the_gaps_final_report_proposed_policy_complete_document.pdf>.



wider population of vulnerable people than those covered in guardianship law. A model across government policy was prepared. The focus of this approach was not on mandatory reporting, but on a *mandatory response* by service providers aware of abuse. Increasing access to practical assistance to provide a right to safety through adult protection policy or law, can help ensure that a person retains their decision-making rights, and the appointment of a guardian is truly a last resort.



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.

- 3.1. This proposal is supported. We do have concerns however that the National Decision-Making Principles and Guidelines might potentially be watered down in the future, through paraphrasing and subtle modification by drafters of laws less engaged with disability rights. One solution would be for law reformers and policy makers to directly reference the Principles; for example by incorporating a statement in any reformed laws that those involved in the administration and implementation of the reformed legislation will uphold the National Decision-Making Principles. A similar approach will be needed in relation to the specific roles, responsibilities and duties of supporters and representatives in each relevant Commonwealth law.
- 3.2. If this were to be accepted, the words in the above proposal “should be guided by” could be replaced with “should uphold, and directly reference where possible.”
- 3.3. See also comments in response to proposals 3–2 to 3–9.

Proposal 3–2 National Decision-Making Principle 1

Every adult has the right to make decisions that affect their life and to have those decisions respected.

- 3.4. This proposal is supported. We support the ALRC’s intention to promote in the first instance the inherent right of every adult to make decisions that affect their lives, and to have those rights respected. We consider that this key principle should be immediately followed by a new principle that describes the presumption of capacity, and by doing so would restate a fundamental common-law principle.
- 3.5. The reference to presumption of ability to make decisions in the proposals is in a subparagraph in proposal 3-7 which refers only to Representative Decision-Making Guidelines. Presumption of capacity is relevant to other aspects of decision making, including the use of supported decision making.
- 3.6. We propose a new stand alone principle could be created by moving 3–7(a) to become National Decision-Making Principle 2. Instead of referencing “an adult” we favour referencing “all adults,” for example, all adults must be presumed to have ability to make decisions that affect their lives.

Proposal 3–3 National Decision-Making Principle 2

Persons who may require support in decision-making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.

- 3.7. The wording of this proposal creates concern in particular that “support in decision making must be provided.” We would prefer the alternative “must have access to”. In many



situations support will be provided by another person. As a general rule the person with a disability will decide if they wish to have support to make a particular decision, and who they wish to provide that support. There are exceptions, such as proposals contained in the VLRC *Guardianship: Final Report* to have tribunal appointed supporters in some circumstances.¹⁴ Mostly though, the control remains with the person with disability who decides that they wish to receive support.

3.8. We are concerned that the phrase “must be provided” could lead in some situations to the overzealous application of supported decision-making arrangements, and an expectation that some people should use a support person, when they would otherwise prefer not to.

3.9. We propose the alternative text:

Persons who may require support in decision making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Proposal 3–4 Support Guidelines

(a) Persons who may require decision-making support should be supported to participate in and contribute to all aspects of life.

(b) Persons who may require decision-making support should be supported in making decisions.

(c) The role of families, carers and other significant persons in supporting persons who may require decision-making support should be acknowledged and respected.

3.10. A number of concerns arise from this proposal. It is suggested that support guideline (a) be removed entirely. This principle confuses the concept of decision-making support with support for participation and contributing to society, which may require a wider range of support services.

3.11. In relation to (b), there is concern about the question of who decides that a person should use a support, particularly when the delivery of support requires the involvement of another person as a supporter, and a decision needs to be made as to who the supporter is.

3.12. This support guideline could be changed to:

Persons who may require decision-making support should have access to support in making decisions, and wherever possible be able to choose whether or not to use support.

3.13. In relation to (c), we recognise the good intention at its core, however we consider that the current sentence construction may conflate the rights of families and carers with the rights of persons with disabilities to have equal capacity before the law. Family and carers need to be respected, but there are other vehicles to do this such as carers recognition Acts.¹⁵ A key issue with supported decision making is that the role of the decision supporter is

¹⁴ Victorian Law Reform Commission, *Guardianship: Final report*, Final Report No 24 (2012) rec [35]. The Victorian Government have not yet responded to the VLRC’s guardianship final report.

¹⁵ See for example, *Carers Recognition Act 2005 (SA)*; *Carers Recognition Act 2010 (Vic)*.



acknowledged and respected whomever that supporter is. Sometimes people will choose someone other than a family member, carer or significant person to provide support for a particular decision.

- 3.14. In rewording this support guideline, it is an opportunity to make clear who decides who a support person will be. This support guideline could be changed to:

The role of supporting persons who provide decision-making support should be acknowledged and respected. (Supporting persons may be family members, carers or other significant persons chosen to provide support by a person who requires it).

Proposal 3–5 National Decision-Making Principle 3

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

- 3.15. We acknowledge the distinctive move away from the principle of ‘best interests’ and the ALRC’s preferred principle of the will, preferences and rights as contained in National Decision-Making Principle 3. We realise that this is intended to reflect the paradigm shift signaled in the CRPD to recognise people with disability as persons before the law and their right to make choices, acknowledging the dignity of risk.
- 3.16. OPA Vic has recommended the term ‘best interests’ be removed from the *Guardianship and Administration Act 1986 (Vic)* in an earlier submission to the VLRC review of that Act.¹⁶ In that submission, OPA Vic proposed that the phrase ‘personal and social wellbeing’ is preferable, referring to the now negative connotation associated with best interests, which has come to constitute something of a euphemism for overriding free will.¹⁷ The phrase ‘personal and social wellbeing’ now appears in the *National Disability Insurance Scheme Act 2013 (Cth)* (NDIS Act).¹⁸ We make further comment about personal and social wellbeing, and financial and cultural wellbeing in relation to proposal 4–5(c).
- 3.17. We are concerned about the inversion of the order of the phrase from article 12 of the CRPD which refers to “rights, will and preferences” to the new order “will, preferences and rights” and how this will be understood by the general community.
- 3.18. We consider that the comma between “the will, preferences” changes the flow. We suggest that people are familiar with the concept of will and preferences, and query whether people might mistake the new sentence to refer to a person’s legal will or testament.
- 3.19. The term ‘will and preferences’ is in our view intended to counter traditional best interests decision making. We are of the view that will and preferences should be the focus, and therefore suggest the following wording:

¹⁶ Office of the Public Advocate (Vic), *Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper* (May 2009) 17.

¹⁷ *Ibid.*

¹⁸ Duties of nominees to participant etc: *National Disability Insurance Scheme Act 2013 (Cth)* s 80(1).



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

- 3.20. This principle, if adopted, is one which will have implications for state and territory decision-making laws. The term ‘best interests’ is contained in the objects of the *Guardianship and Administration Act 1986* (Vic) (GAA (Vic)).¹⁹ A guardian, for example, must act in the best interests of the represented person.²⁰ South Australia’s *Guardianship and Administration Act 1993* (SA) does not contain reference to best interests, rather, it requires consideration (and this will be the paramount consideration) to be given to what would, in the opinion of the decision maker, be the wishes of the person in the matter if he or she were not mentally incapacitated.²¹
- 3.21. This concern is equally relevant to state or territory appointed medical decision makers, in particular automatic appointments of persons responsible under the GAA (Vic).²² Currently, where a decision about a proposed medical research procedure or proposed medical or dental treatment about a patient²³ is required when there is no guardian with the power to make these decisions, a person responsible can be appointed automatically under section 37, which lists a hierarchy, and this person is empowered by section 39, to consent to medical or dental treatment.²⁴ A person responsible can consent to a medical research procedure.²⁵
- 3.22. A person responsible is required to determine whether any special procedure or any medical or dental treatment would be in the best interests of the patient, and must take into account a number of matters.²⁶ In relation to a medical research procedure, the person responsible can consent if they believe that it would not be contrary to the patient’s best interests.²⁷ The cultural and attitudinal shift that will be required on the part of the community if best interests are no longer a paramount consideration would be significant, and thought must be put into how this would operate in practice.
- 3.23. This shift in terminology and primacy of a person’s will, preferences and rights (no matter the order) will have significant implications for mental health legislation also. Compliance with this principle may arguably challenge the power of the authorised psychiatrist in the *Mental Health Act 2014* (Vic) to overrule an advance statement of a patient in some circumstances.²⁸

¹⁹ *Guardianship and Administration Act* (Vic) ss 4(2)(b).

²⁰ *Ibid* 28(1).

²¹ Only so far as there is reasonably ascertainable evidence on which to base such an opinion: *Guardianship and Administration Act 1993* (SA) s 5(a).

²² *Guardianship and Administration Act 1986* (Vic) s 37. See also more broadly: at pt 4A.

²³ See for example section 36(2)(a)(b) of the *Guardianship and Administration Act 1986* (Vic) which provides ‘a person is incapable of giving consent to the carrying out of a special procedure, a medical research procedure or medical or dental treatment if the person— is incapable of understanding the general nature and effect of the proposed procedure or treatment; or (b) is incapable of indicating whether or not he or she consents or does not consent to the carrying out of the proposed procedure or treatment.’

²⁴ See also Victorian Law Reform Commission, *Guardianship: Final report*, Final Report 24 (2012) chapter 13.

²⁵ *Guardianship and Administration Act 1986* (Vic) s 42S.

²⁶ *Ibid* s 38.

²⁷ *Ibid* s 42S.

²⁸ An authorised psychiatrist may make a treatment decision under section 71(3) for a patient that is not in accordance with that patient’s advance statement if the authorised psychiatrist is satisfied that the preferred treatment specified by the patient in the advance statement (a) is not clinically appropriate; or (b) is not a treatment ordinarily provided by the designated mental health service: *Mental Health Act 2014* (Vic) (commences 1 July 2014). Section 71(3) provides for



Proposal 3–6 Will, Preferences and Rights Guidelines

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

(b) *Appointment:* The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time.

(c) *Supporting decision-making:*

(i) a person’s will and preferences, so far as they can be determined, must be given effect;

(ii) where the person’s will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and

(iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person’s human rights and act in the way least restrictive of those rights.

3.24. We believe that guidelines related to will and preferences should refer to both supported decision making as well as substitute decision making. It is important that the principles that guide the making of substituted and supported decisions would, of course, need to be consistent with the principles within the specific piece of Commonwealth legislation.

3.25. We are concerned that “limited in scope” has the potential to be interpreted very differently depending on the context and history of limited appointments in different jurisdictions. For some limited in scope may refer to specific decisions or a small number of related decisions; for others it may refer to large groupings of decisions such as accommodation, lifestyle, health care and finances. We suggest “decision specific” is preferable.

3.26. We consider that the phrase “so far as they can be determined” is unnecessary. The next section already refers to situations where a person’s will and preferences are not known. Through reasonable accommodation—by spending extra time, and carefully communicating—it can be possible to determine the will and preference of people who have a severe disability, when in more casual conversation this might not be obvious. The current qualifier in this principle may inadvertently lead to conclusions being drawn that will and preference cannot be determined, whereas with effort they can be.

3.27. In relation to (c), careful consideration will need to be given to how this will interact with medical decision-making regimes, for example under the *Medical Treatment Act 1988* (Vic) and *Consent to Medical Treatment and Palliative Care Act 1995* (SA) in addition to guardianship and enduring powers of attorney laws.

3.28. In relation to (c)(iii) we are concerned about the use of the word “safeguard.” We note that the ALRC has used it in an appropriate context, but increasingly it is used in a way to connote risk management, and therefore the inclusion in this principle may suggest welfare considerations. We suggest that the word “safeguard” be replaced with “uphold”.

the authorised psychiatrist may make a treatment decision for the patient if the authorised psychiatrist is satisfied that there is no less restrictive way for the patient to be treated other than the treatment proposed by the authorised psychiatrist.



- 3.29. Even without the word safeguard in this guideline, the right to safety under the CRPD should still be upheld, and people should not be placed at unnecessary risk of abuse and neglect or self-harm through not receiving adequate care.

Proposal 3–7 Representative Decision-Making Guidelines

Any determinations about a person’s decision-making ability and any appointment of a representative decision-maker should be informed by the following guidelines:

- (a) An adult must be presumed to have ability to make decisions that affect their life.**
- (b) A person has ability to make a decision if they are able to:**
 - (i) understand the information relevant to the decision and the effect of the decision;**
 - (ii) retain that information to the extent necessary to make the decision;**
 - (iii) use or weigh that information as part of the process of making the decision;**
and
 - (iv) communicate the decision.**
- (c) A person must not be assumed to lack decision-making ability on the basis of having a disability.**
- (d) A person’s decision-making ability is to be assessed, not the outcome of the decision they wish to make.**
- (e) A person’s decision-making ability will depend on the kinds of decision to be made.**
- (f) A person’s decision-making ability may evolve or fluctuate over time.**
- (g) A person’s decision-making ability must be considered in the context of available supports.**
- (h) In communicating decisions, a person is entitled to:**
 - (i) communicate by any means that enables them to be understood; and**
 - (ii) have their cultural and linguistic circumstances recognised and respected.**

3.30. We welcome the proposed term ‘ability’ rather than capacity, which signals a shift from the medical model of disability to a social model of disability.

3.31. We agree with the ALRC that ‘capacity’ is regularly confused with ‘legal capacity’, and ‘legal capacity’ is regularly conflated with ‘mental capacity.’²⁹

3.32. OPA SA and OPA Vic have both previously advocated for the development of national capacity legislation or a nationally consistent approach to defining capacity, like that contained in the *Mental Capacity Act* (UK). We restate our support for national capacity legislation, which could be recast using the terminology of ability, however we acknowledge that there are constitutional and inter-jurisdictional challenges that need to be negotiated to permit this to be implemented.

²⁹ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 38.



- 3.33. National capacity legislation could contain the ALRC's Representative Decision-Making Guidelines and relevant Commonwealth laws could refer to the standard provisions as contained in national capacity legislation.
- 3.34. Failing this, we support the ALRC Representative Decision-Making Guidelines in combination with the National Decision-Making Principles (with amendments as noted) as an advancement towards the development of a nationally consistent approach to defining capacity.

Proposal 3–8 National Decision-Making Principle 4

Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.

- 3.35. We believe there needs to be further clarity in relation to the definition of 'interventions.' Interventions for persons who may require decision-making support must respect their human rights in the utmost. We are concerned that unless specific interventions are at the very least loosely defined then this principle may be used as a vehicle by some to use restrictive interventions on people with a decision-making impairment as a behaviour management tool. While noting this, we do support the accompanying safeguard guidelines contained in proposal 3–9.
- 3.36. We direct the ALRC to our response in relation to proposal 3–6 'Will, Preferences and Rights Guidelines.'

Proposal 3–9 Safeguards Guidelines

Laws and legal frameworks must contain appropriate safeguards in relation to decisions and interventions in relation to persons who may require decision-making support to ensure that such decisions and interventions are:

- (a) the least restrictive of the person's human rights;**
- (b) subject to appeal; and**
- (c) subject to regular, independent and impartial monitoring and review.**

- 3.37. We support this proposal in principle. The current unknown is the body which will perform the regular, independent and impartial monitoring and review mechanism. We consider the Administrative Appeals Tribunal could play a role, as it does with reviewing a decision under the NDIS Act.³⁰

³⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 103.



4. Supported Decision Making in Commonwealth Laws

Proposal 4–1 Commonwealth laws and legal frameworks should encourage supported decision-making by adopting a model for individual decision-making consistent with the National Decision-Making Principles and Proposals 4–2 to 4–9 (the ‘Commonwealth decision-making model’).

- 4.1. We support this proposal generally, however we direct the ALRC to comments in relation to the specific content contained in the National Decision-Making Principles in section three of this submission. This applies also to comments made in relation to proposals 4–2 to 4–9.
- 4.2. We wish to restate our support for the provision of supported decision making in legislation. The National Decision-Making Principles are important, encouraging as they do other citizens to take active roles in the lives of people with even the most profound cognitive impairments. We refer the ALRC to works OPA Vic and OPA SA have published on this topic.³¹
- 4.3. OPA SA ran a supported decision-making project which sought to encourage and trial supported decision making in South Australia.³² Supported decision making fosters autonomy given the concept provides for people with disability to make their own decisions assisted by a supporter. Providing support is a viable alternative to substitute decision making and, while the decision remains that of the person who may require support, a supported decision-making arrangement seeks to encourage a less restrictive alternative to appointing a substitute decision maker.³³
- 4.4. OPA Vic has long supported providing a legislative framework for supported decision making for a variety of important reasons; to respect the rights of people with cognitive impairment to participate in the decisions that affect their lives; to reflect the sometimes evolving or fluctuating nature of capacity noting that capacity is decision-specific; to ensure guardianship laws are compliant with the CRPD; and to reinforce the supremacy of the rights paradigm in laws that impact on people who require decision-making support.³⁴
- 4.5. OPA SA has similarly advocated for supported decision making to be formally recognised in the *Guardianship and Administration Act 1993* (SA), which could be easily achieved by

³¹ OPA (Vic) has produced information (including two discussion papers) on supported decision making (available at <<http://www.publicadvocate.vic.gov.au/research/132/>>) and currently has a supported decision-making trial in place. OPA SA refer the ALRC to the *Evaluation of the Supported Decision Making Project*, the trial of which occurred between 2010 to 2012. See also more broadly Office of the Public Advocate (SA), *Supported Decision Making* (2014) <http://www.opa.sa.gov.au/resources/supported_decision_making>.

³² South Australian Supported Decision Making Project, *Report of Preliminary “Phase 1”* (2011).

³³ See Office of the Public Advocate (SA), *Response to the ALRC Issues Paper: Equality, Capacity and Disability in Commonwealth Laws* (2013) 20. See also Office of the Public Advocate (SA), *Annual Report 2011–2012* (2012) 54.

³⁴ Particularly in relation to the *Guardianship and Administration Act 1986* (Vic). See Office of the Public Advocate (Vic), *Submissions* (2 June 2014) <<http://www.publicadvocate.vic.gov.au/research/131/>> for various submissions on this and related matters.



aligning its principles with the new *Advance Care Directives Act 2013* (SA).³⁵ This can uphold the autonomy of more people.³⁶

- 4.6. OPA Vic's own supported decision-making pilot project was established in 2013, with the objective being: to explore and develop a service model connecting trained volunteers with isolated people who have cognitive impairments and need support to make decisions; to promote participants' dignity and autonomy by facilitating their decision making; to create a formal and structured arrangement to assist and build the participants' decision-making capacity; and to build a skilled volunteer team to provide support and build participants' capacity to make their own decisions.³⁷
- 4.7. As identified by the ALRC, many important areas of decision-making are governed by state and territory laws.³⁸ State and territory laws do not currently provide for supported decision-making arrangements, although significant developments have occurred in both Victoria and South Australia to establish an evidence base for the provision of supported decision making in legislation. We acknowledge that in practice relationships of support currently operate informally, and often very effectively, and we note that formalising otherwise successful decision-making arrangements does carry risks.
- 4.8. Concern about the successful interaction between the Commonwealth decision-making model and state and territory appointments of substitute decision makers does qualify our support for this and subsequent proposals.
- 4.9. We have significant concerns about both the practicalities of interaction, and the legalities around the definition of roles and responsibilities. This relates to appointments of supporters and reviews of appointment. We expand on this below.

Question 4–1 In what areas of Commonwealth law, aside from the National Disability Insurance Scheme, social security, aged care, eHealth and privacy law, should the Commonwealth decision-making model apply?

- 4.10. No further suggestions.

Question 4–2 Are the terms 'supporter' and 'representative' the most appropriate to use in the Commonwealth decision-making model? If not, what are the most appropriate terms?

- 4.11. We are of the view that the terms 'supporter' and 'representative' are the most appropriate to use in the Commonwealth decision-making model.
- 4.12. OPA SA does however hold some concerns and submits the follow qualification explaining the risk. A representative might provide decision-making support or when required act as a substitute. OPA SA suggests that while the term representative might accurately describe the appointment, terms such as 'supported' and 'substitute' more

³⁵ The *Advance Care Directives Act 2013* is an Act to enable a person to make decisions and give directions in relation to their future health care, residential and accommodation arrangements and personal affairs. See *Advance Care Directives Act 2013* (SA) ss 9–10 for objects and principles of the Act.

³⁶ Office of the Public Advocate (SA), *Annual Report 2012–2013* (2013) 8, 51–59. See also Office of the Public Advocate (SA), *Annual Report 2011–2012* (2012) 54–68.

³⁷ Office of the Public Advocate (Vic), *Project Description: Supported Decision-Making Pilot Project* <<http://www.publicadvocate.vic.gov.au/file/file/Research/Current%20projects/SDM%20project%20flyer%20FINAL.pdf>>.

³⁸ Including guardianship, administration, financial management, powers of attorney and consent to and refusal of medical treatment.



clearly describe the types of decision making undertaken by a representative, so the term 'representative decision making' should be avoided.

- 4.13. OPA Vic is of the view that the term representative is less permanent in nature than substitute decision maker, and that it connotes that the representative is there with the will of the person. While we acknowledging the restrictive nature of a tribunal or court appointment of a representative, we believe National Decision-Making Principle 3, if reworded upon our suggestion to proposal 3–6,³⁹ fits more squarely that the person is representing the person.
- 4.14. OPA SA notes the term substitute decision maker is contained in the *Advance Care Directives Act 2013* (SA), and is not meant to be permanent, and is intended to apply only to specific decisions.

Proposal 4–2 The objects or principles provisions in Commonwealth legislation that involves decision-making by people who may require decision-making support should reflect the National Decision-Making Principles.

- 4.15. We support this proposal, noting our suggested amendments to the National Decision-Making Principles contained earlier in this submission.

Proposal 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a 'supporter' and provide that an agency, body or organisation may establish supporter arrangements. In particular, laws and legal frameworks should reflect the National Decision-Making Principles and provide that:

- (a) a person who requires decision-making support should be able to appoint a supporter or supporters at any time;**
- (b) where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support;**
- (c) any decision made with the assistance of a supporter should be recognised as the decision of the person who requires decision-making support; and**
- (d) a person should be able to revoke the appointment of a supporter at any time, for any reason.**

- 4.16. We support this proposal in principle, however more clarity is required about the suggestion that an 'agency, body or organisation may establish supporter arrangements.' Presumably, the identity would be provided for in each of the specific legislative instruments governing that particular area of decision making. For example, the National Disability Insurance Agency as provided for under the NDIS Act could be one such agency.⁴⁰
- 4.17. The status of a supported decision-making arrangement, and information about where the instrument is to be lodged, requires further consideration. For example, if a person wishes to revoke their appointment of a supporter, will the same process be required as that required to revoke an appointment of an enduring power of attorney (financial) that has commenced while the principal still has capacity?

³⁹ The suggested wording for the new proposal – 'The will and preferences of persons who may require decision-making support must direct decisions that affect their lives, and uphold their rights.'

⁴⁰ *National Disability Insurance Scheme Act 2013* (Cth) s 117; see also more generally ch 7.



4.18. Further consideration is required into the possible role of government departments and instrumentalities in this area, for example the role that state and territory Offices of the Public Advocate, Adult and Public Guardians, government departments (Department of Human Services (Cth) or Department of Health and Ageing (Cth)) can or will play in the provision of supporters. The likelihood of a niche agency being established in this area, for example Nidus in the province of British Columbia, Canada, should also be considered.⁴¹

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.**

4.19. We support this proposal.

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.**

⁴¹ Nidus Personal Planning Resource Centre is a non-profit, charitable organisation, providing information to provincial residents about personal planning, specialising in Representation Agreements—a legal document made by a person voluntarily which authorises another person to provide the principal with support. Nidus also operate a centralised Registry for personal planning documents: Nidus Personal Planning Resource Centre, *Helping a family member or friend with a disability* (2014) <http://www.nidus.ca/?page_id=4490>.



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.

- 4.20. While we appreciate the ALRC’s argument in relation to the inclusion of financial and cultural in (c), we are not convinced each term needs to be specifically noted.
- 4.21. We acknowledge the potential role for supporters in supporting people to make decisions which relate to finances, however we believe ‘personal and social wellbeing’ principally includes financial wellbeing. We believe this is equally the case in relation to cultural wellbeing, which is also directly linked to a person’s personal and social wellbeing. This thinking applies in relation to our response to proposals 4–8(d) and 7–6(d).
- 4.22. We support (e) and particularly the proposal’s emphasis on supporting the person making decisions to undertake consultations, as opposed to the supporter taking on this role. If the person making decisions is unable to consult themselves even with support, and this is undertaken by the supporter, then the person should either be present or aware of the consultations.
- 4.23. Consideration and clarification is required here about the interaction between supporters and ‘existing appointees’.

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?

- 4.24. We support this proposal and we are of the view that fiduciary obligation is unlikely to deter a well-intentioned, honest supporter.
- 4.25. In considering this issue, there is a need to distinguish between lack of skill or diligence (negligence) and lack of honesty (breach of fiduciary duty). We suspect that supporters are more likely to be deterred by concerns about whether they are skilled enough or have enough time to perform the role, rather than concerns about such things as whether they might inadvertently benefit themselves or a related party.
- 4.26. We propose that any specific responsibilities and duties of supporters in relation to fiduciary duties could be detailed in the legislation under which the appointment is made. Given there are gaps in regulatory regimes the best way could be to provide particular safeguards stipulated in the relevant legislative instruments.
- 4.27. A further consideration on the point of fiduciary obligation is the status of the supporter. For example, the ALRC consider that a supporter can be paid, particularly in instances where the person does not have family support or is socially isolated, and the role could be performed by a paid carer or an employee from an advocacy group.⁴²
- 4.28. We consider that the fiduciary obligations for all supporters should be the same. However we recognise that it is likely that a supporter who is a voluntary or paid employee of an

⁴² Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 82. The Victorian Law Reform Commission in its *Guardianship: Final Report* did not support OPA Vic fulfilling the role of a supporter, however did not preclude that an employee of an advocacy group or organisation perform the role, hence being indirectly remunerated for their service: at 139.



agency could be subject to additional safeguards. For example, if the supporter is a volunteer or paid employee of an advocacy organisation then they would be required to abide by the code of conduct guidelines of that agency. The actions of a supporter engaged by an organisation would also be covered by the liability insurance of that agency giving the person making the decision further options of redress should fiduciary obligations be breached. Wherever possible though a supporter would be someone already known to the person, and of their choosing, and the other options be used when no other suitable person is available.

Question 4–4 What safeguards in relation to supporters should be incorporated into the Commonwealth decision-making model?

- 4.29. Supported decision making does open up the possibility of conflict, undue influence, abuse and exploitation.⁴³ Establishing appropriate safeguards will be essential. We agree with the key safeguards proposed in paragraph 4.63 of the Discussion Paper.
- 4.30. Detailing specific safeguards is dependent on the scope of the appointment as defined in the legislation and instrument of appointment. Presumably there will be a prescribed form contained in relevant legislation outlining any witnessing requirements and additional criteria for appointment, in addition to the legislation reflecting the National Decision-Making Principles.
- 4.31. In relation to paid supporters, the key concern will be conflict of interest. If the person is independent then conflict of interest is managed. Some of the current projects in the area of supported decision making are using disability workers in the support role and this needs to be evaluated. It is conceivable that the role could expand to this wider group if conflict of interest considerations were managed as part of supporter selection and training.
- 4.32. In response to specific proposals and questions relating to supporters contained in the VLRC *Guardianship: Consultation Paper*, OPA Vic stated that it could play a role in training volunteers and monitoring supporter arrangements (if provided for in new guardianship legislation). OPA Vic also submitted that it would be well placed to carry out reviews of supported decision-making arrangements when requested to do so by interested parties or by VCAT.⁴⁴
- 4.33. We suggest additional safeguards could be that a register of appointments be established (proposed in Victoria to include all supporter arrangements, co-decision-making arrangements, VCAT appointments, enduring appointments and advance directives) and that police checks be conducted in relation to appointments.

Proposal 4–6 Relevant Commonwealth legislation should include the concept of a ‘representative’ and provide that an agency, body or organisation may establish representative arrangements. In particular, legislation should contain consistent provisions for the appointment, role and duties of representatives, and associated safeguards, and reflect the National Decision-Making Principles.

⁴³ Office of the Public Advocate (Vic), *Supported Decision-Making: Background and Discussion Paper* (2009) 25.

⁴⁴ Office of the Public Advocate (Vic), *Submission to the Victorian Law Reform Commission in Response to the Guardianship Consultation Paper* (2011) 10–11.



- 4.34. We support this proposal in principle however we have concerns about how this will operate in practice. Clear definitions about roles and responsibilities will be required in each piece of legislation.
- 4.35. This proposal certainly carries risk if careful consideration is not given to interaction between appointments. Whether the ALRC recommend different categories of representatives, for example guardian and administrator equivalents, will also be relevant. This proposal warrants careful consideration given the unavoidable complexities that will arise when determining interaction between appointments.
- 4.36. We direct you to our responses to question 4–5 and 4–6.

Question 4–5 What mechanisms should there be at a Commonwealth level to appoint a representative for a person who requires full decision-making support?

- 4.37. So far as we see there are two options:

Option 1:

- 4.38. States and territories could cross-vest legislative authority to appoint substitute decision makers to the Commonwealth.
- 4.39. We have a number of concerns about this option, one being that this authority could fall to the Administrative Appeals Tribunal (AAT). OPA Vic would be concerned about the AAT playing the role of the Victorian Civil and Administrative Tribunal (VCAT). VCAT, and the earlier Guardianship and Administration Board, has a long history in this field, including knowledge of state disability service provision, that would not easily be replicated at the federal level.

Option 2:

- 4.40. Allow for representatives in Commonwealth laws (for example in the Aged Care Act and NDIS Act) but maintain tribunal appointments at the state and territory level where certain thresholds are met. There needs to be clarity around who can appoint, and who can be appointed as, representatives (taking note, for example, of earlier personal and tribunal appointments at state and territory level), and there would be a place for the articulation in federal legislation of general principles governing when tribunal appointments would be required (this could exist either in national capacity/ability legislation, or in certain Acts, for example the Aged Care Act and NDIS Act).
- 4.41. The Commonwealth could even vest state and territory tribunals with power to appoint federal representatives, but this seems unnecessarily complex. Suffice it to say we would be keen to see safeguards around any tribunal appointments and we want to minimise the tribunal appointments of substitute decision makers to situations of absolute necessity.
- 4.42. Outside of these situations, then in limited circumstances representatives appointed by CEOs/Departmental Secretaries under Commonwealth laws could play decision-making roles on behalf of individuals who do not have the capacity to make particular decisions (the role played by nominees under the NDIS Act). On this score, though, we make a couple of points.



- 4.43. We would like to see the power to appoint representatives curtailed more than it is currently in the case of NDIS nominees (who are appointed by the CEO), and for relevant legislation to require greater reference than the NDIS Act does, to be had to the rights, will and preferences of participants when nominees/representatives are being appointed.
- 4.44. NDIS nominee arrangements should better align with state and territory appointments. OPA Vic, for instance, cannot at the moment play the role of NDIS nominee (as a result of the limitations of our state legislative authority, which requires amendment if we are to be able to play the role of nominee). And while there is no reason why OPA as guardian of last resort could not in theory act as a plan nominee and make decisions about goals, services and supports, clearly OPA should not take on financial management responsibilities. It appears that the NDIA can particularise the role of nominee, however we note that an equivalent administrator nominee/representative function could be devised for situations where a public trustee would be best placed to perform this role.
- 4.45. We discuss this further in response to the proposals relating to the NDIS in section five of this submission.

Proposal 4–7 A Commonwealth representative 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 decision they might make; and**
- (f) endeavour to ensure the decisions of the person are given effect.**

- 4.46. We support this proposal in principle.

Proposal 4–8 Relevant Commonwealth laws and legal frameworks should provide that Commonwealth representatives must:

- (a) support the person requiring decision-making support to express their will and preferences in making decisions;**
- (b) where it is not possible to determine the wishes of the person who requires decision-making support, determine what the person would likely want based on all the information available;**
- (c) where (a) and (b) are not possible, consider the human rights relevant to the situation;**
- (d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support;**
- (e) support the person who requires decision-making support to consult with ‘existing appointees’, family members, carers and other significant people in their life when making a decision; and**
- (f) assist the person who requires 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.

4.47. We support this proposal in principle however we note that there needs to be more clarity in the relevant Commonwealth legislation about when an appointment of a representative is necessary.

4.48. As noted in our response to proposal 4–5, while we appreciate the ALRC’s argument in relation to the inclusion of financial and cultural in (c), we are not convinced each term needs to be specifically noted given personal and social wellbeing includes both concepts.

4.49. We refer to our response to question 4–6 for our comments in relation to (e) more broadly.

Question 4–6 How should supporters and representatives under the Commonwealth decision-making model interact with state or territory appointed decision-makers?

4.50. This is a complex area and one which deserves careful consideration. The interaction will most likely be dependent on the Commonwealth law under which the appointment is made, and subsequent strict clarification in the instrument of appointment will be required. We direct the ALRC to our response to questions 4–5 and 5–1.

4.51. There needs to be strict clarification on this point, and the role of the agency or department making the appointment must be clearly defined in the relevant law, as would the role and duties of supporters and representatives at the Commonwealth level in instances where a state or territory appointment is in place.

4.52. If the ALRC pursue option 2 contained in our response to question 4–5, then interaction may be somewhat contained in that allowance for representatives could be made in Commonwealth laws, but tribunal appointments at the state and territory level will be maintained where certain thresholds are met. Most importantly, relevant legislation must make greater reference to supporters, representatives and substitute decision makers respecting and upholding the rights, will and preferences of the person.

Proposal 4–9 The appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

4.53. We support this proposal in principle. We refer to our comments in response to question 4–4.

Proposal 4–10 The Australian Government should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication in appointments.

4.54. We support this proposal in principle. Safeguards in relation to protecting the personal information of a person who may require decision-making support is crucial.

4.55. We are currently experiencing some concerns in relation to information sharing with the NDIA. There does not seem to be sufficient safeguards in place in relation to information sharing, particularly where a nominee (possibly appointed on the initiative of the CEO) consents to the sharing of a participant’s personal information.



- 4.56. Interaction between Commonwealth supporters and representatives, and state and territory appointed substitute decision makers, must be considered in this context. Information sharing mechanisms between personal appointments of representatives and substitute decision makers under state or territory law (where VCAT, for example, determine that the risk of appointing the personally appointed representative as guardian is too great; or, if a different person is more appropriate for decisions made at the state or territory level) must be established prior to implementation of the Commonwealth Decision-Making Model.

Proposal 4–11 The Australian Government should ensure that people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) are provided with information and advice to enable them to understand their roles and duties.

- 4.57. We support this proposal and further recommend that any information and advice clearly defines the role and responsibilities of Commonwealth supporters and representatives in an accessible way. It is important for supporters and representatives to fully understand their roles, and any obligations in relation to interaction with state or territory appointed substitute decision makers. This is crucial to the successful operation of these arrangements.

Proposal 4–12 The Australian Government should ensure that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives.

- 4.58. We support this proposal.



5. The National Disability Insurance Scheme

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

- 5.1. The objects and principles contained in the NDIS Act are the best practice example of consistency with the CRPD at the Commonwealth level.⁴⁵ Noting our comments and suggested amendments in relation to the National Decision-Making Principles, we agree that the NDIS Act should be amended where necessary to ensure full compliance with the CRPD. We direct the ALRC to our responses in section three and four of this submission.
- 5.2. The NDIS Act includes general principles guiding actions under the Act and guiding actions of people who may do acts or things on behalf of others.⁴⁶
- 5.3. The general principles guiding actions under the NDIS Act clearly favour supported decision making because the decision is determined to be that of the person in the first instance. For example,
- people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports and,⁴⁷
 - people with disability should be involved in decision-making processes that affect them, and where possible make decisions for themselves.⁴⁸
- 5.4. However, the NDIS Act ultimately retains a substitute decision-making framework through the appointment of ‘nominees’.⁴⁹ We have discussed this previously in our response to question 4–5.

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

- 5.5. This proposal is supported. Refer also to our response to proposal 5–3.

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

- 5.6. We believe the NDIS Act almost reflects the Commonwealth decision-making model in its current form. However we support this proposal and note that amendment to the NDIS Act and NDIS Rules is required in order for it to completely reflect the National Decision-Making Principles.

⁴⁵ *National Disability Insurance Scheme Act 2013 (Cth)* s 1(a).

⁴⁶ *Ibid* ss 4–5.

⁴⁷ *Ibid* s 4(4).

⁴⁸ *Ibid* s 5(a).

⁴⁹ *Ibid* pt X.



Question 5–1 How should the *National Disability Insurance Scheme Act 2013 (Cth)* and NDIS Rules be amended to clarify interaction between supporters and representatives appointed in relation to the NDIS, other supporters and representatives, and state and territory appointed decision-makers?

- 5.7. We do not suggest particular amendments in our response to this question but rather wish to restate our comments in response to question 4–5 and 4–6. Clear and consistent interaction between plan nominees and state and territory substitute decision makers requires reconsideration of the functions and responsibilities of plan nominees. We are of the view that the current and any future NDIS nominee arrangements should better align with state and territory appointments.
- 5.8. It is our interpretation that the role of a nominee under the NDIS Act is an ongoing role. That is, the nominee is involved in the preparation, review or replacement of the participant's plan and management of the funding for supports in the participant's plan. A nominee also has a duty "to apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary."⁵⁰
- 5.9. A plan nominee can be appointed by the CEO of the NDIA following a request by the participant or on the initiative of the CEO. There are some inherent concerns with this, some of which we raised in our response to question 4–5 and 4–6. This includes concerns in relation to the lack of sufficient safeguards and oversight of the actions of the nominee once appointed, and their ability to use their discretion when determining whether the participant is not capable of doing an act.⁵¹
- 5.10. The NDIS (Nominee) Rules notes that the CEO, when appointing a nominee, is to have regard to the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee.⁵²
- 5.11. OPA Vic Advocate Guardians have played a role as advocate for people with significant cognitive impairment who are accessing the NDIS in the Barwon launch site. Questions arise as to when the role of advocate requires a formal appointment; that is, where a decision needs to be made that requires decision-making authority in the form of a formal appointment. Uncertain boundaries exist.
- 5.12. Given this, OPA Vic has determined our Advocate Guardians cannot play the role of plan nominee and that any formal decision making by an Advocate Guardian will require appointment as guardian by VCAT. A plan nominee manages the funding for supports under the participant's plan (a role a guardian is unable to undertake as per our defined function under the GAA (Vic)), therefore a person could very likely have a state or territory appointed guardian and a plan nominee. It remains unclear whose decision would prevail in the event that a participant has both a plan nominee and guardian who disagree.

⁵⁰ *National Disability Insurance Scheme (Nominee) Rules 2013 (Cth)* r 5.10. The rules also note that it is expected the Agency (NDIA) will assist nominees in fulfilling this duty: at r 5.11.

⁵¹ *Ibid* r 5.5.

⁵² *Ibid* r 4.8(a). See: at r 4.8 for other matters that the CEO must have regard to when appointing a nominee.



- 5.13. We have not been able to reconcile within our legislative functions a consideration raised by the ALRC in paragraph 5.100 of the Discussion Paper. We refer in particular to the comment:

even where an existing representative or state or territory appointed decision-maker is appointed, the appointee would be subject to the provisions of the NDIS Act and Rules relating to their role and duties, as well as associated safeguards.⁵³

- 5.14. We have concerns with this given the role of Advocate Guardians in both Victorian and South Australian law does not include that of management of finances—that is the role of an administrator. The expectation contained in the above comment is not easily implemented in our own view. We note the use of ‘where appropriate’, however we consider that it may be oversimplifying the interaction by taking this view.
- 5.15. Advocate Guardians could fulfil part of the plan nominee function in the preparation, review or replacement of the participant’s plan, but cannot be expected to manage the funding for supports. It appears that the NDIA can particularise the role of nominee, however we note that an equivalent administrator nominee/representative function could be devised for situations where a public trustee would be best placed to perform this role.

Question 5–2 In what ways should the *National Disability Insurance Scheme Act 2013 (Cth)* and NDIS Rules in relation to managing the funding for supports under a participant’s plan be amended to:

(a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and

(b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

- 5.16. In relation to (b), see response to question 5–1.

National Monitoring Mechanisms

- 5.17. We wish to restate here the importance of the development of monitoring mechanisms of the NDIS as it is rolled out throughout Australia in the coming years. The development of nationally consistent mechanisms was envisaged in the bilateral agreements that established the pilot/launch NDIS sites and we are keen to see the realisation of this aspiration.
- 5.18. OPA Vic has taken a role to advocate for nationally consistent monitoring mechanisms in relation to provision of disability services and supports under the NDIS and we take this opportunity to further advocate for this development in this submission.

⁵³ Australian Law Reform Commission, *Equality, Disability and Capacity in Commonwealth Laws*, DP 81 (2014) 124.



6. Supporters and Representatives in Other Areas of Commonwealth Law

- 6.1. We have not considered in detail all the proposals within chapter six of the ALRC Discussion Paper.
- 6.2. Proposals 6–1, 6–3 and 6–4 are supported in principle, noting our comments in response to proposals contained in chapter 4—Supported Decision-Making in Commonwealth Laws. We do note however that there will be significant implications for information privacy if the *Privacy Act 1988* (Cth) is amended to include the Commonwealth decision-making model.
- 6.3. We choose to focus our attention on proposals 6–2 and 6–5.

Proposal 6–2 The *Aged Care Act 1997* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

- 6.4. We support this proposal in principle. However, it raises a key jurisdictional question in relation to the interaction of Commonwealth supporters and representatives and state and territory appointed decision makers with decision-making power in relation to accommodation decisions.
- 6.5. How the Commonwealth decision-making model will interact with state and territory appointments is crucial to our own work given that a significant portion of the decisions we make are about accommodation for people who are over the age of 65 years. We deal with interaction of Commonwealth and state and territory appointments throughout this submission. The main points raised in relation to interaction with the proposals contained in chapter 4 apply equally to proposal 6–2.
- 6.6. We agree with the ALRC that the Aged Care Act is ambiguous about informal and formal substitute decision making for people who may require decision-making support with respect to aged care.⁵⁴ Significant reform and concurrent sector and community education will be required to ensure that the operation of the Commonwealth decision-making model will balance duty of care and dignity of risk, while protecting older people from exposure to abuse.⁵⁵
- 6.7. We wish to repeat concerns raised in our respective submission to the Issues Paper about the high use of restrictive interventions on residents of aged care facilities. We expand on this further in our response to proposal 8–1. We encourage the ALRC to carefully consider how the Commonwealth decision-making model can both provide for supported decision-making arrangements, and establish protective mechanisms in relation to the use of restrictive practices in aged care facilities.

⁵⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 139.

⁵⁵ We again refer the ALRC to the Churchill Fellowship report, written on the broad topic of adult protection by OPA (Vic)'s John Chesterman, which examines a number of interventionist adult protection systems to see how Victoria might reform its adult protection system and practices: available at Office of the Public Advocate (Vic), *Reports*, 18 December 2013, <<http://www.publicadvocate.vic.gov.au/research/255/>>.



Proposal 6–5 The Australian Bankers’ Association should encourage banks to recognise supported decision-making. To this end, the ABA should issue guidelines, reflecting the National Decision-Making Principles and recognising that:

- (a) customers should be presumed to have the ability to make decisions about access to banking services;**
- (b) customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;**
- (c) customers are entitled to support in making and communicating decisions; and**
- (d) banks should recognise supporters and respond to their requests, where possible and consistent with other legal duties.**

6.8. We support this proposal and appreciate the importance of the provision of legally recognised supported decision-making arrangements to better and more easily deal with financial institutions, and other third parties. This is particularly in relation to obtaining and communicating often complex information which may be an otherwise difficult undertaking for a person with a cognitive impairment.

6.9. OPA (Vic) stated in the submission to the Issues Paper that we would like to see increased national efforts to address the problem of financial abuse of persons with disabilities, particularly the financial abuse of older Australians with age-related disabilities. Legislative and other regulatory reform concerning Australia's banks and other financial institutions is warranted, which could include the drafting of national guidelines on financial abuse recognition and response.⁵⁶

6.10. We note that states and territories have developed various elder abuse policies, most of which are similar, however significant gaps remain in relation to legislative regulation in the area and response protocols across the country. We refer the ALRC to research undertaken by Wendy Lacey, which argues that ‘only legislation in the form of adult protection legislation would effectively “close the gaps” in elder abuse prevention and response protocols.’⁵⁷

6.11. We suggest that proposal 6–5 make provision for protective mechanisms and safeguards in addition to reflecting the National Decision-Making Principles.

⁵⁶ Office of the Public Advocate (Vic), *Submission in Response to Australian Law Reform Commission Issues Paper on Equality, Capacity and Disability in Commonwealth Laws* (2013).

⁵⁷ Wendy Lacey, ‘Neglectful to the point of cruelty? Elder abuse and the rights of older persons in Australia’, *Sydney Law Review*, 2014, vol. 36, 128.



7. Access to Justice

- 7.1. We express our support broadly for the proposals contained in this section however we note additional comments.
- 7.2. The foremost concern in relation to access to justice is the lack of support available for people with cognitive impairment currently accessing and interacting with the justice system. For example, our experience is that accommodation for people with disabilities in court processes such as cross-examination is not being made.
- 7.3. We refer the ALRC to OPA Vic's Independent Third Person (ITP) Program, where volunteers assist people with a cognitive disability or mental illness during interviews, or when giving formal statements to Victoria Police.⁵⁸ Volunteer ITPs assist victims, witnesses and alleged offenders by facilitating communication, assisting with understanding the questions asked, helping the person to understand their rights and the cautions, and providing general support through the interview.
- 7.4. People with cognitive impairments and mental illness should receive greater support to bring their claims through the justice system. To that end, we propose that greater witness support should be provided.
- 7.5. To this end, to complement law reform, a comprehensive Disability Justice Plan is required, that considers the needs of people with disability who are victims, witnesses and offenders, across civil and criminal law. An example of a plan focussing on the Criminal Law is the South Australian Attorney-General's *Disability Justice Plan*⁵⁹ and accompanying guidelines on collecting evidence from vulnerable witnesses.⁶⁰
- 7.6. Thought should also be put into the provision and funding of litigation guardianship for people who are unable to instruct legal counsel.⁶¹
- 7.7. With respect to litigation guardianship, the same process of considering supported decision making should occur first, prior to involving substitutes. OPA (SA) considers that the SA Law Society Capacity Guidelines, gives excellent guidance on the steps legal practitioners should take to support a person's capacity, and the considerations that should occur before bringing in a third person to act as a supporter.⁶²

⁵⁸ Office of the Public Advocate (Vic), *Independent Third Person*, 16 June 2014

[<http://www.publicadvocate.vic.gov.au/services/108/>](http://www.publicadvocate.vic.gov.au/services/108/).

⁵⁹ South Australian Government, *Disability Justice Plan*, 2014

<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/DJP/Disability%20Justice%20Plan%20FINAL.pdf>.

⁶⁰ South Australian Government, *Supporting vulnerable witnesses in the giving of evidence, Guidelines for securing best evidence* (2014)

http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Initiatives%20Announcements%20and%20News/June%202014%20_%20media%20releases/DJP%20guidelines%20FINAL.pdf.

⁶¹ Office of the Public Advocate (Vic), *Submission in response to Australian Law Reform Commission Issues Paper on Equality, Capacity and Disability in Commonwealth Laws* (2013).

⁶² SA Law Society, *Client Capacity Committee: Statement of Principles with Guidelines* (2012)

<http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuidelines.pdf>.



Proposal 7–1 The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial 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 decisions in the course of the proceedings;**
- (c) use or weigh that information as part of the process of making decisions; and**
- (d) communicate decisions in some way.**

7.8. We note this proposal reflects the Representative Decision-Making Guidelines contained in proposal 3–7 (b)(i)–(iv) and further note our support for each.

Proposal 7–2 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.

7.9. There is significant risk if the provision of support means a person participates in a trial they otherwise would not have been able to participate in, and is delivered a guilty verdict. We anticipate that inequities will arise in relation to the quality of support provided and potentially inconsistent application of proposal 3–7 (Representative Decision-Making Guidelines).

Proposal 7–3 State and territory laws governing the consequences of a determination that a person is unfit to stand trial should provide for limits on the period of detention (for example, by reference to the maximum period of imprisonment that could have been imposed if the person had been convicted) and for regular periodic review of detention orders.

7.10. We support this proposal.

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.**

7.11. We support this proposal.

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.

7.12. The rules should not just reflect availability, but an obligation to seek support, as is considered by the National Decision-Making Principles. If funding is available to support litigation guardians, as it currently is by application for some matters, then it should also be extended to the provision of support.



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

7.13. Further to our response to proposal 4–8(d) and 4–5(c), we believe personal and social wellbeing incorporates financial wellbeing and cultural wellbeing. We are not convinced financial and cultural wellbeing need to be specifically included.

7.14. It is important that any amendment to court rules refer to the National Decision-Making principles in their entirety, and do not only contain extracts related to representative decision making.

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

7.15. We support this proposal.

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:

the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and

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?

7.16. We support further consideration of this proposal. This is a significant legal ethical issue, and should be subject to further discussions both within and outside the profession. The retainer between lawyer and client, encourages utmost respect for the client as a person and their wishes. Any change to this relationship that could be seen by many as best interest in nature, should only be implemented with careful consideration as to what exactly the current problems that are faced by lawyers and their clients, and whether they can be resolved within current frameworks and guidelines. Having said this, changes could be safely made if, at the same time, strong rights based decision-making principles were upheld, and needed to be considered prior to the lawyer taking the types of actions suggested in this question.

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



7.17. We support this proposal.

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

7.18. We support this proposal. See also the general comments submitted at the beginning of this section.

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

7.19. We support this proposal. See also the general comments submitted at the beginning of this section.

7.20. The exact nature of support can be considered as part of a Disability Justice Strategy. At times this will require specific trained technical assistance as is delivered in the UK by professionals in their intermediary program. A range of options will need to be available in specific situations.

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

7.21. We support this proposal.

Question 7–3 Should Commonwealth, state and territory laws be amended to avoid delays in obtaining consent to the taking of forensic samples from people who are incapable of giving consent, and who have been victims of crime? If so, how?

7.22. Yes. We recommend that appropriate support should be given to the person while forensic material is being obtained.

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

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings and jury deliberations;**
- (b) retain that information to the extent necessary to make these decisions;**
- (c) use or weigh that information as part of the jury’s decision-making process; and**
- (d) communicate the person’s decisions to the other members of the jury and to the court.**

7.23. We support this proposal.



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

7.24. We support this proposal.

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

7.25. We support this proposal.

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

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

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

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

7.14. We support this proposal.



8. Restrictive Practices

Proposal 8–1 The Australian Government and the Council of Australian Governments should facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices. In developing such an approach, the following should be considered:

- (a) the need for regulation in relation to the use of restrictive practices in a range of sectors, including disability services and aged care;**
- (b) the application of the National Decision-Making Principles; and**
- (c) the provision of mechanisms for supported decision-making in relation to consent to the use of restrictive practices.**

- 8.1. We support this proposal and make the below additional comments, noting that the ALRC may not make a specific proposal about the form any national or nationally consistent approach to the regulation of restrictive practices should take. We see this as an important opportunity to provide the ALRC with some detail in this area if further consideration within the remit of the inquiry were to occur. OPA Vic wishes to refer the ALRC to a number of publications on the topic of the use of restrictive interventions in a variety of settings, including a discussion paper, available on our website.⁶³
- 8.2. We are particularly concerned about the high use of restrictive interventions (particularly chemical restraints) on residents of aged care facilities. There is an alarming lack of Commonwealth oversight, and the *Aged Care Act 1997* (Cth) is insufficient in its current remit to provide any type of oversight like that currently available in some states and territories in relation to the use of restrictive practices in disability and mental health services, for example that covered by Victoria's *Disability Act 2006* (Vic) and *Mental Health Act 2014* (Vic).
- 8.3. We believe that the biggest challenge here is the lack of uniform legislative controls and reporting requirements and the absence of equivalent key players across all jurisdictions. The use of restrictive interventions in all government funded and supported accommodation needs clear, uniform legislative controls and reporting requirements, which could be modelled on Part 7 of Victoria's *Disability Act 2009* (Vic).⁶⁴ This includes both federal and state funded and supported accommodation, including aged care facilities. This could be considered in the development of a national or nationally consistent approach to the regulation of the use of restrictive practices.
- 8.4. We agree that a national or nationally consistent approach should consider the use of restrictive practices in a range of settings; including supported accommodation and group

⁶³ See, for example, *Position Statement on Seclusion and restraint in mental health facilities* (2013); *Position Statement on Restrictive interventions in educational settings* (2013); *Position Statement on Restrictive interventions* (2011); <<http://www.publicadvocate.vic.gov.au/research/302/>>; *Restrictive Interventions in Victoria's Disability Sector: Issues for Discussion and Reform* (2012) <<http://www.publicadvocate.vic.gov.au/research/132/>>.

⁶⁴ As expressed previously by OPA Vic in *Restrictive Interventions in Victoria's Disability Sector: Issues for Discussion and Reform* (2012), 15 <<http://www.publicadvocate.vic.gov.au/research/132/>>.



houses, residential aged care facilities, mental health facilities, hospitals, prisons and schools.⁶⁵

- 8.5. OPA SA restate the expressed position in the Issues Paper submission that there should be an amendment of the *User Rights Principles 1997* (Cth), made under the *Aged Care Act 1997* (Cth), to minimise and eliminate the use of restrictive practices in aged care.⁶⁶
- 8.6. We support the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (National Framework) and agree that the content is a solid foundation from which a broader national framework, addressing all service settings, could be developed. However, we do hold reservations about the omission of any reference to article 12 of the CRPD in the National Framework. Article 12(3) in particular places an obligation on States Parties to 'take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.' Any national or nationally consistent approach must consider the CRPD in its entirety.
- 8.7. It should be noted however that the National Framework does not address the use of detention. A useful model for regulation of compulsory treatment, which includes restrictions on liberty or freedom of movement, is contained in part 8 of Victoria's *Disability Act 2006* (Vic).⁶⁷
- 8.8. In South Australia, detention is regulated through the *Guardianship and Administration Act 1993*, and the policies of Disability Services and OPA (SA) include detention as a restrictive practice.
- 8.9. It is our view that Australia's ratification of the Optional Protocol of the *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* will ensure that the rights of people with disability who live in places in detention will be better upheld. Disability accommodation that is locked, where people cannot leave unless escorted, would be a place of detention.
- 8.10. Regardless of the content, we are in agreement with the ALRC that there is still a need for a national or nationally consistent approach to regulation beyond the disability services sector and the NDIS. We support the ALRC's suggestion that the Australian Government and COAG should facilitate this development, drawing also from the National Seclusion and Restraint Project.
- 8.11. We are of the view that in addition to a national or nationally consistent approach to the regulation of the use of restrictive practices in the care sector more broadly, there needs to be binding regulation or legislation in this area. We do not believe that high-level principles or core strategies, as currently exist in a piecemeal way across the country, are sufficient to protect and promote the rights of people who are subject to restrictive interventions. We note the ALRC suggest that it is likely that an approach that

⁶⁵ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 202.

⁶⁶ Office of the Public Advocate (SA), *Response to the ALRC Issues Paper: Equality, Capacity and Disability in Commonwealth Laws* (2013).



incorporates legislation and national guidelines, codes of practice or policy directives, as well as education, training and guidance would be appropriate.⁶⁷

- 8.12. We are encouraged by the ALRC's intention that this proposal will address the gaps that currently exist in terms of the service areas that are regulated by current laws and policies.
- 8.13. In relation to (c), while we appreciate the ALRC's intention to encourage supported decision making in this area, we do hold some concerns about how supported decision making in relation to consent to the use of restrictive practices will be practically applied.
- 8.14. Encouraging supported decision making in relation to the use of restrictive practices is good in principle, however, how it will operate in practice remains an area of somewhat uncharted territory. We would be interested to see how article 12 could be applied to seclusion and restraint under state and territory mental health law, or in the development of behaviour support mechanisms under disability legislation.
- 8.15. To frame it as supported decision making, where 'trump' power still exists (mental health legislation in particular), may be counter to the very important principles of supported decision making. We wonder whether it could be framed within a stepped model perhaps, however the distinction between the person participating in a decision about the use of restrictive practices on them, and actually making a decision and consenting to the use, is significant. At the very best, perhaps what can be reasonably happen wherever trump power exists is consultation with and participation of the person.
- 8.16. We do consider however that supported decision making can significantly assist to avoid situations where restrictive practices are used. For example a person with a mental illness who has a Ulysses agreement may be calmer because of an effective pre-planned strategy to deal with distress when unwell; and a person with an intellectual disability who can plan and control their life and has necessary supports will be less likely to be in the types of situation that lead to restrictive practices, such as overcrowding and boredom.
- 8.17. We suggest the ALRC monitor the progress and outcomes of the the Linkage project into Supported Decision Making for people who have received a diagnosis of major depression, bipolar disorder, psychosis or schizophrenia (2014–2017).⁶⁸ The aim of the project is to contribute to the development of mechanisms to facilitate people's meaningful involvement in their own treatments, support and care.⁶⁹

⁶⁷ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, DP 81 (2014) 201.

⁶⁸ The project is funded by the Australian Research Council and a number of partner organisations are supporting the project, including Monash University, Victorian Department of Health, Neami Limited, Victorian Mental Health Carers Network, Victorian Mental Illness Council, Mental Illness Fellowship Victoria and Mind Australia. For more information see Monash University, *Health and Society Research Network: Research Projects*, 2 May 2014 <<http://artsonline.monash.edu.au/hisnet/research-projects/>>.

⁶⁹ *Ibid.*



9. Electoral Matters

Proposal 9–1 Section 93(8)(a) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person of ‘unsound mind’ who is ‘incapable of understanding the nature and significance of enrolment or voting’ is not entitled to have their name on the electoral roll or to vote in any Senate or House of Representatives election. This should be amended to replace the current wording with: ‘does not have decision-making ability with respect to enrolment and voting at the relevant election’.

9.1. We support this proposal. We also recommend that equivalent state and territory electoral acts be amended to reflect this proposal.

Proposal 9–2 The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that a person lacks decision-making ability with respect to enrolment and voting at the relevant election if they cannot:

- (a) understand the information relevant to decisions that they will have to make associated with enrolment and voting at the relevant election;**
- (b) retain that information for a sufficient period to make the decision;**
- (c) use or weigh that information as part of the process of making decisions; and**
- (d) communicate their decision in some way.**

9.2. We support this proposal.

Proposal 9–3 The *Commonwealth Electoral Act 1918* (Cth) should be amended to provide that decision-making assistance and support should be taken into account in determining whether a person has decision-making ability with respect to enrolment and voting at the relevant election.

9.3. We support this proposal.

Proposal 9–4 The Australian Electoral Commission should develop a guide to assessing ability for the purposes of determining whether a person ‘does not have decision-making ability with respect to enrolment and voting at the relevant election’ consistent with the National Decision-Making Principles.

9.4. We support this proposal. We have concerns about the limited extent to which potential voters with cognitive impairments and mental ill health are encouraged to vote and are educated about their right to vote. We note the resources available on the Australian Electoral Commission website are a useful tool for people with disability and their supporters, however care must be taken to ensure these are accessible to people with disability who may not have access to, or have familiarity with, using the internet.

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



9.5. Yes.

Proposal 9–5 The Australian Electoral Commission should collect, and make publicly available, information about the operation of s 93(8)(a) of the *Commonwealth Electoral Act 1918 (Cth)*, including the number of people removed from the electoral roll, the reason, and whether they responded to the objection.

9.6. Yes.

Proposal 9–6 Section 234(1) of the *Commonwealth Electoral Act 1918 (Cth)* should be amended to provide that ‘if any voter satisfies the presiding officer that he or she is unable to vote without assistance, the presiding officer shall permit a person appointed by the voter to enter an unoccupied compartment of the booth with the voter, and mark, fold, and deposit the voter’s ballot paper’.

9.7. Yes.

Proposal 9–7 The Australian Electoral Commission should develop or amend guidance for 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.

9.8. We support this proposal.



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.

- 10.1. We support this proposal and in particular refer the ALRC to our comments in response to proposals contained in sections three, four and five of this submission.
- 10.2. Ultimately, we should aspire to make the system providing for decision-making arrangements for people with a cognitive impairment or mental ill health as simple and accessible as possible. There is a real danger that the interaction between Commonwealth and state and territory models will lead to greater complexity and duplication in appointment, making it more difficult for persons with disability to exercise their legal rights to make their own decisions, even with the provision of legally recognised support mechanisms.



11. Other Issues

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

11.1. Yes.

Question 11–2 Should s 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) be amended to provide that, instead of a test of mental incapacity, a party who did not have the decision-making ability with respect to the marriage, does not give ‘real consent’?

11.2. We are of the view that the test for capacity to enter into a marriage should be the same as that required for other decisions and cannot be subject to a representative’s decision.

Proposal 11–1 The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to ensure they are consistent with the National Decision-Making Principles.

11.3. We support this proposal.

Question 11–4 If a person acting under an enduring power of attorney may make a binding death nomination on behalf of a person holding a superannuation interest under the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth), should they be required to have regard to the will, preferences and rights of the member in making the nomination? What safeguards need to be in place?

11.4. We consider that this proposal needs significant further consideration and research. As indicated in the Discussion Paper, changes in the will of a person who has lost capacity can occur through a court. The role of an enduring attorney assigning a death benefit is substantially different to their other decision-making roles, and would need significant consideration as to its desirability, and the safeguards that would be needed if it were to occur. This might include endorsement of nominations by a tribunal.

Proposal 11–2 Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to provide that a person is incapable of acting in the particular role if they cannot:

- (a) understand the information relevant to the decisions that they will have to make in performing the role;
- (b) retain that information to the extent necessary to make those decisions;
- (c) use or weigh that information as part of the process of making decisions; and
- (d) communicate the decisions in some way.



Parenthood and family law

- 11.5. We wish to raise again the issue of the effect that a parent having disability may have on parenting proceedings in the Family Court.⁷⁰ We note Chief Justice Bryant's view, cited in the ALRC's Discussion Paper, however we consider it important to note our position in relation to this matter.
- 11.6. We believe that unless parents with a disability are specifically protected in family law legislation, the section 60cc application of the children's best interests can be used in a way that is discriminatory and based on assumptions about an inherent lack of capacity amongst parents with a disability (without this being challenged or having to be demonstrated).
- 11.7. Article 23 of the CRPD commits State Parties to—
- ensuring that children are not separated from their parents on the basis of a disability of either the child or one or both of the parents⁷¹
 - taking measures to eliminate discrimination against persons with disabilities in matters relating to parenthood and to giving persons with disabilities assistance in the performance of their child-rearing responsibilities.⁷²
- 11.8. We wish to state our support that the current provisions of the CRPD be reflected in the *Family Law Act 1975* (Cth).

⁷⁰ See also Office of the Public Advocate (Vic), *What Even Happened to the Village? The Removal of Children from Parents with a Disability*, Report 1: Family Law—Hidden Issues, December 2013.

⁷¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 23[4].

⁷² *Ibid* art 23[1]–[2].