



Australian Government

Australian Law Reform Commission

Equality, Capacity and Disability in Commonwealth Laws

SUMMARY REPORT

This Summary Report reflects the law as at 21 August 2014.

The Australian Law Reform Commission (ALRC) was established on 1 January 1975 by the *Law Reform Commission Act 1973* (Cth) and reconstituted by the *Australian Law Reform Commission Act 1996* (Cth).

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Terms of Reference

Review of equal recognition before the law and legal capacity for people with disability

I, Mark Dreyfus QC MP, Attorney-General of Australia, having regard to:

- the United Nations Convention on the Rights of Persons with Disabilities, to which Australia is a party and which sets out:
 - rights for people with disability to recognition before the law, to legal capacity and to access to justice on an equal basis with others, and
 - a general principle of respect for inherent dignity, individual autonomy, including freedom to make one's own choices, and independence of persons, and
- Australian Governments' commitment to the National Disability Strategy, which includes 'rights protection, justice and legislation' as a priority area for action.

REFER to the Australian Law Reform Commission (ALRC) for inquiry and report, pursuant to s 20(1) of the *Australian Law Reform Commission Act 1996* (Cth):

- the examination of laws and legal frameworks within the Commonwealth jurisdiction that deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity, and
- what if any changes could be made to Commonwealth laws and legal frameworks to address these matters.

For the purposes of the inquiry, equal recognition before the law and legal capacity are to be understood as they are used in the Convention on the Rights of Persons with Disabilities: including to refer to the rights of people with disability to make decisions and act on their own behalf.

Scope of the reference

In undertaking this reference, the ALRC should consider all relevant Commonwealth laws and legal frameworks that either directly, or indirectly, impact on the recognition of people with disability before the law and their exercise of legal capacity on an equal basis with others, including in the areas of:

- access to justice and legal assistance programs
- administrative law
- aged care
- anti-discrimination law
- board participation

- competition and consumer law
- contracts
- disability services and supports
- electoral matters
- employment
- federal offences
- financial services, including insurance
- giving evidence
- holding public office
- identification documents
- jury service
- marriage, partnerships, intimate relationships, parenthood and family law
- medical treatment
- privacy law
- restrictive practices
- social security
- superannuation, and
- supported and substituted decision making.

The review should also have particular regard for the ways Commonwealth laws and legal frameworks affect people with disability who are also children, women, Indigenous people, older people, people in rural, remote and regional areas, people from culturally and linguistically diverse backgrounds and lesbian, gay, bisexual, transgender and intersex people.

The purpose of this review is to ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights. In considering what if any changes to Commonwealth law could be made, the ALRC should consider:

- how laws and legal frameworks are implemented and operate in practice
- the language used in laws and legal frameworks
- how decision making by people with impairment that affects their decision making can be validly and effectively supported
- presumptions about a person's ability to exercise legal capacity and whether these discriminate against people with disability
- use of appropriate communication to allow people with disability to exercise legal capacity, including alternative modes, means and formats of communication such as Easy English, sign language, Braille, and augmentative communications technology
- how a person's ability to independently make decisions is assessed, and mechanisms to review these decisions

- the role of family members and carers and paid supports such as legal or non-legal advocates in supporting people with disability to exercise legal capacity for themselves – both in relation to formal and informal decisions and how this role should be recognised by laws and legal frameworks
- safeguards – are the powers and duties of decision making supporters and substituted decision makers effective, appropriate and consistent with Australia’s international obligations
- recognition of where a person’s legal capacity and/or need for supports to exercise legal capacity is evolving or fluctuating (where a person with disability may be able to independently make decisions at some times and circumstances but not others or where their ability to make decisions may grow with time and/or support), including the evolving capacity of children with disability, and
- how maximising individual autonomy and independence could be modelled in Commonwealth laws and legal frameworks.

In conducting this inquiry, the ALRC should also have regard to:

- initiatives under the National Disability Strategy, including the National Disability Insurance Scheme and other services and supports available to people with disability, and how these should/could interact with the law to increase the realisation of people with disability’s recognition before the law and legal capacity
- how Commonwealth laws and legal frameworks interact with State and Territory laws in the areas under review, contemporaneous developments and best practice examples within the States and Territories, and
- international laws and legal frameworks that aim to ensure people with disability are accorded equal recognition before the law and legal capacity on an equal basis with others, including international work to implement the Convention on the Rights of Persons with Disability.

Consultation

In undertaking this reference, the ALRC should identify and consult with relevant stakeholders, particularly people with disability and their representative, advocacy and legal organisations, including through accessible formats, but also families and carers of people with disability, relevant Government departments and agencies in the Commonwealth and States and Territories, the Australian Human Rights Commission, and other key non-government stakeholders.

Timeframe

The Commission should provide its report to the Attorney-General by August 2014.

Dated 23 July 2013

Mark Dreyfus

Attorney-General

Summary Report

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Towards supported decision-making in Australia

1.1 This Inquiry is about ensuring people with disability have an equal right to make decisions for themselves. It is about respecting people's dignity, autonomy and independence, while supporting them to make their own decisions, where such support is needed. This reflects an important movement away from

viewing persons with disabilities as 'objects' of charity, medical treatment and social protection towards viewing persons with disabilities as 'subjects' with rights, who are capable of claiming those rights and making decisions for their lives based on their free and informed consent as well as being active members of society.¹

1.2 The Inquiry commenced in July 2013, the same month in which a pilot of the National Disability Insurance Scheme (NDIS) in Australia was initiated, representing 'a new way of providing community linking and individualised support for people with permanent and significant disability, their families and carers'.² The objective of the NDIS is to provide persons with disability with greater choice and control over the disability services and support they receive.

1 United Nations Enable-Secretariat for the CRPD, *Convention on the Rights of Persons with Disabilities* <www.un.org/disabilities>.

2 Department of Families, Housing, Community Services and Indigenous Affairs, *One Big Difference to Lots of Lives: An Introduction to DisabilityCare Australia* (2013) 3.

1.3 The Terms of Reference required the Australian Law Reform Commission (ALRC) to consider ‘how maximising individual autonomy and independence *could be modelled* in Commonwealth laws and legal frameworks’.³ The ALRC considers this can best be achieved by setting out principles and guidelines that can be used as a template for specific reforms. These principles and guidelines can be applied to Commonwealth and state and territory laws—in particular, guardianship and administration laws.

National Decision-Making Principles

1.4 The ALRC recommends that the reform of relevant Commonwealth, state and territory laws should be consistent with the following National Decision-Making Principles:

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who 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.

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

1.5 These principles reflect the paradigm shift signalled in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) to recognise people with disabilities as persons before the law and their right to make choices for themselves. The emphasis is on the autonomy and independence of persons with disability who may require support in making decisions—their will and preferences must drive decisions that they make, and that others make on their behalf.

1.6 These four general principles reflect the key ideas and values upon which the ALRC’s approach is based. They are drawn from the CRPD, other international models, stakeholder submissions and the work of other bodies and individuals. They are not prescriptive, and are of general application.

1.7 The principles are supported by three sets of guidelines. The principles and guidelines are discussed in Chapter 3.

3 Terms of Reference (emphasis added).

A Commonwealth decision-making model

1.8 To encourage supported decision-making at a Commonwealth level, the ALRC recommends a new model (the Commonwealth decision-making model) based on the positions of ‘supporter’ and ‘representative’. These terms are also part of building a new lexicon for supported decision-making. The role of both supporters and representatives is to assist persons who need decision-making support to make decisions in relevant areas of Commonwealth law.

1.9 In Chapter 4, the ALRC makes recommendations about amending the objects or principles provisions in relevant Commonwealth legislation; the appointment, recognition, role and duties of supporters and representatives; and appropriate and effective safeguards.

The National Disability Insurance Scheme

1.10 The NDIS represents a significant new area of Commonwealth responsibility and expenditure with respect to persons with disability in Australia. In Chapter 5, the ALRC recommends that the Commonwealth decision-making model be applied to the NDIS, which already incorporates elements of supported decision-making. This will require some amendment of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and Rules to provide for legal recognition of supporters and representatives, including provisions for their appointment, removal and associated safeguards.

1.11 The Chief Executive Officer of the National Disability Insurance Agency should retain the power to appoint a ‘representative’ for a participant as a measure of last resort. There are circumstances where the exercise of this power is necessary—in the absence of a Commonwealth guardianship tribunal or equivalent body—to ensure that persons with disability are properly supported in the relation to the NDIS.

1.12 There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative, and amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

1.13 In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.

Supporters and representatives in other areas of Commonwealth law

1.14 The Commonwealth decision-making model may also be applied to other existing legislative schemes in Commonwealth laws that already contain a decision-making mechanism or make some provision for supporters and representatives—however described.

1.15 As discussed in Chapter 6, these schemes concern individual decision-making in relation to social security, under the *Social Security (Administration) Act 1999* (Cth); aged care, under the *Aged Care Act 1997* (Cth); and eHealth records, under the *Personally Controlled Electronic Health Records Act 2012* (Cth).

1.16 The model might also be applied to individual decision-making in relation to personal information under the *Privacy Act 1988* (Cth) and the provision of banking services.

1.17 In some of these areas, legislation should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model. However, any reform needs to be proportionate to the situation, and to the role of the supporter or representative. In relation to privacy and banking, the ALRC recommends new guidelines to encourage supported decision-making, rather than legislation.

1.18 One overarching issue is the interaction between Commonwealth decision-making schemes and state and territory appointed decision-makers. In each area, the interaction of Commonwealth supporters and representatives with state and territory appointed decision-makers will have to be considered.

Access to justice

1.19 Chapter 7 deals with issues concerning decision-making and access to justice. There are a range of Commonwealth laws and legal frameworks affecting persons with disability involved in court proceedings, including as:

- defendants in criminal proceedings—the concept of unfitness to stand trial;
- parties to civil proceedings—the appointment and role of litigation representatives;
- witnesses in criminal or civil proceedings—giving evidence as a witness, and consenting to the taking of forensic samples; and
- potential jurors—qualification for jury service.

1.20 In each of these areas there are existing tests of a person’s capacity to exercise legal rights or to participate in legal processes. The ALRC recommends that these tests be reformed consistently with the National Decision-Making Principles. By providing models in Commonwealth laws, the ALRC seeks to inform and provide a catalyst for reform of state and territory laws.

1.21 An important theme is the tension between laws that are intended to operate in a ‘protective’ manner—for example, in order to ensure a fair trial—and increasing demands for equal participation, in legal processes, of persons who require decision-making support.

Restrictive practices

1.22 The term ‘restrictive practices’ refers to the use of interventions that have the effect of restricting the rights or freedom of movement of a person in order to protect them. Serious concerns have been expressed about inappropriate and under-regulated use of restrictive practices in a range of settings in Australia.

1.23 Current regulation of restrictive practices occurs mainly at a state and territory level. However, the Commonwealth, state and territory disability ministers endorsed

the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (National Framework) in March 2014 to forge a consistent national approach.

1.24 As discussed in Chapter 8, the National Framework is intended to reduce the use of restrictive practices, including by informing the development of the NDIS quality assurance and safeguards system. The ALRC recommends that the Australian Government and the Council of Australian Governments (COAG) incorporate aspects of the National Decision-Making Principles in developing the NDIS system.

1.25 The ALRC also recommends that the Australian Government and COAG adopt a similar, national approach to the regulation of restrictive practices in other relevant sectors such as aged care and health care.

Electoral matters

1.26 Australia is obliged, under the CRPD, to guarantee that persons with disability can ‘effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives’, including the right and opportunity to vote and be elected.⁴

1.27 In Chapter 9, the ALRC recommends that the ‘unsound mind’ provisions of the *Commonwealth Electoral Act 1918* (Cth) (the Electoral Act), which relate to disqualification for enrolment and voting, be repealed. A new exemption to compulsory voting based on a functional test consistent with the National Decision-Making Principles should be enacted, so that a person who lacks decision-making ability relating to voting is exempt from penalties arising from a failure to vote.

1.28 Where a person with disability requires assistance to vote, they should be supported by all available means. The ALRC recommends that current provisions of the Electoral Act concerning permissible support be broadened, and that the Australian Electoral Commission (AEC) provide its officers with guidance and training to improve support in enrolment and voting for persons with disability. As the right to a secret vote is fundamental to the right to vote, but may be compromised by some forms of support, the AEC should also investigate methods of maintaining the secrecy of voting.

Review of state and territory legislation

1.29 This new approach to individual decision-making at the Commonwealth level can also be used to guide law reform at the state and territory level. Reform at the state and territory level is critical to the implementation of the CRPD because many important areas of decision-making are governed by state and territory law—including in relation to guardianship and administration, consent to medical treatment, mental health and disability services.

⁴ *UN Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 29.

1.30 The ALRC recommends that state and territory governments review their legislation that deals with decision-making to ensure laws are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In Chapter 10, the ALRC discusses how, in conducting such a review, regard should be given to:

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

Other issues

1.31 Chapter 11 deals with a number of other issues raised that are relevant to Commonwealth laws and legal frameworks that concern the exercise of legal capacity, including in relation to:

- the common law relating to incapacity to contract;
- consumer protection laws;
- consent to marriage;
- the nomination of superannuation beneficiaries;
- acting in the role of a board member and in other corporate roles; and
- holding public office.

1.32 The ALRC recommends amendments to the *Marriage Act 1961* (Cth) and associated guidelines for marriage celebrants, and some provisions of the *Corporations Act 2001* (Cth) to better reflect the National Decision-Making Principles. It also recommends that the Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person's 'unsound mind' or 'mental incapacity'.

The law reform process

1.33 Law reform recommendations cannot be based upon assertion or assumption and need to be built on an appropriate conceptual framework and evidence base.

Framing principles

1.34 The ALRC identified five framing principles for guiding the recommendations for reform in this Inquiry: dignity; equality; autonomy; inclusion and participation; and accountability. There was wide support by stakeholders for these principles, which are reflected in the decision-making model that is developed in the Report.

1.35 **Dignity** is one of the guiding principles of the CRPD⁵ and is recognised in a number of other international human rights instruments.⁶ In Australia, the National Disability Strategy (NDS) prioritised the concept of dignity in its principles.⁷ Similarly, the Productivity Commission identified human dignity as ‘an inherent right’ of persons with disability and suggested that dignity as a human being is linked to self-determination, decision-making and choice.⁸

1.36 **Equality** is at the heart of the CRPD. The United Nations Committee on the Rights of Persons with Disabilities stated that: ‘Equality before the law is a basic and general principle of human rights protection and is indispensable for the exercise of other human rights’.⁹ Similarly, art 5 prohibits all discrimination on the basis of disability and requires States to promote equality, and arts 6 and 7 emphasise equality for women and children. The NDS principles emphasise equality of opportunity,¹⁰ and a range of Commonwealth laws also protect the equality of people and proscribe discrimination on the basis of disability—for example, the *Disability Discrimination Act 1992* (Cth).

1.37 **Autonomy** is a significant principle underlying the ability of persons with disability to exercise legal capacity. It is enshrined in the general principles of the CRPD and is a key principle of the NDS.¹¹ The objects and principles of the NDIS also reflect the notion of autonomy.¹² This Inquiry has been informed by autonomy in the sense of ‘empowerment’, not just ‘non-interference’.¹³ This involves seeing an individual in relation to others, in a ‘relational’ or ‘social’ sense,¹⁴ and understanding that connects with respect for the family as the ‘natural and fundamental group unit of society’ that is entitled to protection by States Parties.¹⁵ Such a view sits comfortably with a shift in emphasis towards supported decision-making, which ‘acknowledges that

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

6 See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948); *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

7 Australian Government, *National Disability Strategy 2010–2020*, 22.

8 Productivity Commission, ‘Review of the *Disability Discrimination Act 1992* (Cth)’ (30 Vol 1, 2004) 182.

9 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 on Article 12 of the Convention—Equal Recognition before the Law*, 2014 [1].

10 Australian Government, *National Disability Strategy 2010–2020*, 22.

11 Australian Government, *National Disability Strategy 2010–2020*, 22.

12 *National Disability Insurance Scheme Act 2013* (Cth) ss 3, 4.

13 Mary Donnelly, *Healthcare Decision-Making and the Law—Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010) 269–272. Donnelly draws, for example, on the work of Joseph Raz, eg Joseph Raz, *The Morality of Freedom* (Clarendon Press, 1986). See her discussion particularly in ch 1, ‘Autonomy: Variations on a Principle’.

14 John Christman, ‘Relational Autonomy, Liberal Individualism, and the Social Constitution of Selves’ (2004) 117 *Philosophical Studies* 143, 143.

15 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS171 (entered into force 23 March 1976) art 23(1); *Standard Rules on the Equalization of Opportunities for Persons with Disabilities*, GA Res 48, UN GAOR, 3rd Comm, 48th Sess, Agenda Item 109, UN Doc A/RES/48/96 (20 December 1993) r 9.

individuals rely to a greater or lesser extent on others to help them make and give effect to decisions'.¹⁶

1.38 Closely related to the principles of dignity and equality, the principles of **inclusion and participation** are central to many contemporary perspectives on disability, particularly a social model of disability. The social model emphasises that, while 'a person might have an impairment, their disability comes from the way society treats them, or fails to support them'.¹⁷ Inclusion and participation are active values, consistent with an approach to autonomy as empowerment. An emphasis on inclusion has important consequences for education, workforce participation and economic security, as people with disability are seen as 'citizens with rights, not objects of charity'.¹⁸ Further, one of the objects of the NDIS Act is to facilitate greater community inclusion of people with a disability.¹⁹ The focus on supported decision-making developed throughout the Report reflects the principle of inclusion and participation.

1.39 The principle of **accountability** has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards. 'Supporters' who fulfil a supportive role in decision-making must be properly accountable, as well as those who are appointed to make decisions on a person's behalf. Another important component is the accountability and responsibility of persons with disability for their decisions, recognising that active participation involves both responsibilities and risks.²⁰

Building an evidence base

1.40 A major aspect of building the evidence base to support the formulation of ALRC recommendations for reform is consultation, acknowledging that widespread community consultation is a hallmark of best practice law reform.²¹ Under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC 'may inform itself in any way it thinks fit' for the purposes of reviewing or considering anything that is the subject of an inquiry.²²

1.41 The process for each law reform project may differ according to the scope of the inquiry, the range of stakeholders, the complexity of the laws under review, and the period of time allotted for the inquiry. For each inquiry the ALRC determines a consultation strategy in response to its particular subject matter and likely stakeholder interest groups. The nature and extent of this engagement is normally determined by the subject matter of the reference and the timeframe in which the inquiry must be

16 Piers Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and Its Implications for Mental Health Law' (2013) 20 *Psychiatry, Psychology and Law* 431, 435.

17 Productivity Commission, 'Disability Care and Support' (July 2011) 54 Vol 1, 98.

18 Australian Government, *National Disability Strategy 2010–2020*, 16.

19 *National Disability Insurance Scheme Act 2013* (Cth) s 3.

20 Children with Disability Australia, *Submission 68*.

21 B Opeskin, 'Measuring Success' in B Opeskin and D Weisbrot (eds), *The Promise of Law Reform* (2005), 202.

22 *Australian Law Reform Commission Act 1996* (Cth) s 38.

completed under the Terms of Reference. While the exact procedure is tailored to suit each inquiry, the ALRC usually works within an established framework, outlined on the ALRC's website.²³

Community consultation

1.42 A multi-pronged strategy of seeking community comments was used. Two consultation documents were released to facilitate focused consultations in stages through the Inquiry. An Issues Paper was released on 15 November 2013 and a Discussion paper on 22 May 2014.²⁴

1.43 The Discussion Paper put forward 56 proposals and 16 questions to assist the ALRC to develop its recommendations for reform. Both consultation papers and this final Report were also released in an Easy English format.²⁵

1.44 Two national rounds of stakeholder consultation teleconferences, meetings, forums and roundtables were also conducted following the release of each of the consultation documents.

1.45 The Terms of Reference for this Inquiry directed the ALRC to consult with relevant stakeholders, particularly persons with disability and their representative, advocacy and legal organisations, but also families and carers of people with disability, relevant Commonwealth, states and territory departments and agencies, the Australian Human Rights Commission, and other key non-government stakeholders. The many individuals, departments, agencies and organisations consulted in the Inquiry are listed at the end of the Report.

1.46 The ALRC received 156 submissions, a full list of which appears at the end of the Report. Submissions were received from a wide range of people and agencies, including: bodies representing persons with disability; courts; public guardians and advocates; individuals; academics; lawyers; community legal centres; law societies and representative groups; and Commonwealth and state government agencies.

1.47 The ALRC acknowledges the contribution of all those who participated in the Inquiry consultation rounds and the considerable amount of work involved in preparing submissions. This can have a significant impact in organisations with limited resources. It is the invaluable work of participants that enriches the whole consultative process and the ALRC records its deep appreciation for this contribution.

Appointed experts

1.48 In addition to the contribution of expertise by way of consultations and submissions, specific expertise is also obtained in ALRC inquiries through the establishment of Advisory Committees, panels, roundtables and the appointment by the

23 <www.alrc.gov.au/law-reform-process>.

24 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (2013) 41; Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014).

25 Easy English is an accessible format that uses simple, everyday language and illustrations for people with low English literacy.

Attorney-General of part-time Commissioners. The Advisory Committee for this Inquiry had 11 members, listed at the beginning of the Report. Two meetings were held in Sydney on 3 October 2013 and 8 April 2014.

1.49 In this Inquiry the ALRC was able to call upon the expertise and experience of Graeme Innes AM, Disability Discrimination Commissioner, who was appointed as a part-time Commissioner specifically to assist the ALRC in this Inquiry. The Hon Justice Berna Collier of the Federal Court of Australia contributed her experience as a part-time Commissioner until October 2013 and thereafter on the Advisory Committee for the Inquiry.

1.50 While the ultimate responsibility in each inquiry remains with the Commissioners of the ALRC, the establishment of a group of experts as an Advisory Committee, panel or roundtable and the enlisting of expert readers are invaluable aspects of ALRC inquiries. These experts assist in the identification of key issues, providing quality assurance in the research and consultation effort, and assisting with the development of reform proposals. The ALRC acknowledges the significant contribution made by the Advisory Committee in this Inquiry and expresses its gratitude to them for voluntarily providing their time and expertise.

Implementation

1.51 Once tabled in the Australian Parliament, the Report becomes a public document.²⁶ ALRC reports are not self-executing documents. The ALRC is an advisory body and provides recommendations about the best way to proceed—but implementation is a matter for others. However, the ALRC has a strong track record of having its advice followed. The Annual Report 2012–2013 records that 61% of ALRC reports are substantially implemented and 28% are partially implemented, representing an overall implementation rate of 89%.²⁷

1.52 Quite apart from such statistics, an assessment of the contribution that law reform work makes must have a long view. Law reform inquiries have a far bigger impact than just the implementation of recommendations, some of which may occur shortly after a report is released, some many years later. But whether or not recommendations are implemented, ALRC reports provide enormous value. Each ALRC report provides not only a mapping of law as at a particular moment in time, but in reviewing the submissions and consultations the reports also provide a snapshot of opinion on the issues being considered—providing a considerable contribution to legal history, and increasingly locating that within its particular social context at a given time. In making a submission to the Senate Standing Committee on Legal and Constitutional Affairs, when the Committee conducted an inquiry into the ALRC over

26 The Attorney-General is required to table the report within 15 sitting days of receiving it: *Australian Law Reform Commission Act 1996* (Cth) s 23.

27 Australian Law Reform Commission, *Annual Report 2011–2012* (ALRC Report 121), 24 and see Appendix F.

the summer of 2010–2011,²⁸ the Federal Court of Australia said that the Court benefits greatly from ALRC reports:

More often than not, an ALRC report contains the best statement or source of the current law on a complex and contentious topic that can remain the case for decades thereafter, whether or not the ALRC's recommendations are subsequently implemented.²⁹

Outcomes

1.53 Australia was an active participant and leader in the development of the CRPD, contributing greatly to the negotiations of the text of the Convention. Australia was also one of the original signatories when it opened for signature on 30 March 2007.

1.54 The adoption by the Australian Government of the National Decision-Making Principles and the Commonwealth decision-making model set out in the Report will provide the impetus for further reform of laws nationally to promote better compliance with the CRPD.

1.55 The most difficult policy challenges in this area concern those who require the most support. Where a person's will and preferences are difficult, or impossible to determine, they may need someone else to make decisions on their behalf. These hard cases should not, however, be treated as a barrier to building law and legal frameworks that move towards supported decision-making in practice, as well as in form.

1.56 Recent reviews and amendment of state and territory guardianship and administration laws provide important directions for reform. In the Report, the ALRC puts forward a model to encourage supported decision-making under Commonwealth laws and to provide the catalyst towards further initiatives at the state and territory level.

1.57 In adopting the model and leading its implementation federally, the Australian Government can maintain its leadership in championing and implementing reforms for persons with disability, ensuring their equal recognition before the law in accordance with art 12 of the CRPD.

28 See the inquiry report: Australian Parliament, Senate Legal and Constitutional Affairs References Committee, *Inquiry into the Australian Law Reform Commission* (8 April 2011), <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%inquiries/2010-13/lawreformcommission>.

29 Ibid, Submission 22.

Recommendations

3. National Decision-Making Principles

Recommendation 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3–2 to 3–4) to ensure that:

- supported decision-making is encouraged;
- representative decision-makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who 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.

Principle 3: Will, preferences and rights

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

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

Recommendation 3–2 ***Support Guidelines***

- (1) *General*
 - (a) Persons who require decision-making support should be supported to participate in and contribute to all aspects of life.
 - (b) Persons who require decision-making support should be supported in making decisions.
 - (c) The role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support.

(d) Persons who require decision-making support may choose not to be supported.

(2) *Assessing support needs*

In assessing what support is required in decision-making, the following must be considered:

- (a) All adults must be presumed to have ability to make decisions that affect their lives.
- (b) A person must not be assumed to lack decision-making ability on the basis of having a disability.
- (c) A person's decision-making ability must be considered in the context of available supports.
- (d) A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.
- (e) A person's decision-making ability will depend on the kind of decisions to be made.
- (f) A person's decision-making ability may evolve or fluctuate over time.

Recommendation 3–3 ***Will, Preferences and Rights Guidelines***

(1) *Supported decision-making*

- (a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:
 - (i) support the person to express their will and preferences; and
 - (ii) assist the person to develop their own decision-making ability.
- (b) In communicating will and preferences, a person is entitled to:
 - (i) communicate by any means that enable them to be understood; and
 - (ii) have their cultural and linguistic circumstances recognised and respected.

(2) *Representative decision-making*

Where a representative is appointed to make decisions for a person who requires decision-making support:

- (a) The person's will and preferences must be given effect.
- (b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.
- (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.

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- (d) A representative may override the person's will and preferences only where necessary to prevent harm.

Recommendation 3–4 *Safeguards Guidelines*

(1) *General*

Safeguards should ensure that interventions for persons who require decision-making support 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.
- (2) *Support in decision-making*
- (a) Support in decision-making must be free of conflict of interest and undue influence.
 - (b) Any appointment of a representative decision-maker should be:
 - (i) a last resort and not an alternative to appropriate support;
 - (ii) limited in scope, proportionate, and apply for the shortest time possible; and
 - (iii) subject to review.

4. Supported Decision-Making in Commonwealth Laws

Recommendation 4–1 A Commonwealth decision-making model that encourages supported decision-making should be introduced into relevant Commonwealth laws and legal frameworks in a form consistent with the National Decision-Making Principles and Recommendations 4–2 to 4–9.

Recommendation 4–2 The objects and principles provisions in Commonwealth legislation concerning decision-making by persons who require decision-making support should reflect the National Decision-Making Principles.

Recommendation 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a supporter and reflect the National Decision-Making Principles in providing that:

- (a) a person who requires decision-making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;
- (b) where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support; and
- (c) supported decisions should be recognised as the decisions of the person who required decision-making support.

Recommendation 4-4 A supporter assists a person who requires support to make decisions and may:

- (a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;
- (b) provide advice to the person about the decisions they might make;
- (c) assist the person to communicate the decisions; and
- (d) endeavour to ensure the decisions of the person are given effect.

Recommendation 4-5 Relevant Commonwealth laws and legal frameworks should provide that supporters of persons who require decision-making support must:

- (a) support the person to make decisions;
- (b) support the person to express their will and preferences in making decisions;
- (c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person;
- (d) act honestly, diligently and in good faith;
- (e) support the person to consult, as they wish, with existing appointees, family members, carers and other significant people in their life in making decisions; and
- (f) assist the person 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 formally appointed to make decisions for the person.

Recommendation 4-6 Relevant Commonwealth legislation should include the concept of a representative and provide for representative arrangements to be established that reflect the National Decision-Making Principles.

Recommendation 4-7 A representative assists a person who requires support to make decisions or, where necessary, makes decisions on their behalf and may:

- (a) obtain and disclose personal and other information on behalf of the person, and assist the person to understand information;
- (b) provide advice to the person about the decisions that might be made;
- (c) communicate the decisions; and
- (d) endeavour to ensure the decisions made are given effect.

Recommendation 4–8 Relevant Commonwealth laws and legal frameworks should provide that representatives of persons who require decision-making support must:

- (a) support the person to make decisions or make decisions on their behalf reflecting their will and preferences;
- (b) where it is not possible to determine the will and preferences of the person, determine what the person would likely want based on all the information available;
- (c) where (a) and (b) are not possible, consider the person’s human rights relevant to the situation;
- (d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person;
- (e) act honestly, diligently and in good faith;
- (f) consult with existing appointees, family members, carers and other significant people in their life in making decisions; and
- (g) assist the person to develop their own decision-making ability.

For the purposes of paragraph (f), ‘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 formally appointed to make decisions for the person.

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

Recommendation 4–10 The Australian and state and territory governments should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring.

Recommendation 4–11 The Australian Government should ensure that persons who require decision-making support, and their supporters and representatives are provided with information and guidance to enable them to understand their functions and duties.

Recommendation 4–12 The Australian Government should ensure that employees and contractors of Commonwealth agencies who engage with supporters and representatives are provided with information, guidance and training in relation to the roles of supporters and representatives.

5. The National Disability Insurance Scheme

Recommendation 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.

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

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

Recommendation 5–4 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the National Disability Insurance Agency in appointing representatives. These provisions should make it clear that the CEO’s powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant’s will, preferences and support networks.

Recommendation 5–5 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to provide that, before exercising the power to appoint a representative, the CEO of the National Disability Insurance Agency may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.

6. Supporters and Representatives in Other Areas of Commonwealth Law

Recommendation 6–1 The *Social Security (Administration) Act 1999* (Cth) should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model.

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

Recommendation 6–3 The *Personally Controlled Electronic Health Records Act 2012* (Cth) should be amended to include provisions dealing with supporters and representatives consistent with the Commonwealth decision-making model.

Recommendation 6–4 The Australian Information Commissioner should develop guidelines consistent with the Commonwealth decision-making model describing the role of supporters and explaining how ‘APP entities’ should recognise the role of supporters in assisting people to exercise their rights under the *Privacy Act 1988* (Cth).

Recommendation 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:

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- (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, consistent with other legal duties.

7. Access to Justice

Recommendation 7-1 The *Crimes Act 1914* (Cth) should be amended to provide that a person cannot stand trial if the person cannot be supported to:

- (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; or
- (d) communicate the decisions in some way.

Recommendation 7-2 State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:

- (a) limits on the period of detention that can be imposed; and
- (b) regular periodic review of detention orders.

Recommendation 7-3 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that a person needs a litigation representative if the person cannot be supported to:

- (a) understand the information relevant to the decisions that they will have to make in conducting proceedings, including in giving instructions to their legal practitioner;
- (b) retain that information to the extent necessary to make those decisions;
- (c) use or weigh that information as part of a decision-making process; or
- (d) communicate the decisions in some way.

Recommendation 7-4 The *Federal Court of Australia Act 1976* (Cth), *Family Law Act 1975* (Cth) and the *Federal Circuit Court of Australia Act 1999* (Cth) should provide that litigation representatives must:

- (a) support the person represented to express their will and preferences in making decisions;

- (b) where it is not possible to determine the will and preferences of the person, determine what the person would likely want based on all the information available;
- (c) where (a) and (b) are not possible, consider the person's human rights relevant to the situation; and
- (d) act in a manner promoting the personal, social, financial and cultural wellbeing of the person represented.

Recommendation 7-5 Federal courts should develop practice notes explaining the duties that litigation representatives have to the person they represent and to the court.

Recommendation 7-6 The Law Council of Australia should consider whether the Australian Solicitors' Conduct Rules and Commentary should be amended to provide for a new exception to solicitors' duties of confidentiality where:

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

Recommendation 7-7 The *Evidence Act 1995* (Cth) should be amended to provide that a person is not 'competent to give evidence about a fact' if the person cannot be supported to:

- (a) understand a question about the fact; or
- (b) give an answer that can be understood to a question about the fact.

Recommendation 7-8 The *Evidence Act 1995* (Cth) should be amended to provide that a person who is 'competent to give evidence about a fact' is not competent to give sworn evidence if the person cannot understand that he or she is under an obligation to give truthful evidence, and cannot be supported to understand.

Recommendation 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.

Recommendation 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.

Recommendation 7-11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence.

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

- (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; or
- (d) communicate the person’s decisions to the other members of the jury and to the court.

Recommendation 7–13 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.

Recommendation 7–14 The *Federal Court of Australia Act 1976* (Cth) should be amended to provide that communication assistants, allowed by the trial judge to assist a juror, should:

- (a) swear an oath or affirm to faithfully communicate the proceedings or jury deliberations; and
- (b) be permitted in the jury room during deliberations without breaching jury secrecy principles, providing they are subject to and comply with requirements for the secrecy of jury deliberations.

Recommendation 7–15 The *Federal Court of Australia Act 1976* (Cth) should provide for offences, in similar terms to those 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.

8. Restrictive Practices

Recommendation 8–1 The Australian Government and the Council of Australian Governments should take the National Decision-Making Principles into account in developing the national quality and safeguards system, which will regulate restrictive practices in the context of the National Disability Insurance Scheme.

Recommendation 8–2 The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care.

9. Electoral Matters

Recommendation 9-1 The *Commonwealth Electoral Act 1918* (Cth) should be amended to repeal:

- (a) s 93(8)(a), which 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; and
- (b) s 118(4), which relates to objections to enrolment on the basis that a person is of ‘unsound mind’.

Recommendation 9-2 State and territory governments should repeal ‘unsound mind’ provisions in their electoral legislation and make other changes consistent with those recommended by the ALRC with respect to the *Commonwealth Electoral Act 1918* (Cth).

Recommendation 9-3 Section 245 of the *Commonwealth Electoral Act 1918* (Cth) on compulsory voting should be amended to provide that it is a ‘valid and sufficient reason’ for not voting if a person cannot:

- (a) understand information relevant to voting at the particular election;
- (b) retain that information for a sufficient period to make a voting decision;
- (c) use or weigh that information as part of the process of voting; or
- (d) communicate their vote in some way.

Recommendation 9-4 The Australian Electoral Commission should provide Divisional Returning Officers with guidance and training, consistent with the National Decision-Making Principles, to help them determine if a person with disability has a valid and sufficient reason for failing to vote.

Recommendation 9-5 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 chosen by the voter to assist them with voting.

Recommendation 9-6 The Australian Electoral Commission should provide its officers with guidance and training, consistent with the National Decision-Making Principles, to improve support in enrolment and voting for persons who require support to vote.

Recommendation 9-7 The Australian Electoral Commission should investigate methods of maintaining the secrecy of votes of persons who require support to vote.

10. Review of State and Territory Legislation

Recommendation 10–1 State and territory governments should review laws and legal frameworks concerning individual decision-making 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; consent to medical treatment; mental health; and disability services.

11. Other Issues

Recommendation 11–1 Sections 23(1)(iii) and 23B(1)(d)(iii) of the *Marriage Act 1961* (Cth) should be amended to remove the references to ‘being mentally incapable’ and instead provide that ‘real consent’ is not given if ‘a party did not understand the nature and effect of the marriage ceremony’.

Recommendation 11–2 The *Guidelines on the Marriage Act 1961 for Marriage Celebrants* should be amended to reflect the removal of the reference to ‘mental incapacity’ in the *Marriage Act 1961* (Cth) and to provide further guidance on determining whether or not a person can ‘understand the nature and effect of the marriage ceremony’.

Recommendation 11–3 Sections 201F(2), 915B and 1292(7)(b) of the *Corporations Act 2001* (Cth) should be amended to remove references to ‘mental incapacity’, ‘being incapable, because of mental infirmity’ and ‘mental or physical incapacity’. Instead, the provisions should state that a person is not eligible to act in the roles of director, auditor or liquidator, or a financial services licence holder, if they cannot be supported to:

- (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; or
- (d) communicate the decisions in some way.

Recommendation 11–4 The Australian Government should review and replace provisions in Commonwealth legislation that require the termination of statutory appointments by reason of a person’s ‘unsound mind’ or ‘mental incapacity’.

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