

4. Supported Decision-Making in Commonwealth Laws

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Summary

4.1 To encourage the adoption of supported and fully supported decision-making at a Commonwealth level, the ALRC proposes a new model for decision-making (the Commonwealth decision-making model). This chapter outlines the proposed model, the basis of which is the concept of a ‘supporter’ and ‘representative’. The role of both supporters and representatives is to support people who may require decision-making support to make decisions in the relevant area of Commonwealth law.

4.2 This chapter first describes the Commonwealth decision-making model and discusses the potential application of the model in areas of Commonwealth law, and the chosen terminology.

4.3 The chapter then addresses the key elements of the model. It makes a number of proposals and asks questions about: the objects and principles of relevant legislation; the appointment, recognition, role and duties of supporters; and appropriate and

effective safeguards. The ALRC also proposes introducing the concept of a representative, outlines the possible roles and duties of representatives; and asks questions about appropriate mechanisms for their appointment and the interaction with state and territory appointed decision-makers.

4.4 Finally, the ALRC makes a number of complementary proposals with respect to information sharing and the need for training and guidance.

Supported decision-making at a Commonwealth level

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’).

4.5 In the ALRC’s view, it is desirable to introduce statutory mechanisms for formal supported decision-making at a Commonwealth level. A range of stakeholders expressed support for the introduction of supported decision-making and its introduction in statutory form.¹

4.6 The ALRC proposes introducing mechanisms for the appointment of ‘supporters’ for adults who may require decision-making support, in a number of areas of Commonwealth law. The introduction of provisions relating to ‘representatives’ to address circumstances in which a person may desire, or require, fully supported decision-making, is also proposed.

4.7 The proposed Commonwealth decision-making model represents a significant shift and would require reconfiguration of decision-making approaches. The question of how the ALRC’s model interacts with decision-making regimes under state and territory law is also discussed below.

Levels of support

4.8 Article 12 of the CRPD and National Decision-Making Principle 2 contain the key idea of decision-making support. The central idea underlying the Commonwealth decision-making model is, therefore, that all adults, except in very limited circumstances, have some level of decision-making ability and should be entitled to make decisions expressing their will and preferences, but may require varying levels of support to do so. The Office of the Public Advocate (Queensland) observed:

¹ See, eg, MHCA, *Submission 77*; Office of the Public Advocate (SA), *Submission 17*; Office of the Public Advocate (Vic), *Submission 06*. See also, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [7.73]–[7.82], which adopted the view that formalisation of supported decision-making arrangements would be desirable.

supported decision-making ... reflects efforts to provide better ways of recognising and meeting the needs of adults who have difficulty with certain areas of decision-making but who could make their own decisions ‘with a little friendly help’.²

4.9 Rather than starting by questioning whether a person has the capacity to make decisions—reflecting a binary view of capacity and decision-making³—the preferable approach is to ask what level of support, or what mechanisms are necessary, to support people to express their will and preferences. This recognises that the ability of a person who may require decision-making support ‘to exercise legal agency is dependent on the integrity, quality and appropriateness of support available’.⁴

4.10 There are a number of levels of support that a person may require to make a decision:

- No or minimal support—for example, a person may require no support, or require some assistance obtaining information, but when provided with the information is then able to make the necessary decision. Similarly, the person may only require support to communicate to a third party a decision they have made.
- Low to medium support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, and receive advice about the possible decisions they might make.
- High support—for example, a person may require support to obtain information, have the information explained to them in an appropriate way, receive advice about the possible decisions they might make, communicate their decision, and to ensure their decision is given effect to.

4.11 At each of these levels of support, under the Commonwealth decision-making model, a person could appoint a supporter or supporters to assist them to make a decision in the particular area of Commonwealth law.

4.12 There is one other category of support—full support. In such circumstances a person may choose fully supported decision-making, or it may be necessary to appoint someone to provide that support. Under the Commonwealth decision-making model, a representative would support the person to express their will and preferences in order to make a decision. Where it is not possible to determine the person’s will and preferences, the representative would make a decision based on the person’s will and preferences as constructed using the information available, or on the basis of the human rights relevant to the situation. This is discussed further in Chapter 3 under the Will, Preferences and Rights Guidelines and is consistent with National Decision-Making Principle 3.

2 Office of the Public Advocate (Qld), *Submission 05*. The OPA (Qld) referred to Robert M Gordon, ‘The Emergence of Assisted (supported) Decision-Making in the Canadian Law of Adult Guardianship and Substitute Decision-Making’ (2000) 23 *International Journal of Law and Psychiatry* 61, 71.

3 See Ch 2.

4 PWDA, ACDL and AHRC, *Submission 66*.

4.13 Fully supported decision-making differs from substitute decision-making because it is ‘based on facilitating access to the enjoyment of existing rights, rather than on making decisions on behalf of a person based on a subjective assessment of their best interest’.⁵ Importantly, representatives are not intended to replicate nominees under existing Commonwealth law. Stakeholders expressed concerns about the potential risks arising from a combination of supported and substitute decision-making. In particular, there was concern that substitute decision-making could become predominant—what Professor Terry Carney and Fleur Beaupert refer to as ‘net widening’.⁶ The concept of fully supported decision-making and its development is discussed in more detail in Chapter 2.

Operation and effect of the model

Operation

4.14 The Commonwealth decision-making model provides for formal supported decision-making along a spectrum. At one end is a supporter appointed by a person who requires decision-making support to assist them to make a decision or category of decisions. At the other is fully supported decision-making, which involves the appointment of a representative, either by the person who requires decision-making support or a court, tribunal or other body.

4.15 The development of the Commonwealth decision-making model differs from, but builds on, the examination and articulation of approaches to supported decision-making by bodies such as the Victorian Law Reform Commission (VLRC), the Office of the Public Advocate (SA), as well as a number of international models.⁷

4.16 The ALRC intends that a supporter and representative scheme would be provided for in particular areas of Commonwealth law, tailored to suit the legislative context. However, it would ideally incorporate a number of key elements based on the model outlined below. This approach was supported in submissions which suggested, for example, that the ALRC ‘explore the idea of consolidating Commonwealth ... decision systems or at least having one consistent structure that each system hangs off’.⁸

4.17 The ALRC focuses on a number of key elements of the model, rather than being overly prescriptive about the mechanics of its application. For example, the ALRC does not intend to outline the formal requirements that may be necessary to facilitate the appointment of a supporter, or the way in which a particular Commonwealth

5 Ibid.

6 Terry Carney and Fleur Beaupert, ‘Public and Private Bricolage—Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making’ (2013) 36 *University of New South Wales Law Journal* 175.

7 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Office of the Public Advocate (SA), *Submission 17*, attachment 1 ‘Stepped Model of Supported and Substitute Decision-Making’. See, also, *Mental Capacity Act 2005* (UK); Michael Bach and Lana Kerzner, ‘A New Paradigm for Protecting Autonomy and the Right to Legal Capacity’ (Law Commission of Ontario, October 2010); Amnesty International and the Centre for Disability Law and Policy, National University of Ireland, Galway, *Essential Principles: Irish Legal Capacity Law*, 2001.

8 NSW Council for Intellectual Disability, *Submission 33*.

department or agency might record the appointment, other than to highlight the need for information sharing between Commonwealth departments and agencies.

Effect

4.18 The implementation of the Commonwealth decision-making model is likely to have a number of important outcomes. First, it would ensure that people with disability retain decision-making power in areas of Commonwealth law in order to express their will and preferences and exercise legal capacity on an equal basis with others.

4.19 Secondly, formalisation of support relationships would, as emphasised by the VLRC in its guardianship report, ‘provide important legal acknowledgment of the fact that mechanisms other than substitute decision making can be used to help people engage in activities requiring legal capacity’.⁹

4.20 Thirdly, formalisation of support arrangements in the way envisaged by the model is likely to create greater certainty for third parties about the role of supporters and facilitate the provision of decision-making support to persons who may require it.¹⁰ This is likely to allow third parties to interact with supporters about decision-making with greater confidence.

4.21 A related point is that, by formalising support relationships, the model also provides a mechanism for acknowledging and respecting the role of family, carers and other supporters in the lives of people with disability, one of the key elements of the ALRC’s Support Guidelines.¹¹ This may help address some of the difficulties and frustrations expressed by stakeholders in the course of this Inquiry.¹² Such recognition may also have the added effect of decreasing applications for state and territory guardianship and administration orders initiated primarily for the purposes of engaging with Commonwealth Government systems.¹³ As Pave the Way highlighted,

families are less likely to seek a guardianship or administration order in relation to their loved one when government agencies and other organisations recognise their role in their family member’s lives.¹⁴

4.22 Finally, if implemented across a range of Commonwealth areas of law, support provided in accordance with the model may also facilitate navigation of the

9 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012), [8.62]. See also: *UN Convention on the Rights of Persons with Disabilities*, Opened for Signature 30 March 2007, 999 UNTS 3 (entered into Force 3 May 2008).

10 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012); Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011 5. In a state and territory context see, eg, Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67, 2010.

11 See Ch 3.

12 See, eg, Carer’s Alliance, *Submission 84*; Carers NSW, *Submission 23*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Office of the Public Advocate (SA), *Submission 17*; Carers Queensland Australia, *Submission 14*. See also more generally in relation to family and carers: G Llewellyn, *Submission 82*; NMHCCF and MHCA, *Submission 81*; Children with Disability Australia, *Submission 68*; B Arnold and Dr W Bonython, *Submission 38*; Office of the Public Advocate (SA), *Submission 17*; Mental Health Coordinating Council, *Submission 07*.

13 See, eg, Australian Guardianship and Administration Council, *Submission 51*.

14 Pave the Way, *Submission 09*.

‘labyrinth’¹⁵ of Commonwealth systems by people who require decision-making support.

4.23 In order to guide the adoption of supported decision-making at a Commonwealth level, the ALRC makes a range of proposals below that, considered together, form the proposed Commonwealth decision-making model.

4.24 In outlining the model, there are a number of areas and issues in relation to which the ALRC seeks further stakeholder input prior to making final law reform recommendations. For example, the ALRC asks a question about the most appropriate approach to the complex interaction of Commonwealth decision-making structures and state and territory appointed decision-makers—an issue highlighted by a range of stakeholders in the course of the Inquiry.¹⁶

Application of model

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?

4.25 It may be beneficial to have consistent decision-making structures across Commonwealth law for people who may require decision-making support. However, given the significant shift the proposed model represents, and the views of some stakeholders and commentators who have emphasised the need for a fuller analysis of supported decision-making before wholesale implementation,¹⁷ the ALRC limits its proposals to a number of key areas.

4.26 The following chapters of this Discussion Paper discuss the potential application of the model in a number of areas of Commonwealth law. Chapter 5 discusses the application of the model in the context of the NDIS. Chapter 6 discusses its possible application in other areas of Commonwealth law, including those that have existing decision-making provisions which will require amendment.

4.27 There are other areas of Commonwealth law to which the Commonwealth decision-making model could apply, including for example, Medicare and tax. The ALRC is interested in stakeholder comment in relation to these, or other areas of Commonwealth law.

15 Youngcare, *Submission 34*.

16 See, eg, Financial Services Council, *Submission 35*; Australian Guardianship and Administration Council, *Submission 51*.

17 See, eg, Carney and Beaupert, above n 6; Nina Kohn, Jeremy Blumenthal and Amy Campbell, ‘Supported Decision-Making: A Viable Alternative to Guardianship’ (2013) 117 *Penn State Law Review* 1111.

Terminology

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?

4.28 As outlined in Chapter 2, in light of the often contested nature of terminology, and the potential need for a new lexicon in the context of capacity and decision-making, the ALRC is asking a number of questions about the appropriateness of particular terminology. In the context of this chapter, the ALRC is interested in stakeholder views on the appropriateness of the terms ‘supporter’ and ‘representative’, and suggestions for alternative terms.

4.29 The term ‘supporter’ is used in the ALRC’s model to reflect the role played by an individual or organisation that provides a person with the necessary support to make a decision or decisions. The term reflects the nature of the role, and that ultimate decision-making power and responsibility remains with the person, with support being provided to assist them to make the decision themselves. The term supporter is used in a number of jurisdictions, including in a model recommended by the VLRC in its guardianship inquiry.¹⁸

4.30 The term ‘representative’ is used to signal that the role of a representative is to support and represent the will, preferences and rights of the person who requires decision-making support.¹⁹ Representative is preferred over nominee in order to signal the shift from existing decision-making arrangements in a number of areas of Commonwealth law, including the NDIS and social security, both of which use the term nominee. Further, in circumstances where a person who may require decision-making support has not chosen or ‘nominated’ the person, the term nominee does not appropriately reflect the nature of the appointment.

Objects and principles of Commonwealth legislation

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.

4.31 The first key component of the ALRC’s proposed approach to reform of Commonwealth laws and legal frameworks is the inclusion of supported decision-making principles under relevant legislation. As a result, the ALRC proposes amendment of existing objects or principles provisions contained in relevant

¹⁸ Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 30.

¹⁹ A formulation currently used under the *Personally Controlled Electronic Health Records Act 2012* (Cth). The term representative is also used in other jurisdictions: eg *Representation Agreement Act RSBC 1996 c405 1996*.

legislation, or where there are no such provisions, their inclusion, to reflect the National Decision-Making Principles. This would ensure the National Decision-Making Principles guide the application and interpretation of the legislation as a whole, or the particular division or part that deals with supporters and representatives. This approach was supported by a number of stakeholders. For example, the Disability Advocacy Network Australia (DANA) submitted that

it should be an explicit object of legislation in the disability area ... to promote the decision making capacity of people with disability, to build the capacity of people with disability to make decisions and participate in decision making, and to enable access to decision making support for all people with disability whose decision making capacity is impaired.²⁰

Supporters

4.32 The Commonwealth decision-making model proposed by the ALRC introduces the concept of formal supported decision-making at a Commonwealth level. At the core of supported decision-making is the idea that people, except in very limited circumstances, have some level of decision-making ability and that, with the appropriate support, they can be supported to make a decision. The nature and level of the support may vary, however the decision remains that of the person who requires the decision-making support.

4.33 A supporter under the model is an individual or organisation appointed by a person who may require decision-making support to enable them to make a decision. Ultimate decision-making power and responsibility remains with the person who requires decision-making support. Supporters should be entitled to support people to make any decision relevant to the area of Commonwealth responsibility in relation to which they have been appointed, including in relation to financial decisions.

4.34 A person may appoint whomever they wish as their supporter and may appoint more than one. For example, a person may appoint a family member, friend or carer. A supporter may play a range of roles, including in relation to information, advice or communication. The ALRC does not consider that there should be a requirement that a supporter be unpaid.²¹ For example, there may be circumstances in which a paid carer may be appointed as a supporter, particularly where the person does not have family support or is socially isolated.²² Advocacy organisations, which may not be directly paid by the person, but which receive funding from government or other sources, may in certain instances also be appropriately appointed as a supporter.²³ A person may also appoint, or revoke their appointment of, a supporter at any time.

20 Disability Advocacy Network Australia, *Submission 36*.

21 Compare Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 38; Office of the Public Advocate (SA), *Submission 17* Attachment 1.

22 See, eg, MHCA, *Submission 77*; Caxton Legal Centre, *Submission 67*; ADACAS, *Submission 29*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 62, 63.

23 See, eg, discussion of importance of advocates in decision-making regimes: Disability Advocacy Network Australia, *Submission 36*. See also MDAA, *Submission 43* in relation to advocates' authority to engage with Centrelink.

4.35 There is currently no provision for a supporter, or supporter-type role, which reflects the ideas of supported decision-making, in Commonwealth legislation. The mechanisms closest to the role of a supporter are Centrelink correspondence nominees²⁴ and nominated representatives in relation to eHealth.²⁵ However, as outlined below, these roles differ significantly, particularly with respect to the duties owed to the person who may require decision-making support.²⁶

What about informal supporters?

4.36 Informal supporters and support networks play a vital role in decision-making of people with disability. Support under art 12 of the CRPD ‘encompasses both informal and formal support arrangements, of varying types and intensity’.²⁷ As the VLRC stated:

supported decision making recognises the interdependent nature of most people’s lives. Most people make important decisions with personal support (such as advice from family, friends or mentors), or sometimes with professional support (for example, doctors or accountants).²⁸

4.37 A number of stakeholders emphasised the important role informal supporters play in decision-making and that entitlement to support should include informal support.²⁹ The Multicultural Disability Advocacy Association of NSW highlighted the effect of culture on decision-making and noted ‘the differences in ways decisions are made in various cultures’:

in some cultures decisions are made by individuals, whereas in others, all important decisions may be made by the head of the family, or collectively by the local elders, or in consultation with other significant members of the family or community concerned.³⁰

4.38 Consistent with these observations, some stakeholders have expressed concerns about the potential for over-formalising existing support mechanisms and support networks that assist people with disability to make decisions.³¹ In the ALRC’s view, the introduction of Commonwealth supporters should not diminish the involvement of, or respect for, informal support, including in relation to decision-making.

4.39 A number of the elements of the Commonwealth decision-making model recognise the important role played by informal supporters. For example, the ALRC proposes that formal supporters have an obligation to support a person in consulting family members, carers and other significant people in their life in the process of

24 *Social Security (Administration) Act 1999* (Cth) ss 123C, 123H. See, also, Department of Social Services, *Guide to Social Security Law* (2014) [8.5.1], [8.5.2].

25 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7.

26 See the discussion of social security and eHealth in Ch 6.

27 United Nations Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law* [15].

28 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.5].

29 See, eg, Carers NSW, *Submission 23*; Office of the Public Advocate (Qld), *Submission 05*.

30 MDAA, *Submission 43*.

31 See, eg, Law Council of Australia, *Submission 83*; Queensland Advocacy Incorporated, *Submission 45*. See also in relation to ‘net widening’: Carney and Beaupert, above n 6.

making decisions. A similar duty is proposed for representatives. There are also specific mechanisms in some areas of Commonwealth law considered in following chapters.

4.40 Importantly, however, the ALRC also makes a number of proposals in relation to safeguards, as some informal arrangements are ‘in fact more restrictive ... because decisions [are] made informally on a substitute basis by others’.³² The formalisation of such arrangements and associated safeguards may ensure people are able to exert choice and control over decision-making in their lives.

Appointment and recognition

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.

4.41 To introduce the concept of formal supported decision-making at a Commonwealth level, the ALRC proposes that relevant laws and legal frameworks should include the concept of a supporter. The ALRC also proposes that such laws and legal frameworks should reflect the National Decision-Making Principles and specifies a number of key elements relating to the appointment and recognition of a supporter or supporters that should be incorporated into any supporter scheme.

4.42 The most important elements of the proposal are recognition that, where a supporter is appointed, ultimate decision-making authority remains with the person who requires decision-making support, and that any decision made with the assistance of a supporter must be recognised as the decision of the person who requires that support.³³ These elements are intended to ensure that decisions are made by the people

32 Office of the Public Advocate (SA), *Submission 17* attachment 1, 31. See, also, Australian Guardianship and Administration Council, *Submission 51*.

33 The VLRC made a similar recommendation: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 46.

who require support, but also that support may be required to make or convey a decision, which in turn maximises autonomy, and allows for dignity of risk.

4.43 The other two elements of the proposal relate to ensuring that a person is able to exercise choice and control in relation to the appointment, or revocation of the appointment, of their supporter or supporters. There does not appear to be an equivalent power under existing Commonwealth decision-making regimes. For example, s 123E of the *Social Security (Administration) Act 1999* (Cth), which relates to suspension and revocation of nominee appointments, does not make provision for the person who has a nominee appointed to request suspension or revocation.³⁴ The importance of this power was emphasised by stakeholders.³⁵

Role and duties

Potential roles of a supporter

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.

4.44 A supporter may perform a number of roles for a person who requires decision-making support. The ALRC proposes that relevant Commonwealth laws and legal frameworks should provide that supporters may exercise some or all of the roles outlined in Proposal 4–4.

4.45 For example, a supporter may need to obtain relevant information and explain it to the person they are supporting in a way that is easily understood, or provide advice to the person about the decisions the person might make. This role in the collection and

³⁴ *Social Security (Administration) Act 1999* (Cth) s 123E.

³⁵ See, eg Physical Disability Council of NSW, *Submission 32*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 54.

explanation of information is provided for under a number of existing and proposed models of supported decision-making.³⁶

4.46 A related role is the handling of relevant personal information of the person being supported. In view of stakeholder submissions highlighting the difficulties that family members and carers often face in attempting to access information, it is important that supporters are able to handle the relevant personal information of the person they are supporting. The operation of the *Privacy Act 1998* (Cth) and the possible need for supporters under that Act is discussed in Chapter 6.

4.47 In circumstances where a person who may require decision-making support experiences difficulty communicating, the supporter may either assist them to communicate a decision, or in some circumstances may communicate the person's decision to third parties. Where a supporter is purportedly communicating a person's decision, it may be necessary for the relevant Commonwealth department or agency to include additional safeguards to ensure that there is no abuse of the supporter's role or duties. This communication-related role is currently provided for under a number of models.³⁷

4.48 A supporter may also play a role in endeavouring to ensure that the decision of the person is given effect. They may, for example, contact the relevant Commonwealth department or agency to follow up on the information provided, or the decision, or provide assistance for the person to seek review of a decision which they consider does not appropriately reflect their will and preferences. However, it would be a matter for individual supporters to determine the extent to which they are able to play this role, depending on the circumstances of the person who requires decision-making support and the particular decision. This role is also provided for currently under some decision-making models.³⁸

Supporter duties

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;

36 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* div 1, s 4(2); *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1).

37 See, eg, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) rec 43; *Adult Guardianship and Trusteeship Act SA 2008 cA4.2* div 1, s 4(2); *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1).

38 *Decision Making, Support and Protection to Adults Act SY 2003 c21* sch A, pt 1, s 5(1); *Mental Capacity Act 2005* (UK) s 36(3).

- (c) act in a manner promoting the personal, social, financial, and cultural wellbeing of the person who requires decision-making support;
- (d) act honestly, diligently and in good faith;
- (e) support the person requiring decision-making support to consult with ‘existing appointees’, family members, carers and other significant people in their life in making a decision; and
- (f) assist the person requiring support to develop their own decision-making ability.

For the purposes of paragraph (e), ‘existing appointee’ should be defined to include existing Commonwealth supporters and representatives and a person or organisation who, under Commonwealth, state or territory law, has guardianship of the person, or is a person appointed formally with power to make decisions for the person.

4.49 The duties of supporters should be set out in the legislation relevant to the area of Commonwealth law.

4.50 The first duty should be to act only within the scope of their appointment. This does not preclude supporters acting informally, or a person appointing a supporter in relation to a broader range of decisions than initially envisaged.

4.51 Supporters should be required to act in a manner that promotes the personal, social, financial, and cultural wellbeing of the person who requires decision-making support.

4.52 This duty is similar to the duty imposed on nominees under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) to act in a manner that promotes personal and social wellbeing,³⁹ but adds elements relating to financial and cultural wellbeing. Given the potential role of supporters in supporting people to make decisions which relate to finances, the ALRC considers financial wellbeing to be an important inclusion. In addition, the importance of cultural wellbeing and sensitivity was highlighted by a number of stakeholders.⁴⁰ The exact nature and content of this duty is likely to require further articulation, including in supporting material in specific areas of Commonwealth law.

4.53 Should supporters have any personal liability for decisions made by the person being supported? The VLRC commented that the extent to which supporters should be liable in such circumstances is ‘challenging’. While it can be argued ‘that the supported person should be responsible for the consequences of any decisions made within a supported arrangement because they retain decision-making authority’, the VLRC concluded that the law should ‘recognise that the support relationship is one of

39 *National Disability Insurance Scheme Act 2013* (Cth) s 80(1).

40 See, eg, MDAA, *Submission 43*.

special trust and confidence, and the supported person is likely to be in a position of vulnerability relative to their supporter’:

Therefore, to avoid doubt, the law should designate the relationship between a supporter and the supported person as fiduciary. Supporters who fail to comply with their fiduciary obligations will leave themselves open to the full range of equitable remedies that are available in these circumstances.⁴¹

4.54 The ALRC acknowledges that the issue of the potential liability of supporters (and representatives) is a difficult one. In the case of supporters, ultimate decision-making authority rests with the person who requires decision-making support, and therefore why should a supporter be held liable for any consequences arising from the decision or decisions? The ALRC is interested in stakeholder views on the question of the standard of the duty of supporters.

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?

4.55 The ALRC also proposes a duty to facilitate consultation. A number of stakeholders highlighted the importance of ensuring supporters (and representatives) consult family members, carers and other significant people in the life of the person who may require decision-making support.⁴² However, these submissions were primarily responding to decision-making circumstances involving substitute decision-making. Rather than imposing a duty on supporters to consult, the ALRC considers it may be more appropriate to propose a duty to facilitate desired consultation, between a person requiring decision-making support and with family, carers and other significant people in the life of the person.

4.56 In order to facilitate the appropriate interaction of supporters with existing state and territory appointed decision-makers, discussed in more detail later in the chapter, a supporter should have a duty to facilitate consultation with existing appointees. The description of ‘existing appointee’ is similar to the one in the NDIS Act.⁴³ This duty may, in part, address concerns such as those expressed by the Financial Services Council about the need for ‘access to critical and relevant information, by a [state or territory] duly appointed decision-maker’.⁴⁴

4.57 Finally, the ALRC is interested in stakeholder views on the appropriateness of imposing an obligation on supporters to develop the capacity of the person being supported to make their own decisions. This would mirror an obligation imposed on nominees under the *National Disability Insurance Scheme (Nominee) Rules 2013*

41 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.128]–[8.130]. See *Ibid* recs 59–61.

42 See, eg, Carers Queensland Australia, *Submission 14*.

43 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

44 Financial Services Council, *Submission 35*.

(Cth).⁴⁵ The nature and content of the obligation is likely to vary according to the circumstances of the appointment. For example, the identity of the supporter will affect their ability to develop the person's capacity, as will resource constraints.

4.58 The ALRC welcomes stakeholder feedback on the duties contained in the proposal, and whether there should be any additional duties of supporters. The ALRC considers a high level of responsibility and the imposition of particular duties is important. However, there may be concerns about unintended consequences, including, for example, people being deterred from acting as supporters.

Safeguards

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

4.59 As outlined in Chapter 3, art 12(4) of the CRPD requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards. The balance between ensuring supporters and decisions made under support arrangements are subject to appropriate safeguards, and avoiding over-regulation of supporters is a delicate one. Excessive regulation may

discourage honest people from accepting an appointment as a supporter. Too much regulation would also have a tendency to undermine the important relationship of trust between a supporter and a supported person.⁴⁶

4.60 There needs to be a number of safeguards and recognition of the different purposes of safeguards. For example, some are designed to protect the person who may require decision-making support from abuse, neglect or exploitation; others may be required to 'ensure that a decision made under a supported decision making arrangement truly expresses and effects the wishes of the person with disability'.⁴⁷

4.61 The Office of the Public Advocate (Vic) highlighted that 'supported decision-making does open up the possibility of conflict, undue influence, abuse and exploitation'.⁴⁸ Similarly, Bruce Arnold and Dr Wendy Bonython submitted that

factors such as undue, or inappropriate, influence are not specific to decision-making by disabled people; nonetheless steps should be taken to ensure that their decision-making—particularly decision-making with serious consequences, such as extensive or potentially high risk medical treatment, or decisions about care—are not a consequence of inappropriate consideration of factors of this type.⁴⁹

45 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.10. See also *Mental Capacity Act 2005* (UK) s 4(4).

46 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012). [8.120]

47 Caxton Legal Centre, *Submission 67*.

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

49 B Arnold and Dr W Bonython, *Submission 38*.

4.62 The Australian Guardianship and Administration Council (AGAC) observed that:

Supported decision making schemes must ‘value-add’ to informal decision making schemes by providing accountability structures and transparency. Like guardianship systems, supported decision making systems must also have clear systems for avoiding, so far as possible, the inclusion of supported decision makers who may use that position to abuse a person with a disability.⁵⁰

4.63 While it is difficult to protect people who may require decision-making support from abuse and neglect in all instances, there are a number of potential safeguards with respect to supporters under the Commonwealth decision-making model. The key safeguards include:

- the proposed duties of supporters;
- the ability of the person who requires decision-making support to revoke the appointment at any time;
- provision for appointment of more than one supporter; and
- the provision of guidance and training to people who require decision-making support, supporters and Commonwealth departments and agencies interacting with supporters.

4.64 The ALRC would be interested in stakeholder feedback about what other safeguards may be appropriate for supporters. For example, in British Columbia to safeguard against financial abuse a monitor must be appointed to oversee the person providing support except in certain circumstances.⁵¹ Other suggestions made to the VLRC in its guardianship inquiry included: registration of arrangements; police checks on appointments; and appointment of monitors.⁵²

Representatives

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.

4.65 In certain circumstances, a person may require full support in decision-making. The ALRC proposes the introduction of Commonwealth representatives as a

50 Australian Guardianship and Administration Council, *Submission 51*.

51 *Representation Agreement Act RSBC 1996 c405 1996* ss 12(1), (2).

52 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012), [8.57].

mechanism for the provision of fully supported decision-making in areas of Commonwealth law.

4.66 A representative should only be appointed as a last resort and in limited circumstances. A representative under the model is an individual or organisation appointed by a person who requires decision-making support, or through some other mechanism (discussed below). A representative would support a person to make decisions and express their will and preferences in making decisions; determine the person's will and preferences and give effect to them; or consider the human rights relevant to the situation in making a decision.

4.67 As with supporters, the introduction of representatives would occur under specific Commonwealth legislation and needs to be tailored to suit the particular legislative context. The ALRC proposes a number of key core elements of any Commonwealth representative regime.

4.68 The ALRC does not intend to make proposals with respect to different categories of representatives. However, consistent with the ALRC's approach to ensuring that fully supported decision-making is the least restrictive alternative and the scope of the appointment is as narrow in scope as possible, consideration will need to be given to possible categories or types of representatives in implementing the Commonwealth decision-making model.

Appointment

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?

4.69 There are a number of ways a representative may be appointed. The most straightforward mechanism involves a person appointing their own representative. A person may choose to appoint a representative—including in circumstances where they have decision-making ability but would prefer to appoint a representative, or in anticipation of losing decision-making ability.⁵³

4.70 It may also be necessary or appropriate to incorporate other appointment mechanisms into the model to account for circumstances where a person may not be in a position to appoint their own representative, but requires fully supported decision-making in an area of Commonwealth law. The ALRC would be interested in stakeholder feedback on what mechanisms there should be at a Commonwealth level to appoint a representative for a person who requires full decision-making support.

4.71 There are a number of other potential options for appointment, either through a central Commonwealth mechanism, or in a specific area of Commonwealth law. For example, it may be appropriate to confer jurisdiction on a court, tribunal or other body

53 This is like the appointment of enduring or lasting powers of attorney.

to appoint representatives. In some senses appointment by a court, tribunal or other body might operate similarly to current appointment of state and territory guardians and administrators. However, given the different nature of the role, any court, tribunal or body conferred with such jurisdiction would need to be guided by considerations different from those currently provided for under Commonwealth, state and territory law. AGAC suggested a mechanism along these lines, submitting that the Commonwealth could develop ‘a single scheme for assessment of the need for a representative in these decision making areas, with a system for impartial appointment and review’.⁵⁴ AGAC also submitted that an alternative may be ‘a more fully developed symbiosis with State and Territory substitute decision making schemes’.⁵⁵

4.72 Another option may be to provide for the appointment of a representative by the relevant Commonwealth department or agency, as is currently permitted in the context of the NDIS and social security. For example, the *Social Security (Administration) Act 1999* (Cth) provides for appointment of a ‘nominee’, as does the NDIS Act. However, stakeholders expressed significant concerns about an agency head or their delegate having the power to make such an appointment,⁵⁶ and about the considerations relevant to making an appointment.

4.73 In light of such concerns, the ALRC is interested in stakeholder views on whether there should be a very confined power for an agency head to appoint a representative in some limited circumstances, and about what considerations should be taken into account. For example, should the desirability of appointing an existing Commonwealth supporter or representative, or a state or territory appointed decision-maker, be a factor that must be considered?⁵⁷

4.74 In addition to possible appointment by a court, tribunal or other body, or in limited circumstances by an agency head, the ALRC is interested in stakeholder views on possible mechanisms at a Commonwealth level for the appointment of a representative for a person who requires full decision-making support.

Role and duties

Potential roles of a representative

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;

54 Australian Guardianship and Administration Council, *Submission 51*.

55 Ibid.

56 See, eg, Children with Disability Australia, *Submission 68*; Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*.

57 For example, an amended form of the considerations under r 3.14 of the *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth). See also considerations as recommended in the Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012).

- (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.

4.75 The ALRC proposes that a representative may perform the same roles as a supporter in supporting a person who requires decision-making support to make a decision or decisions. These roles are discussed in more detail below.

Representative duties

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.

4.76 A representative should have the same duties as a supporter, as well as a number of additional duties. It is important that representatives owe duties under the relevant Commonwealth legislation, even where they are an existing state or territory appointed decision-maker and are subject to duties under state and territory legislation.

4.77 The ALRC has outlined, in the context of supporters, some of the duties that a representative should have. The ALRC seeks stakeholder input on the appropriateness of these duties applying to both supporters and representatives. For example, in relation to the duty to develop the decision-making ability of the person being supported, the nature and content of the obligation should probably vary, according to the circumstances of the appointment. It would be unreasonable to expect a representative to fulfil this duty in circumstances where a person does not, and is unlikely ever to have, the ability to make decisions.

4.78 The key additional duties the ALRC considers may be appropriate for representatives include the duty to support the person who requires decision-making support to express their ‘will, preferences and rights’. The ALRC prefers this obligation to the objective ‘best interests’ test which currently applies to nominees under existing Commonwealth legislation and to state and territory appointed decision-makers.⁵⁸ This shift away from the best interests test received significant support from a wide range of stakeholders⁵⁹ and is discussed in Chapters 2 and 3, including in relation to the corresponding principle of the National Decision-Making Principles.

4.79 In circumstances in which a representative is providing full support and needs to determine the will and preferences of the person because they are unable to communicate that will and those preferences, the representative must determine what the person would likely want based on all the information available. This may, for example, involve consideration of decisions the person has made in the past. If that is not possible, consideration should turn to the human rights relevant to the situation. Ultimately, however, this approach requires decision-making ‘based on facilitating access to the enjoyment of existing rights, rather than on making decision on behalf of a person based on a subjective assessment of their best interest’.⁶⁰

Safeguards

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

4.80 Consistent with National Decision-Making Principle 4 and art 12(4) of the CRPD, the ALRC proposes that the appointment and conduct of Commonwealth representatives be subject to appropriate and effective safeguards.

58 See, eg, *Social Security (Administration) Act 1999* (Cth) s 123O.

59 See, eg, PWDA, ACDL and AHRC, *Submission 66*; Qld Law Society, *Submission 53*.

60 PWDA, ACDL and AHRC, *Submission 66*.

4.81 Article 12(4) of the CRPD requires that all measures relating to the exercise of legal capacity provide for appropriate and effective safeguards. In particular, it requires that such safeguards:

- respect the rights, will and preferences of the person;
- are free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible;
- are subject to regular review by a competent, independent and impartial authority or judicial body; and
- are proportional to the degree to which such measures affect the person's rights and interests.⁶¹

4.82 There needs to be a number of safeguards and recognition of the different purposes of safeguards with respect to representatives. For example, some safeguards are designed to protect the person who may require decision-making support from abuse, neglect or exploitation. Other safeguards are designed to protect the appointed representative.

4.83 The ALRC does not intend to be overly prescriptive with respect to the nature or operation of the safeguards which should apply to the appointment and conduct of representatives. However, the ALRC considers the elements outlined in art 12(4) represent the key safeguard elements of any Commonwealth representative scheme. In light of those elements, it may be necessary for the Australian Government to consider the following in implementing the Commonwealth decision-making model in areas of Commonwealth law:

- mechanisms for review and appeal of the appointment of representatives, including on the application of any interested party;
- the potential for representatives to be periodically required to make declarations regarding compliance with their duties,⁶²
- reporting obligations on representatives with respect to decisions, for example provision of a report, inventory or accounts;⁶³

61 *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 12(4).

62 Note, however the VLRC did not favour this form of compliance requirement: Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.105].

63 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 84; *Social Security (Administration) Act 1999* (Cth) s 123L; Department of Social Services, *Guide to Social Security Law* (2014) [8.5.3]; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) recs 297–302.

- considering the powers of any Commonwealth body conferred with jurisdiction to appoint a representative to ensure it is capable of responding to instances of abuse, neglect or exploitation;
- considering the role of Commonwealth departments and agencies in monitoring, auditing and investigating the conduct of representatives;⁶⁴ and
- considering the broader applicability of safeguards envisaged under any NDIS quality assurance and safeguards framework.

Interaction with other appointed decision-makers

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

4.84 One of the key difficulties in applying the Commonwealth decision-making model is determining the appropriate interaction of supporters and representatives with other supporters and representatives and state and territory appointed decision-makers, such as guardians and administrators.

4.85 Stakeholders such as the Financial Services Council submitted that ‘harmony between State and Territory Guardianship and Administration laws and Commonwealth laws is highly desirable so as to enhance the effectiveness of disability services on a national level’.⁶⁵

4.86 There are a number of possible approaches to the issue of interaction between supporters and representatives, and state or territory appointed decision-makers. The ALRC is interested in stakeholder feedback on this issue, including on two possible approaches outlined below.

4.87 Under the first approach, which reflects the current position, it is possible to have a Commonwealth supporter or representative and a state or territory appointed decision-maker.

4.88 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for Commonwealth purposes.

Possible approaches

4.89 Under the first approach, it is possible to have a Commonwealth supporter or representative and a state or territory appointed decision-maker. In circumstances where they are appointed in relation to different decisions or areas of decision-making,

64 See, however, Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [18.106]–[18.107].

65 Financial Services Council, *Submission 35*. See, also, Law Council of Australia, *Submission 83*.

this should operate without difficulty and may be facilitated by amendment of state and territory legislation to ensure state and territory appointments are as confined in scope and time as possible and, therefore, less likely to overlap with any Commonwealth appointment.

4.90 In circumstances where there is some overlap between the areas of decision-making in relation to which they have been appointed, there is a need to ensure that the authority of the state and territory decision-maker 'is recognised under the Commonwealth Scheme'.⁶⁶

4.91 As a result, there is also a need to consider mechanisms for resolving any conflict between the two. In some circumstances, s 109 of the *Australian Constitution* may operate to ensure that the responsibility of a state or territory appointed decision-maker extends only to those areas not covered by the decision-making powers of the Commonwealth representative.

4.92 Where the scope of state or territory decision-making powers are not inconsistent with those of a Commonwealth decision-maker, harmonisation mechanisms may need to be considered. Stakeholders submitted that, to the greatest extent possible,

where there are several systems in which a person may have an appointed decision-maker, those systems must integrate and, where appropriate, allow the same decision-maker to act in all systems.⁶⁷

4.93 The ALRC suggests that it may be beneficial to propose a duty to facilitate consultation between Commonwealth, state and territory appointees, and to permit, but not require, that one person act under all systems. Importantly, under the ALRC model, representatives and state or territory appointed decision-makers will be subject to the relevant duties arising from the legislation under which they were appointed, which may differ.

4.94 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for Commonwealth purposes. If the person requires fully supported decision-making, then a representative should be appointed, either by the person, or using a Commonwealth appointment mechanism. Under this approach, the ALRC considers that the appointment of the existing state or territory appointed decision-maker as a representative should be permitted and encouraged, but not automatic.

4.95 A number of stakeholders expressed the view that it would be desirable for people to have one Commonwealth representative, who is also the relevant state or territory appointed decision-maker.⁶⁸ For example, the Financial Services Council submitted

66 Australian Guardianship and Administration Council, *Submission 51*.

67 Office of the Public Advocate (Qld), *Submission 05*.

68 See, eg, Australian Guardianship and Administration Council, *Submission 51*; Financial Services Council, *Submission 35*.

that, in the context of the NDIS, state and territory appointed decision-makers should be the default nominee.⁶⁹

4.96 This approach would make provision for the recognition of existing state and territory appointed decision-makers but would also provide sufficient flexibility to allow for circumstances where it is not appropriate for a state or territory appointed decision-maker to be a representative for Commonwealth purposes.

4.97 Even where an existing representative or state or territory appointed decision-maker was appointed, the appointee would be subject to the provisions of the particular Commonwealth legislation relating to their role and duties, and associated safeguards.

Information sharing

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

4.98 The appointment of supporters and representatives in accordance with the Commonwealth decision-making model would represent a significant reform to current Commonwealth decision-making arrangements. As outlined earlier in this chapter, one of the key effects is likely to be to provide greater certainty for third parties about the role of supporters and facilitate their provision of support to the person who may require decision-making support.⁷⁰ This will allow third parties, such as Commonwealth departments and agencies, to interact with those providing decision-making support with greater confidence.

4.99 It may also address the frustrations expressed by stakeholders such as the Carers Alliance, who submitted that ‘there should be seamless sharing of information (by prior consent) to avoid the continuous and interminable requirements to complete forms’.⁷¹

4.100 In order to have such an effect, there is a need for information sharing between Commonwealth departments and agencies, and potentially also state and territory bodies, with respect to the appointment of supporters, representatives and state and territory appointed decision-makers.

4.101 Accordingly, the ALRC proposes that the Australian Government, through its departments and agencies, develop methods of sharing information about such appointments. Information sharing could take a number of forms and serve a number of different roles. For example, at one end of the spectrum it could serve the function envisaged under the VLRC’s supporter model, which recommended that supported

69 Financial Services Council, *Submission 35*.

70 See, eg, Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011; Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.66]. In a state and territory context see, eg, Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67, (2010).

71 Carer’s Alliance, *Submission 84*.

decision-making arrangements and orders should be registered on an online register and should not come into force until they are registered.⁷² Development of a register of this type could act as a centralised source of information about the appointment of supporters and representatives in particular areas of Commonwealth law and facilitate the appointment of existing appointees or representatives as a supporter or representative.

4.102 Alternatively, departments and agencies could develop or revise existing memorandums of understanding with respect to information sharing in relation to individuals.

4.103 There is also a need for exchange of information between the Commonwealth and state and territory appointed decision-makers. The ALRC understands informal arrangements are already in place between some Commonwealth departments and agencies and public trustees and guardians in some jurisdictions. This should be considered in the development of any information sharing method.

4.104 The ALRC would be interested in stakeholder views on the most appropriate approach to information sharing in this context, including in relation to types of information shared, storage, access and associated costs.

Guidance and training

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.

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.

4.105 The ALRC considers that consistent information and advice, and targeted training and guidance for all parties involved in the Commonwealth decision-making is of vital importance in ensuring the effective operation of the proposed Commonwealth decision-making model.

4.106 In addition to being central to the successful implementation of the model, as the model aligns Commonwealth decision-making structures with art 12 of the CRPD, such education, training and guidance may also contribute to the fulfilment of Australia's obligations under art 4 of the CRPD.⁷³ It may also respond to the recommendations made by the UNCRPD that Australia

⁷² Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) [8.123], [8.124].

⁷³ *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 4(1)(i). See also art 8.

provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.⁷⁴

4.107 The ALRC considers the complementary proposals with respect to training, awareness raising and guidance material are important because, as the Office of the Public Advocate (SA) noted in its submission,

while supported decision-making interventions might notionally address a person's impairments, most of the work is in tackling attitudinal and environmental barriers. In particular, overcoming attitudinal beliefs that a person with disability cannot make a decision, and addressing environmental barriers, such as a lack of practical decision-making assistance and support.⁷⁵

4.108 Similarly, Queenslanders with Disability Network emphasised that

for any changes to be effective, accessible information and services must be provided, and free access to additional supports (advocacy, translation and interpretation) must be available. It is also critical that if systemic changes are made, these must be communicated to all stakeholders including people with disability.⁷⁶

4.109 The ALRC considers it is necessary to develop and deliver accessible and culturally appropriate information and training for:

- supporters and representatives, and potential supporters and representatives;⁷⁷
- people who require decision-making support;⁷⁸ and
- the employees of Commonwealth departments and agencies which operate under the proposed model, as well as associated experts and third parties.

4.110 This approach was strongly encouraged by a range of stakeholders. For example, the Mental Health Council of Australia emphasised the need for

capacity building measures, programs or processes at the individual or community levels to empower consumers and communities to actively participate in supported decision-making. These could include programs to educate consumers and carers.⁷⁹

4.111 In relation to supporters and representatives, the OPA (SA) noted that, in delivering its Supported Decision-Making Pilot Project, it established that 'a key element in educating supporters is that they have a support role only: the supporter is

74 Committee on the Rights of Persons with Disabilities, '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) 26.

75 Office of the Public Advocate (SA), *Submission 17*.

76 QDN, *Submission 59*.

77 Carers NSW, *Submission 23*; Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011.

78 Office of the Public Advocate (SA), *Submission 17*; Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011.

79 MHCA, *Submission 77*.

not the decision maker, and is educated as such on support strategies, and how not to inadvertently become a substitute decision maker in this role'.⁸⁰ Carers NSW emphasised the need for carers taking on either supported or substitute decision-making roles 'should have access to an easy to read document outlining the definition of capacity and any expectations and requirements involved with their role'.⁸¹

4.112 In addition, some stakeholders emphasised the need to develop the capacity of people with disability to make decisions. Stakeholders such as the DSC (Vic) has also emphasised the need for 'training and support being provided for people with disabilities to enhance their own decision making skills and their understanding of the various options for assistance'.⁸² The NSW Council for Intellectual Disability submitted that for some people with intellectual disability,

in ideal circumstances they may be able to make their own decisions. However, they may not be in those circumstances in that they have had very limited exposure to alternatives to current deprived lifestyles and/or are in entrenched relationships of control (benevolent or malevolent) by family members or other long-standing people in their lives.⁸³

4.113 The ALRC welcomes stakeholder feedback on these proposals, either generally or in relation to specific areas of Commonwealth law.

80 Office of the Public Advocate (SA), *Submission 17*.

81 Carers NSW, *Submission 23*.

82 Disability Services Commissioner Victoria, *Submission to the Victorian Law Reform Commission, Guardianship Inquiry*, May 2011 6.

83 NSW Council for Intellectual Disability, *Submission 33*.

