6. Supporters and Representatives in Other Areas of Commonwealth Law

Contents

Summary

6.1 In Chapter 4, the ALRC proposes a new model for supported and fully supported decision-making in areas of Commonwealth legislative responsibility (the Commonwealth decision-making model). Chapter 5 discussed the application of the model to the National Disability Insurance Scheme (NDIS).

6.2 This chapter discusses how the Commonwealth decision-making model might be applied to other existing legislative schemes that already contain some decision-making mechanism or make some provision for supporters and representatives, (however they are described). These schemes concern individual decision-making in relation to:

- social security, specifically 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* (PCEHR Act).

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

6.4 In most of these areas, the ALRC proposes that legislation should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model and suggests how this might be done. In relation to banking, the ALRC proposes that banks should be encouraged to recognise supporters, including through new guidelines reflecting supported decision-making principles.

6.5 As discussed with respect to the Commonwealth decision-making model and the NDIS, one overarching issue is the interaction between the various Commonwealth decision-making schemes and state and territory appointed decision-makers. In each area, the interaction of supporters and representatives, recognised under specific Commonwealth legislation with other Commonwealth supporters and representatives and with state and territory appointed decision-makers will have to be considered.[1]

Social security

6.6 The legislative, policy and administrative framework for social security in Australia is set out in the *Social Security Act 1991* (Cth), the *Social Security (Administration) Act 1999* (Cth) and the *Social Security (International Agreements) Act 1999* (Cth).[2] This section discusses how the Commonwealth decision-making model may be applied in social security law.

Individual decision-making in social security

6.7 There are three key decision-making mechanisms in the context of social security law: autonomous decision-making by social security payment recipients; informal supported decision-making; and substitute decision-making by nominees.

6.8 In many circumstances, family members, friends and others may provide informal support to people with disability to make social security-related decisions without any formal recognition or appointment. The significant role of 'informal and supportive decision-making arrangements' in the context of social security was emphasised by a number of stakeholders.[3]

6.9 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement or respect for, informal support, including in relation to decision-making.

---

1 See Ch 10.

2 *Social Security (Administration) Act 1999* (Cth) s 3 defines social security law to include these three Acts. There are equivalent provisions for family assistance (family tax benefit, child care) in *A New Tax System (Family Assistance) (Administration) Act 1999* (Cth) Pt 8 ss 219TA—219TR.

3 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20.*

6.10 The *Social Security (Administration) Act* contains a nominee scheme, and was the model for the nominee scheme under the *National Disability Insurance Scheme Act 2013* (Cth). Specifically, the Act makes provision for a 'principal'[4] to authorise another person or organisation to enquire or act on the person's behalf when dealing with the Department of Human Services (DHS).[5] There are two types of arrangements:

- correspondence nominees—a person or organisation authorised to act and make changes on the principal's behalf;[6] and
- payment nominees—a person or organisation authorised to receive a principal's payment into an account maintained by the nominee.[7]

6.11 Only one person can be appointed for each arrangement; however the same person can be appointed as both correspondence and payment nominee.[8]

6.12 A principal may appoint their own nominee, however where a question arises in relation to a principal's capacity to consent to the appointment of a nominee, or any concerns arise in relation to an existing arrangement, DHS must 'investigate the situation'.[9] The *Guide to Social Security Law*[10] provides that in circumstances where 'a principal is not capable, for example, due to an intellectual/physical constraint…of consenting to the appointment of a nominee', a delegate may appoint one.[11] The Guide also provides that 'where a principal has a psychiatric disability, a nominee can be appointed in these instances where there is a court-appointed arrangement such as a Guardianship Order'.[12]

6.13 Nominees have a range of functions and responsibilities.[13] The primary duty of nominees is to 'act at all times in the best interests of the principal'.[14]

6.14 With respect to issues of liability, a principal is protected against liability for the actions of their correspondence nominee, and correspondence nominees are not subject to any criminal liability under the social security law in respect of: any act or omission of the principal; or anything done, in good faith, by the nominee in his or her capacity

---

4 A 'principal' for the purposes of the nominee provisions is a social security payment recipient who has had a nominee appointed to receive either correspondence and/or payments on their behalf: *Social Security (Administration) Act 1999* (Cth) s 123A.

5 Social security law is administered by the Department of Human Services (DHS) through Centrelink.

6 *Social Security (Administration) Act 1999* (Cth) ss 123C, 123H; see also, Department of Social Services, Guide to Social Security Law (2014) [8.52], [8.53].

7 *Social Security (Administration) Act 1999* (Cth) ss 123B, 123F; Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.3].

8 *Social Security (Administration) Act 1999* (Cth) s 123D(1).

9 Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.2].

10 The Guide to Social Security Law, produced by the Department of Social Services provides guidance to decision-makers in implementing this legislation: Department of Social Services, Guide to Social Security Law (2014).

11 'In these cases, a delegate may appoint a nominee on behalf of the principal, with attention to supporting evidence, and where the delegate is fully satisfied that the nominee is required and will act in the principal's best interests. The decision made by the delegate to appoint a nominee in these circumstances must be fully documented': Ibid [8.5.1], [8.5.2].

12 Ibid.

13 *Social Security (Administration) Act 1999* (Cth) ss 123H–123L, 123O.

14 Ibid s 123O.

as nominee.[15] However, if a correspondence nominee fails to satisfy a particular requirement, the principal is taken to have failed to comply with that requirement. This may then have adverse consequences in terms of compliance and payments.[16]

The Commonwealth model and social security law

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

6.15 To ensure compliance with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles, and given concerns about the current nominee provisions,[17] the ALRC proposes that the *Social Security (Administration) Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

6.16 The application of the Commonwealth decision-making model in social security law would contribute to the development of consistent decision-making structures across key Commonwealth areas of law. The desirability of such consistency was encouraged by stakeholders such as the Law Council of Australia.[18]

6.17 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the *Social Security (Administration) Act* should not diminish the involvement or respect for, informal support, including in relation to decision-making. However, as outlined in Chapter 4, the ALRC considers there are significant benefits to making provision for formal supported decision-making—a view shared by a range of stakeholders both broadly and in the context of social security law.[19]

6.18 While, broadly speaking, the role played by correspondence nominees is analogous to the role envisaged for supporters under the Commonwealth decision-making model, the existing nominee system does not make provision for formal supported decision-making. Accordingly, significant amendments would need to be made to the *Social Security (Administration) Act* to incorporate the Commonwealth decision-making model.

6.19 The ALRC does not intend to prescribe a comprehensive new decision-making scheme for social security law. However, the ALRC outlines below some key ways in which the Commonwealth decision-making model might operate in the context of social security.

---

15 Ibid ss 123M, 123N.
16 See, eg, Ibid s 123J.
17 See, eg, Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.
18 Law Council of Australia, *Submission 83*.
19 See, eg, in relation to supported decision-making and social security law: Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20.*

Objects and principles

6.20 Section 8 of the *Social Security (Administration) Act* contains general principles of administration. However, there are no principles relating to decision-making. The ALRC suggests that s 8 could be amended to incorporate principles relating to decision-making and supported decision-making, or that principles could be inserted into the part of the Act which will contain provisions relating to supporters and representatives.

Supporters

6.21 Under the Commonwealth decision-making model, a principal would be entitled to appoint one or more supporters to support them to make social security-related decisions. Ultimate decision-making power and responsibility would remain with the principal. Centrelink would need to recognise any decision made by a principal with the assistance of a supporter as being the decision of the principal.

6.22 A principal may appoint whomever they wish as their supporter, including for example a family member, friend or carer. In the context of social security, the ability to appoint a supporter may also assist advocacy organisations to support people with disability. For example, stakeholders such as the Multicultural Disability Advocacy Association of NSW emphasised the need for an 'authority form' to facilitate provision of support to clients from culturally and linguistically diverse or non-English speaking backgrounds to engage with Centrelink.[20] It may also address some of the privacy-related difficulties encountered by those who support people with disability, given one of the potential roles of a supporter is to handle the relevant personal information of the principal.

6.23 In many respects, correspondence nominees under the current system reflect the role potentially played by a supporter, including making enquiries and obtaining information to assist the principal, completing forms, and receiving mail. The key difference under the model would be that the principal formally retains ultimate decision-making responsibility. The role of a supporter is to support the principal to make a decision, rather than the supporter themselves making a decision.

6.24 As a result, rather than having a duty to act in the best interests of the principal, supporters would have duties to: support the principal to express their will and preferences; act in a manner promoting the personal, social, financial, and cultural wellbeing of the principal; act honestly, diligently and in good faith; support the principal to consult with other relevant people; and develop the capacity of the principal to make their own decisions. These duties may address concerns expressed by stakeholders that the current nominee provisions 'are generally disempowering of the person with the disability, as they place no obligation on a nominee to act in ways that genuinely involve the person or that assist them to exercise their legal capacity'.[21]

---

20 MDAA, *Submission 43*.

21 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

6.25 In addition, a principal would be entitled to revoke the appointment of a supporter at any time. This differs from the current system, under which there does not appear to be legislative provision for a principal to request cancellation of a nominee arrangement, an issue raised with concern by a number of stakeholders.[22]

Representatives

6.26 Consistent with the Commonwealth decision-making model, a principal would also be entitled to appoint a representative to support them to make social security related decisions.

6.27 There may also be other circumstances in which a representative might be appointed—for example, where a person may not be in a position to appoint their own representative, but requires fully supported decision-making.

6.28 Chapter 4 discusses possible alternative appointment mechanisms in these circumstances, including appointment by a court, tribunal or other body at a Commonwealth level or, in limited circumstances, by Centrelink. However, concerns expressed in relation to the powers of the CEO of the National Disability Insurance Agency to appoint a nominee may also apply to the similar powers of Centrelink delegates.[23]

6.29 The key amendment to the *Social Security (Administration) Act*, applying the Commonwealth decision-making model with respect to representatives, would be to provide that representatives have a duty to consider the will, preferences and rights of the principal. This would replace the current duty of nominees to act in the best interests of the principal.

6.30 Finally, the ALRC proposes that the appointment and conduct of representatives should be subject to appropriate and effective safeguards. The ALRC does not intend to be overly prescriptive in proposing what safeguards should apply under social security law. However, these safeguards might include: mechanisms for review and appeal of the appointment of representatives; potential monitoring or auditing of representatives by Centrelink; and the adoption of existing safeguards. For example, one of the existing safeguards that could apply to representatives is the power of DHS to require provision of a statement from payment nominees outlining expenditure of the principal's payments by the nominee.[24]

Education, training and guidance

6.31 The ALRC considers education, training and guidance for all parties involved in the decision-making under social security law is of vital importance in ensuring the effective operation of this model of decision-making. This is particularly important in

---

22 Section 123E of the *Social Security (Administration) Act 1999* (Cth) outlines the specific power to revoke a nominee appointment, but does not appear to make provision for a request by a principal. See, eg, Law Council of Australia, *Submission 83.*

23 For powers see, Department of Social Services, Guide to Social Security Law (2014) [8.5.1], [8.5.2].

24 *Social Security (Administration) Act 1999* (Cth) s 123L. It is a strict liability offence not to comply which attracts a penalty of 60 penalty units. See also Department of Social Services, Guide to Social Security Law (2014) [8.5.3].

light of stakeholder concerns about existing difficulties in navigating the social security system, interacting with Centrelink, and obtaining information.

6.32 Accordingly, the ALRC considers it is necessary for Centrelink to develop and deliver consistent, regular and targeted education and training as well as associated guidance for:

- supporters and representatives, and potential supporters and representatives;
- Centrelink payment recipients who require decision-making support; and
- Centrelink employees and others involved decision-making or engagement with Centrelink customers.

6.33 The focus of education, training and guidance could include topics such as: the introduction of the supporter and representative model under social security law and differences between the new model and existing nominee provisions; interaction with state and territory decision-making systems; and supported decision-making in the context of social security.

Other issues

6.34 Stakeholders also raised a range of systemic issues concerning social security. Briefly, stakeholders consistently emphasised the complexity of the social security system and the difficulties people with disability face in navigating the system; difficulties arising in relation to eligibility, participation requirements and the consequences of breach of certain requirements; and appeal and review processes. Stakeholders also highlighted the particular difficulties for people with disability who are Aboriginal or Torres Strait Islander, from a culturally and linguistically diverse community, or who live in a rural, regional or remote community.[25]

6.35 While these are important issues in the lives of people with disability, the issues do not relate directly to individual decision-making, and the ALRC does not intend to make proposals in these areas.

Aged care

6.36 The following section outlines how the National Decision-Making Principles and the Commonwealth decision-making model may apply to aged care. Aged care is an increasingly important area of federal responsibility in the context of Australia's ageing population. The Australian Government is responsible for the funding and regulation of most residential aged care and home care packages,[26] under the *Aged*

---

25 See, eg, Legal Aid Qld, *Submission 64*; Vicdeaf, S*ubmission 56*; Central Australian Legal Aid Service, *Submission 48*; MDAA, *Submission 43*; Equal Opportunity Commission of South Australia, *Submission 28*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. See also: National People with Disabilities and Carers Council, *Shut Out: The Experience of People with Disabilities and Their Families in Australia* (2009).

26 On 1 July 2012, the Australian Government assumed full funding, policy and operational responsibility for the Home and Community Care services for older people in all states and territories except Victoria and WA. The state and territory governments will continue to fund and administer HACC services for

Care Act,[27] as well as social security payments, such as the age pension and the carer payment.

6.37 Dementia related policy imperatives and elder abuse concerns have produced a raft of reports on aged care issues.[28] The Australian Government has responded to them with the Living Longer Living Better reforms to aged care.[29] Changes starting from 1 July 2014 include income testing for home care packages, new accommodation payment arrangements for residential aged care, and the removal of the distinction between high and low care in residential care.[30] Consultation on the exposure drafts of subordinate legislation slated for commencement on 1 July 2014 began in March 2014.[31]

6.38 In referring to the Living Longer Living Better reforms, Caxton Legal Centre submitted that it is concerned about the 'omission of the CRPD' as well as the weakening of human rights principles through the exclusion of the Residents' Lifestyle Principle in the new Quality of Care Principles.[32]

6.39 The Commonwealth decision-making model answers the calls in academic commentary, reports and in the submissions to the Inquiry for clear, national guidance for substitute decision-making in aged care that is compliant with the CRPD.[33]

Individual decision-making in aged care

6.40 At present, decisions in aged care, ranging from personal care and visitation to accommodation and medical treatment are made in various ways: by the aged care recipients themselves; informally by their families or carers; or by formally appointed substitute decision-makers like guardians.

6.41 Informal decision-making for an aged care recipient seems to be widespread and accepted in aged care. The Victorian Law Reform Commission report on guardianship

---

people under the age of 65 or under 50 for Aboriginal and Torres Strait Islander people. In May 2013, Victoria has agreed to transition responsibility for HACC for older people to the Commonwealth from 1 July 2015 and in August 2013, WA has agreed to do the same from 2016–2017.

27 From 1 July 2014, the Australian Aged Care Quality Agency (instead of the Department of Social Services) will be responsible for the quality review of home care services. The Quality Agency was established by the *Australian Aged Care Quality Agency Act 2013* (Cth). From 1 January 2014, the Australian Aged Care Quality Agency has replaced the Aged Care Standards and Accreditation Agency to take on the accreditation of residential aged care homes. Accreditation is conducted in accordance with the *Quality Principles 2013* (Cth), *Quality Agency Reporting Principles 2013* (Cth) and other legislative instruments issued pursuant to the *Aged Care Act 1997* (Cth).

28 'Caring for Older Australians' (Inquiry Report No 53, Productivity Commission, 2011); Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014).

29 See *Aged Care (Living Longer Living Better) Act 2013* (Cth) and associated legislation.

30 Department of Social Services, *Reform Overview* <http://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/reform-overview>.

31 Department of Social Services, *Get Involved* <http://www.dss.gov.au/our-responsibilities/ageing-and-aged-care/aged-care-reform/get-involved>.

32 Caxton Legal Centre, Submission 67.

33 John Chesterman, 'The Future of Adult Guardianship in Federal Australia' (2013) 66 Australian Social Work 26; 'Caring for Older Australians', above n 28, rec 15.10; Office of the Public Advocate (Qld), *Submission 05*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*; Law Council of Australia, *Submission 83*.

noted that many people with impaired decision-making capacity live in facilities like nursing homes with only the informal consent of a family member or carer.[34] The Australian Guardianship and Administration Council (AGAC) submitted such 'informal decision making' or 'de facto arrangements' were initially approved as 'less restrictive alternatives' when compared to formal guardianship appointments but that informal decision-making lacks safeguards against abuse as required by art 12(5) of the CRPD.[35]

6.42 On the other hand, government agencies and service providers prefer the formality of legal arrangements for aged care decisions. AGAC's experience has been that Commonwealth agencies tend to assume that most people with disability have formally appointed guardians and when forms are designed on this basis, state and territory tribunals have been periodically 'inundated by applications for appointment of guardians or administrators' to meet the specific purposes of asset assessment[36] or an application under the Continence Aids Payment Scheme.[37]

6.43 The *Aged Care Act* is ambiguous about informal and formal substitute decision-making for people who may require decision-making support with respect to aged care. Section 96–5 of the Act provides for a person, other than an approved provider to represent an aged care recipient who, because of any 'physical incapacity or mental impairment' is unable to enter into agreements relating to residential care, home care, extra services, accommodation bonds and accommodation charges. Section 96–6 states that in making an application or giving information under the Act, a 'person authorised to act on the care recipient's behalf' can do so.

6.44 There seems to be a distinction between 'representation' for binding contracts and 'authorisation' for informal correspondence. However, there is inconsistency in the use of the 'representative' throughout the Commonwealth laws and legal frameworks for aged care recipients. The Act contains references to a 'legal representative' to imply a guardianship arrangement;[38] 'representative' to refer to an advocate;[39] and an undefined 'appropriate person'.[40]

6.45 Stakeholders emphasised the right to autonomy of aged care consumers, and the importance of supporting them in decision-making. The Centre for Rural and Regional Law and Justice, and the National Rural Law and Justice Alliance stressed the value of supported and co decision-making arrangements in aged care, which is particularly relevant in the regional and rural context.[41]

---

34 Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) ch 15, 318.
35 Australian Guardianship and Administration Council, *Submission 51*.
36 As part of an application for residential aged care.
37 Australian Guardianship and Administration Council, *Submission 51*.
38 *Aged Care Act 1997* (Cth) s 52F–2.
39 Ibid s 81.1(1)(c)(ii).
40 Ibid s 44.8A.
41 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*. The submission also drew attention to the difficulties in accessing in-home support and respite services, which can greatly exacerbate the 'disabling effects of ageing' and, thereby, create greater difficulties for the person in the exercise of legal capacity.

6.46 Stakeholders reflected on the need to balance duty of care and the dignity of risk in aged care decision-making. The Illawarra Forum recommended change to the legislation so that 'risk management strategies' do not result in older people with dementia being 'locked up' in aged care.[42]

6.47 The Mental Health Coordinating Council expressed concern about the chemical restraint of people with mental illness who are deemed to be 'challenging' in aged care facilities. The Council argued,

> Supported decision-making is extremely important for this group of particularly vulnerable people, who the system characteristically 'medicates' and 'manages'. It is critical that the mental health and age care services work closely together so that a vulnerable and isolated person does not fall between service gaps and that older people are appropriately cared for in mental health and age care facilities using principles of recovery and enablement.[43]

6.48 The Office of the Public Advocate (SA) suggested an amendment of the *User Rights Principles 1997* (Cth), made under the *Aged Care Act*, to minimise and eliminate the use of restrictive practices in aged care.[44] OPA (SA) recommended a clear definition of each restrictive practice, a requirement that non-coercive measures be considered and a distinct authority for restrictive practices to be used. Restrictive practices are discussed in more detail in Chapter 8.

The Commonwealth model and aged care

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

6.49 The ALRC proposes that the *Aged Care Act* be amended in the light of the National Decision-Making Principles and the Commonwealth decision-making model.

6.50 While the ALRC does not intend to prescribe a comprehensive new decision-making scheme for aged care, some key ways in which the Commonwealth decision-making model might operate in this area are outlined below.

Objects

6.51 Division 2 of the *Aged Care Act* lists the objects of the Act, in providing for the funding of aged care. These objects include such matters as encouraging aged care services that 'facilitate the independence of, and choice available to' recipients and to help recipients 'to enjoy the same rights as all other people in Australia'. The extensive set of objects does not, however, make any direct reference to decision-making.

6.52 The ALRC suggests s 2–1 of the Act could be amended to incorporate principles relating to decision-making and supported decision-making, or that a principles

42 The Illawarra Forum, *Submission 19*.
43 Mental Health Coordinating Council, *Submission 07*.
44 Office of the Public Advocate (SA), *Submission 17*.

provision could be inserted into the part of the Act which will contain provisions relating to supporters and representatives.

Supporters and representatives

6.53 The definition of 'representative' in the *User Rights Principles* appears to conflate a decision-maker chosen by the care recipient, for example, a partner (a supporter) with a formally appointed decision-maker, such as a holder of an enduring power of attorney (representative).[45]

6.54 The proposed model will provide new approaches for the involvement and regulation of representatives in decisions by aged care consumers. Supported decision-making in the aged care context means that people who may require decision-making support can make as many of their own decisions as possible, with the assistance of a 'supporter', whether it is about where they live or what services they receive. For fully supported decision-making in aged care, the 'will, preferences and rights' standard would replace the existing 'best interests' test, in compliance with the CRPD.

6.55 The Commonwealth decision-making model would apply from the first trigger for decision-making by an aged care consumer. Under the framework, a potential aged care consumer of residential or home care services who has impaired decision-making ability would make decisions about assessment of his or her care needs by the Aged Care Assessment Team[46] with the assistance of a supporter or in consultation with a representative.

6.56 Often, the decision to undergo assessment of care needs is made under pressure when a crisis has arisen for the potential aged care consumer. There are likely to be benefits for both consumers and service providers, where the consumer has a supporter with whom to make a decision.

6.57 The next significant decision for the aged care consumer may be whether to enter a Resident agreement or Home care package agreement. These agreements are legally binding documents that outline the services to be provided, fees charged, and the rights and responsibilities of both parties.

6.58 It will be important for the Commonwealth decision-making model to augment existing state and territory systems with a clear, structured approach to decision-making that will mirror the rights and responsibilities of consumers and service providers of aged care.[47] Advocacy and safeguarding of rights are critical to preventing elder abuse. Under an effective, nationally coordinated model, the aged care consumer will receive assistance from supporters whose role and duties are specified. They will know that they are ultimately responsible for the decision made with the assistance of a supporter. Where a representative makes a decision for the aged care consumer, the

---

45 *User Rights Principles 1997* (Cth) para 23.25.

46 The Aged Care Assessment Service (ACAS) in Victoria.

47 See, Australian Government Department of Social Security, *Charter of Residents Rights and Responsibilities*; Australian Government Department of Social Security, *Charter of Rights and Responsibilities for Home Care*.

decision will be based on the will and preferences of the person requiring support and the representative will be subject to safeguards in the system.

6.59 Where the rights and responsibilities of the aged care consumer are clearly set out under such a model, the service provider will be assured that a consumer who has a supporter, will have had the agreement explained to them in an appropriate manner and understand what is signed. If a representative signs an agreement, the service provider will know that the contract is in accordance with the wishes of the consumer and that it is legally binding.

6.60 A suite of accreditation standards and guidelines made under the *Aged Care Act* would need to be revised to specifically acknowledge and implement the supporter and representative model. For instance, the Resident Care Manual states that a representative may be a guardian or a person nominated by the care recipient as his or her representative.[48] Currently, the accredited provider must be satisfied that the nominated person has a connection with the resident, and is concerned for the 'safety, health and well-being' of the resident.[49] The inclusion of the supporter and representative scheme in the Act would apply the more specific and subjective standard of the 'will, preferences and rights' of the person to these aged care decisions.

6.61 The Home Care Packages Program Guidelines provide that shared decision-making between the consumer, an appointed representative and the home care provider should take place where the consumer has 'cognitive impairment'.[50] The Commonwealth decision-making model would give structured and consistent guidance so that an aged care consumer is presumed to have the ability to make decisions, is entitled to support in making those decisions; and, if a representative is appointed, to have a representative make decisions that accord with the will, preferences and rights of the consumer.

eHealth records

6.62 The following section discusses the PCEHR Act, which contains provisions dealing with decision-making concerning the collection, use and disclosure of personally controlled electronic health records—referred to as 'eHealth records'.

6.63 An eHealth record is an electronic summary of a person's health records, which the individual and their healthcare providers can access online when needed. The eHealth record system was rolled out nationally in July 2012, allowing people seeking health care in Australia to register for an eHealth record. Healthcare Provider Organisations can also register to participate in the eHealth record system, and authorise their healthcare providers to access the eHealth record system.

6.64 As the system develops over time, having an eHealth record will give healthcare providers access to a summary of key health information, as long as the person gives initial consent when confirming access settings for the eHealth record. This will

48 Department of Social Services, 'The Residential Care Manual' (2014) 6.
49 Ibid.
50 Department of Health and Ageing, 'Home Care Packages Program Guidelines' (August 2013) 3.1.4.

include information such as medications, hospital discharge summaries, allergies and immunisations.[51]

Individual decision-making and eHealth records

6.65 Under the legislative framework for eHealth, there are protections against the mishandling of information.[52] Individuals can control their own eHealth record by choosing to restrict which healthcare providers can access it and what information is included through exercising 'access controls'.[53] Unauthorised collection, use or disclosure of eHealth record information is both a contravention of the PECHR Act and an interference with privacy under the *Privacy Act 1988* (Cth).[54]

6.66 The PCEHR Act contains detailed schemes for 'nominated representatives' and 'authorised representatives'. In the terminology used by the ALRC, the former are analogous to 'supporters' and the latter to 'representatives'.

'Nominated representatives'

6.67 The nominated representative provisions are intended to support the involvement of people other than healthcare professionals in assisting consumers in managing their healthcare. Nominated representatives may be family members, carers, neighbours or any other person nominated by a consumer.[55]

6.68 For a person to be a nominated representative, there must be an agreement between the consumer and the proposed nominated representative. This agreement does not have to be in writing. The consumer must also notify the System Operator that the other person is her or his nominated representative.[56]

6.69 Consumers remain able to access and control their eHealth record themselves, and access by a nominated representative is subject to any access controls set by the consumer.

6.70 For example, in some cases a nominated representative may have 'read-only' access to a consumer's eHealth record. In other cases, a consumer may allow a nominated representative to do anything the consumer can do, including setting access controls, and granting access to healthcare provider organisations.

> This flexibility in setting access controls is designed to take into account the many circumstances where a person may not be able to, or may not wish to, manage their own [eHealth record] but where they do not have a formal legally recognised representative to act on their behalf.[57]

---

51 See Department of Health, *EHealth–General Individuals FAQs* <http://www.ehealth.gov.au/internet/ehealth/publishing.nsf/Content/faqs-individuals-gen>.

52 *Personally Controlled Electronic Health Records Act 2012* (Cth) pt 4.

53 See, eg, Ibid s 61.

54 Ibid s 73.

55 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.

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

57 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.

6.71 A nominated representative must always act in the 'best interests' of the consumer, subject to the consumer's directions.[58]

'Authorised representatives'

6.72 People who may have impaired decision-making ability are able to have an eHealth record. To facilitate this, an authorised representative is able to register a consumer for an eHealth record and manage the access controls on behalf of the consumer.

6.73 A person may be an authorised representative of a person over 18 years old if the System Operator is satisfied that a consumer is not capable of making decisions for themselves, and that another person is authorised by an Australian law, or by a decision of an Australian court or tribunal, to act on behalf of the consumer.[59]

6.74 If there is no such person, the System Operator may appoint someone else if satisfied that person an appropriate person to be the authorised representative.[60] This provision is said to allow the System Operator, in making appointments, to 'take into account a range of other circumstances for people without capacity, or with only limited capacity'.[61]

6.75 For the purposes of the PCEHR Act and the eHealth system, an authorised representative is treated as if she or he were the consumer. That is, the authorised representative can do anything authorised or required of the consumer, and anything done by an authorised representative in relation to the system is taken as if it were done by the consumer.[62]

6.76 An authorised representative must always act in the best interests of the consumer, having regard to any directions from the consumer expressed when they had capacity to act on their own behalf.[63] A consumer may have more than one authorised representative.[64]

The Commonwealth model and eHealth records

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

6.77 The existing scheme for authorised and nominated representatives contained in the PCEHR Act is detailed and tailored to the operation of the voluntary national system for the provision of access to electronic health information.

---

58 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 7(6).
59 Ibid s 7(4).
60 Ibid s 6(4)(b).
61 Explanatory Memorandum, Personally Controlled Electronic Health Records Bill 2011 (Cth) 10.
62 *Personally Controlled Electronic Health Records Act 2012* (Cth) s 6(7).
63 Ibid s 6(9).
64 Ibid s 6(8).

6.78 The scheme is designed, among other things, to ensure that people who have impaired decision-making ability are able to have an eHealth record; and to enable people to share their health information with those who need it. For example, an older person may want their son or daughter to be able to view key health information, such as currently prescribed medications and test results, in order to provide care and assistance to them.

6.79 The ALRC does not intend to prescribe a comprehensive new decision-making scheme for the PCEHR Act. Individual decision-making under the PCEHR Act is relatively limited—being confined to decisions about the collection, use and disclosure of health information—as compared to, for example, decision-making under the *Aged Care Act*, which often involves significant decisions about the provision of residential and home care services and the entering of contractual arrangements.

6.80 However, the existing PCEHR Act provisions concerning nominated and authorised representatives should be reviewed and amended in the light of the decision-making principles and the Commonwealth decision-making model.

6.81 Broadly, nominated representatives under the PCEHR Act are analogous to 'supporters' in the Commonwealth decision-making model. They are nominated by the person concerned, and are subject to directions by the consumer, who may also continue to make decisions under the PCEHR Act.

6.82 Apart from adopting consistent terminology, possible changes to these nominated representatives provisions might include providing that, in making decisions, supporters have obligations to:

- consider the will, preferences and rights of the person represented (rather than the current best interests test);
- consult with existing appointees, family members, carers and other significant people;
- perform the role diligently and in good faith.

6.83 Authorised representatives provide substitute decision-making concerning eHealth records and, therefore, perform a role analogous to that of 'representatives' in the proposed Commonwealth supporter and nominee model. Changes to these PCEHR Act provisions may include incorporating the 'will, preferences and rights' approach to decision making; the proposed guidelines for determining decision-making ability; and the proposed factors for determining whether a person or organisation is suitable for appointment.

6.84 The NSW Council for Intellectual Disability (NSWCID) observed that

> so far as possible, people with intellectual disability should be supported to make their own decisions in relation to the creation of and access to their e-health record. Where

> maximum support proves inadequate, there needs to be a system of authorised representatives.[65]

6.85 The Council cautioned that if it were 'unduly time-consuming or complex to create an authorised representative for an individual, the strong likelihood would be that families and doctors would be deterred from taking this course and the person with disability would be denied the considerable advantages to their health of having an e-health record'.[66]

6.86 There may be arguments that no change to existing provisions of the PCEHR Act is necessary because the system already strikes a balance between safeguards for the privacy and related rights of the person and allows representatives to be appointed without undue administrative complexity.

6.87 In the ALRC's view, it is important to encourage the implementation of supported decision-making in this area of Commonwealth responsibility. There is, however, no intention to create unnecessary formality. Decisions under the PCEHR Act involve only the handling of personal information. Therefore, there may be a case for supporter and representative provisions that are more minimal than those proposed in the Commonwealth decision-making model.

Information privacy

6.88 The *Privacy Act* is Australia's key information privacy law. The Act is concerned with the protection of personal information held by certain entities, rather than with privacy more generally. Personal information is defined in s 6(1) of the Act as information or opinion about an identified individual, or an individual who is reasonably identifiable, whether or not true and whether or not in material form.

6.89 The *Privacy Act* provides 13 'Australian Privacy Principles' (APPs) that set out the broad requirements on collection, use, disclosure and other handling of personal information.[67] The APPs bind only 'APP entities'—primarily Australian Government agencies and large private sector organisations with a turnover of more than $3 million. Certain small businesses are also bound, such as those that provide health services and those that disclose personal information to anyone else for a benefit, service or advantage.[68] Generally, individuals are not bound by the *Privacy Act*.[69]

6.90 Privacy of health information may be a special concern for people with disability. Health and genetic information is 'sensitive information' that is subject to

---

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

66 Ibid.

67 *Privacy Act 1988* (Cth) sch 1.

68 'APP entity' is defined in Ibid s 6(1). Small businesses are not, in general, APP entities, with some exceptions as set out in s 6D.

69 There are some exceptions. For example, an individual who is a reporting entity under the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth), will be treated as an APP entity under the *Privacy Act 1988* (Cth).

stronger protection under the APPs.[70] Separate Commonwealth legislation protects healthcare identifiers[71] and eHealth records.[72]

6.91 The major issue for stakeholders was to ensure that personal information is able to be shared appropriately in order to support people with disability. National Disability Services, for example, stated:

> The key challenge is often to transfer sufficient personal information (such as medication requirements or worker safety issues) that will enable the provision of high quality, tailored and safe support, while also protecting the right to privacy.[73]

6.92 There is a public interest in families and friends being involved in the care and treatment of people with a mental illness, for example, and this clearly involves the sharing of information.[74] The NSWCID observed that, for a person with an intellectual disability, there may be 'numerous times in a month when an agency needs to obtain information about the person from a range of sources and provide information to a range of agencies or individuals'.[75] The ACT Disability, Aged and Carer Advocacy Service noted:

> If [supported decision-making] frameworks are to reduce or replace the use of guardianship, consideration needs to be given to how relevant information can be shared with decision supporters while balancing the right of people with disability to privacy.[76]

Individual decision-making and the *Privacy Act*

6.93 The *Privacy Act* makes no express provision for supporters or representatives to be recognised as acting on behalf of an individual in relation to decisions about the handling of personal information held by APP entities.

6.94 Some state privacy legislation does provide for representatives. The *Health Records and Information Privacy Act 2002* (NSW), for example, provides for the position of an 'authorised representative' to act on behalf of an individual who is 'incapable of doing an act authorised, permitted or required' by the Act.[77]

6.95 An authorised representative may not do an act on behalf of an individual who is capable of doing that act, unless the individual expressly authorises the authorised representative to do that act.[78]

---

70 *Privacy Act 1988* (Cth) s 6(1).
71 *Healthcare Identifiers Act 2010* (Cth).
72 *Personally Controlled Electronic Health Records Act 2012* (Cth).
73 National Disability Services, *Submission 49*.
74 Public Interest Advocacy Centre, *Submission 41*.
75 NSW Council for Intellectual Disability, *Submission 33*.
76 ADACAS, *Submission 29*.
77 *Health Records and Information Privacy Act 2002* (NSW) s 7. An individual is defined as incapable 'if the individual is incapable (despite the provision of reasonable assistance by another person) by reason of age, injury, illness, physical or mental impairment of: (a) understanding the general nature and effect of the act, or (b) communicating the individual's intentions with respect to the act'.
78 Ibid s 8(3).

6.96 An 'authorised representative' for these purposes means a person appointed under an enduring power of attorney, a guardian, a person having parental responsibility (if the individual is a child), or person who is 'otherwise empowered under law to exercise any functions as an agent of or in the best interests of the individual'.[79] Essentially, therefore, the *Health Records and Information Privacy Act 2002* provides recognition for representatives, but not for supporters, as those terms are used in this Discussion Paper.

6.97 The ALRC has considered previously whether the *Privacy Act* should include provision for representatives. In its 2008 report, *For Your Information: Australian Privacy Law and Practice*, the ALRC recommended that the *Privacy Act* should be amended to include the concept of a 'nominee'. An agency or organisation would be able to establish nominee arrangements and then 'deal with an individual's nominee as if the nominee were the individual'.[80] The ALRC recommended that nominee arrangements should include, at a minimum, the following elements:

> (a) a nomination can be made by an individual or a substitute decision maker authorised by a federal, state or territory law;
>
> (b) the nominee can be an individual or an entity;
>
> (c) the nominee has a duty to act at all times in the best interests of the individual; and
>
> (d) the nomination can be revoked by the individual, the nominee or the agency or organisation.[81]

6.98 The ALRC concluded that establishing nominee arrangements would 'provide flexibility for individuals to decide who can act as their "agent" for the purposes of the *Privacy Act*, and also operate as a useful mechanism in situations where an individual has limited, intermittent or declining capacity'.[82]

6.99 The rationale for the original ALRC recommendations was to address problems faced by individuals and their representatives in gaining access to benefits and services due to perceived or real conflicts with the *Privacy Act*. That is, organisations refusing to provide information or deal with supporters 'because of the *Privacy Act*'. Similar concerns were expressed in this Inquiry.[83]

6.100 The ALRC's 2008 recommendations would have provided recognition for both supporters and representatives.

6.101 The ALRC envisaged that a nominee could be either nominated by the individual or a substitute decision-maker appointed under some other law. While it would not be necessary for an authorised substitute decision-maker to be registered as a nominee for the agency or organisation to recognise that person, the nominee

---

79 Ibid s 8.
80 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Rec 70–1.
81 Ibid Rec 70–2.
82 Ibid [70.96].
83 See, eg, NSW Council for Intellectual Disability, *Submission 33*; ADACAS, *Submission 29*.

arrangements were seen as a convenient way for the decision-maker to be recognised for ongoing dealings with the agency or organisation.[84]

The Commonwealth model and the *Privacy Act*

Proposal 6–4 The *Privacy Act 1988* (Cth) should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model.

6.102 Successive Australian Governments have not responded to the ALRC's recommendations concerning decision-making arrangements under the *Privacy Act*.[85] There seems good reason to revisit this issue in the context of the present Inquiry.

6.103 The *Privacy Act* does not prevent a supporter from providing assistance to the individual where this is done with the consent of the individual. Where the assistance requires the supporter to have access to the personal information of the individual, the individual can provide consent for the agency or organisation to disclose the information to the supporter. Sometimes it should be quite clear, for example, that a requested disclosure of personal information would be covered by APP 6.[86]

6.104 There are concerns, however, that such arrangements are not implemented consistently, or recognised by agencies and organisations.[87] The NSWCID submitted:

> So far as possible, people with intellectual disability should be given the support that they need to make their own privacy decisions. If this is not adequate, there needs to be a legislative system of substitute consent and/or administrative safeguards that provides reasonable safeguards on the privacy of the individual whilst also recognising that other rights of the individual may be imperilled if personal information cannot be gathered and promptly used as occasions arise.[88]

6.105 If the privacy rules covering this sort of information exchange are 'cumbersome or complex', then optimal support of people with intellectual disabilities will not occur.[89] Other stakeholders referred to the desirability of uniform Commonwealth, state and territory privacy regulation.[90]

---

84 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [70.101].

85 Many other recommendations made in the 2008 privacy report were implemented following the enactment of the *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth).

86 That is, the disclosure is for the purpose the information was collected, or the individual has consented to the disclosure of the information: *Privacy Act 1988* (Cth) sch 1, cl 6.

87 ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) [70.104].

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

89 The NSWCID referred to the *Health Records and Information Privacy Act 2002* (NSW) as a good model for dealing with 'incapacity issues': Ibid.

90 See, eg, Mental Health Coordinating Council, *Submission 07*. The ALRC has previously recommended an intergovernmental cooperative scheme that provides that the states and territories should enact legislation regulating the handling of personal information in the state and territory public sectors that is consistent with the *Privacy Act*: ALRC, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008) Recs 3–4, 3–5.

6.106 The advantages of recognising supporters in Commonwealth laws are discussed in Chapter 4. In particular, formalisation of support is likely to create greater certainty for third parties about the role of supporters, and facilitate the provision of support to people who need it. In the context of information privacy, this is likely to allow third parties to interact with supporters with greater confidence, allowing for timely collection, use and disclosure of information.

6.107 There is a downside to this approach, in that legislative arrangements may work against flexible practices by encouraging the perception that a supporter must be formally appointed in order to be recognised. However, more informal arrangements may not be implemented consistently or recognised by APP entities. Some form of legislative underpinning may be more effective in establishing recognition of supporters.

6.108 In the ALRC's view, the *Privacy Act* should be amended to include supporter and representative provisions consistent with the Commonwealth decision-making model. The new provisions would apply potentially to an individual's relationships with the full range of APP entities—Commonwealth government agencies and private sector organisations.

6.109 The *Privacy Act* should permit APP entities to establish a supporters and representatives scheme, but this should not be mandatory. APP entities need to retain the flexibility to develop practices and procedures consistent with their broader operations. Agencies and organisations also may be subject to other obligations—such as the bankers' duty of confidentiality or particular legislative provisions—which place limits on decision-making by supporters. Each agency and organisation must consider the extent to which it is able to recognise and act upon decisions made by a supporter.

6.110 Incorporating the Commonwealth decision-making model within the *Privacy Act* may facilitate assistance for people in making and communicating decisions concerning control of their personal information by recognising supporters, including family and carers, as being able to act on their behalf. At the least, supporters should be recognised and be made subject to a duty to support an individual's will and preferences in relation to the handling of their personal information.

6.111 However, some circumstances will require a more rigorous process for appointment and verification than others, due to the potential consequences of the disclosure of personal information or the transaction involved. For example, a bank or other financial institution might establish an arrangement that has effect for the purposes of disclosing account balances and banking transactions, but does not extend to a supporter withdrawing funds from an account on behalf of the individual, without putting further integrity measures in place.

Banking services

6.112 Banking is another area of Commonwealth legislative responsibility,[91] in relation to which the application of the decision-making model might be considered.

6.113 Article 12(5) of the CRPD requires States Parties to take all appropriate and effective measures to ensure the equal right of persons with disabilities to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit.[92]

6.114 In practice, a tension emerges between these rights and the need to protect people from financial abuse and exploitation in conducting their banking and financial activities. There is also a need to ensure the legal validity of financial transactions.

6.115 An issue in relation to banking is the refusal of some banks to allow people with disability to access or operate a bank account independently, and hesitancy in recognising informal supporters. Such refusals may reflect bank concerns about capacity or financial exploitation.[93] In this context, the Australian Bankers' Association (ABA) has commented that

> Financial exploitation of a vulnerable person is a deeply challenging area for banks. Every customer's situation is unique and banks have an obligation to protect their customers' privacy, maintain the bank's duty of confidentiality, and to not unnecessarily intrude into their customers' lives.[94]

6.116 The ABA issues non-binding industry guidelines that are relevant to the ability of people with disability to engage with the banking industry and to make decisions in that context.[95] In particular, the ABA has issued guidelines on responding to requests from a power of attorney or court-appointed administrator (the ABA guidelines).

6.117 The ABA guidelines explain how powers of attorney and court-appointed administrator arrangements apply to banks' relationships with their customers; and outline a framework that banks can use to consistently deal with requests from attorneys and administrators.[96]

6.118 The ABA guidelines note that it 'is not the role of bank staff (or a bank) to determine a customer's capacity'.[97] They outline the roles of administrators and

---

91 See, eg, *Banking Act 1959* (Cth); *Australian Prudential Regulation Authority Act 1998* (Cth); *Australian Securities and Investments Commission Act 2001* (Cth).

92 *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(5).

93 See, eg, Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, (2012) 190.

94 Australian Bankers' Association, *Financial Abuse Prevention* (12 November 2013) <http://www.bankers.asn.au/Consumers/Financial-abuse-prevention>.

95 ABA industry guidelines provide assistance to banks in recognising financial abuse, advocate raising awareness among bank employees about this risk, and outline strategies for dealing with a situation of potential financial abuse: Australian Bankers' Association Industry Guideline, *Protecting Vulnerable Customers from Potential Financial Abuse*, June 2013.

96 Australian Bankers' Association Industry Guideline, *Responding to Requests from a Power of Attorney or Court-Appointed Administrator*, June 2013, 1.

97 Ibid 2.

guardians, how to recognise their authority, and highlight differences in the role, authority and responsibilities of guardians and administrators between jurisdictions.[98]

Encouraging supported decision making

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

(a) customers should be presumed to have the ability to make decisions about access to banking services;

(b) customers may be capable of making and communicating decisions concerning banking services, where they have access to necessary support;

(c) customers are entitled to support in making and communicating decisions; and

(d) banks should recognise supporters and respond to their requests, where possible and consistent with other legal duties.

6.119 There may be some reluctance on the part of banks to allow people who need decision-making support to access banking services independently and to recognise the role of supporters. Banks may tend to recognise only formal, substitute decision-making appointments. The ABA guidelines state, for example:

> Banks have a contractual obligation to act in accordance with the customer's mandate. If a customer has set up a power of attorney, or a court has appointed an administrator to represent a customer's interests, then these authorities are considered to be in line with the customer's mandate. It is important to recognise and respond to requests from these authorities as if they were made from the customer themselves.[99]

6.120 In the ALRC's view, people who need decision-making assistance should not necessarily have to access banking services only through an administrator or the holder of a power of attorney.

6.121 Submissions referred to difficulties faced by people with disability in obtaining access to banking services, including because supporters are not recognised. Pave the Way, for example, stated that banks often refuse to allow people with disability to have their own bank account:

> This is a problem that is regularly experienced by families who are trying to open an ordinary bank account for their family member who has a disability. We are aware of numerous examples of banks being willing to open an account for a child without disability but refusing to open an account for a child with disability. Similarly banks

98 Ibid 4–5, 7.
99 Ibid 6.

> regularly refuse to open accounts for adults with disability. While it appears that there is no actual legal impediment to banks offering this service, some banks express concern about capacity and others cite an obligation to protect vulnerable people. When facing this problem some families decide to seek an administration order.[100]

6.122 The Equal Opportunity Commission of South Australia referred to a decision of the Equality Opportunity Tribunal (SA), which found that a finance company had discriminated against a loan applicant on the basis of disability. The Commission stated that the decision is 'a reminder of the risk that service providers may take in making assumptions about a person based on a disability, without adequately assessing a person's capacity'.[101]

6.123 The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance submitted that recognition of supported decision-making arrangements could better enable people with disabilities to 'exercise equal legal capacity in their use of financial services'. While the reluctance of banks to recognise informal arrangements was said to be understandable, provision for supported decision-making could help provide certainty for banks, while still ensuring that 'support for people with disabilities in the exercise of legal capacity is tailored to their needs, as required by Article 12 of the [CRPD]'.[102]

6.124 Banking may not be an area in which the full Commonwealth decision-making model can easily be applied. It may not be practical, for example, to impose any legislative requirement on banks to set up their own systems for recognising supporters and responding to requests from these supporters.

6.125 The nomination of a supporter does not involve the limitations and protective formalities of, for example, a power of attorney.[103] As discussed in Chapter 2, the 'paradigm shift' towards encouraging supported, rather than substitute, decision-making, is a relatively new development. Fully recognising supported decision-making arrangements would constitute a break with existing banking practices, which are based on contract and agency law, with potentially unforeseen legal consequences.

6.126 Nevertheless, here may be room to encourage a more flexible approach on the part of banks, without being prescriptive, and recognising that banks bear risks in relation to voidable transactions.

6.127 The ALRC proposes that the ABA provide additional guidance on how banks may meet the needs of people who require decision-making support to access banking services. This would be consistent with the ABA's *Code of Banking Practice*, which states that banks 'recognise the needs of older persons and customers with a disability

---

100 Pave the Way, *Submission 09*.

101 Equal Opportunity Commission of South Australia, *Submission 28*. (Referring to *Jackson v Homestart Finance* [2013] SAEOT 13).

102 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

103 Eg, in relation to an appointment by written instrument, independent witnesses and so on.

to have access to transaction services, so we will take reasonable measures to enhance their access to those services'.[104]

6.128 The new guidance should reflect the National Decision-Making Principles, including the Representative Decision-Making Guidelines.[105] In particular, banks should be encouraged to recognise that customers:

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

104 Australian Bankers' Association, *Code of Banking Practice* (2013) [7].
105 See ch 3.