

Proposals and Questions

2. Conceptual Landscape—the Context for Reform

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

3. National Decision-Making Principles

Proposal 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning decision-making by persons who may require support in making decisions should be guided by the National Decision-Making Principles and Guidelines, set out in Proposals 3–2 to 3–9.

Proposal 3–2 National Decision-Making Principle 1

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

Proposal 3–3 National Decision-Making Principle 2

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

Proposal 3–4 Support Guidelines

- (a) Persons who may require decision-making support should be supported to participate in and contribute to all aspects of life.
- (b) Persons who may require decision-making support should be supported in making decisions.
- (c) The role of families, carers and other significant persons in supporting persons who may require decision-making support should be acknowledged and respected.

Proposal 3–5 National Decision-Making Principle 3

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

Proposal 3–6 Will, Preferences and Rights Guidelines

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

- (b) *Appointment*: The appointment of a representative decision-maker should be limited in scope, be proportionate, and apply for the minimum time.
- (c) *Supporting decision-making*:
 - (i) a person's will and preferences, so far as they can be determined, must be given effect;
 - (ii) where the person's will and preferences are not known, the representative must give effect to what the person would likely want, based on all the information available, including communicating with supporters; and
 - (iii) if it is not possible to determine what the person would likely want, the representative must act to promote and safeguard the person's human rights and act in the way least restrictive of those rights.

Proposal 3–7 Representative Decision-Making Guidelines

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

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

- (h) In communicating decisions, a person is entitled to:
 - (i) communicate by any means that enables them to be understood; and
 - (ii) have their cultural and linguistic circumstances recognised and respected.

Proposal 3–8 National Decision-Making Principle 4

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

Proposal 3–9 Safeguards Guidelines

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

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

4. Supported Decision-Making in Commonwealth Laws

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

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?

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?

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.

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.

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.

Proposal 4-5 Relevant Commonwealth laws and legal frameworks should provide that Commonwealth supporters must:

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

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.

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?

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

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.

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?

Proposal 4–7 A Commonwealth representative may perform the following functions:

- (a) assist the person who requires decision-making support to make decisions;
- (b) handle the relevant personal information of the person;
- (c) obtain or receive information on behalf of the person and assist the person to understand information;
- (d) communicate, or assist the person to communicate, decisions to third parties;
- (e) provide advice to the person about the decision they might make; and
- (f) endeavour to ensure the decisions of the person are given effect.

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.

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

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

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

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.

5. The National Disability Insurance Scheme

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

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

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

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

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

- (a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and
- (b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

6. Supporters and Representatives in Other Areas of Commonwealth 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.

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.

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.

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

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.

7. Access to Justice

Proposal 7–1 The *Crimes Act 1914* (Cth) should be amended to provide that a person is unfit to stand trial if the person cannot:

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

Proposal 7–2 The *Crimes Act 1914* (Cth) should be amended to provide that available decision-making assistance and support should be taken into account in determining whether a person is unfit to stand trial.

Question 7-1 What other elements should be included in any new test for unfitness to stand trial, and why? For example, should there be some threshold requirement that unfitness be due to some clinically-recognised mental impairment?

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

Proposal 7-4 The rules of federal courts should provide that a person needs a litigation representative if the person cannot:

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

Proposal 7-5 The rules of federal courts should provide that available decision-making support must be taken into account in determining whether a person needs a litigation representative.

Proposal 7-6 The rules of federal courts should provide that litigation representatives:

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

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

Question 7-2 Should the Australian Solicitors' Conduct Rules and state and territory legal professional rules be amended to provide a new exception to solicitors' duties of confidentiality where:

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

- (b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative?

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

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

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

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

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

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

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

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

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

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

- (a) that communication assistants allowed by the trial judge to assist a juror should swear an oath faithfully to communicate the proceedings or jury deliberations;
- (b) that communication assistants allowed by the trial judge to assist a juror should be permitted in the jury room during deliberations without breaching jury secrecy principles, so long as they are subject to and comply with requirements for the secrecy of jury deliberations; and
- (c) for offences, in similar terms to those arising under ss 58AK and 58AL of the Act, in relation to the soliciting by third parties of communication assistants for the provision of information about the jury deliberations, and the disclosure of information by communication assistants about the jury deliberations.

8. Restrictive Practices

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

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

9. Electoral Matters

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

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

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

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

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

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

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

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

Question 9–2 What further changes, if any, are required to the *Commonwealth Electoral Act 1918* (Cth) or relevant legal frameworks to facilitate the provision of assistance and support to people who require decision-making support to vote, including by secret ballot?

Proposal 9–7 The Australian Electoral Commission should develop or amend guidance for Divisional Returning Officers to assist them to determine if a valid or sufficient reason for failing to vote exists in circumstances where an elector is a person with disability.

10. Review of State and Territory Legislation

Proposal 10–1 State and territory governments should review laws that deal with decision-making by people who need decision-making support to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In conducting such a review, regard should also be given to:

- (a) interaction with any supporter and representative schemes under Commonwealth legislation;
- (b) consistency between jurisdictions, including in terminology;
- (c) maximising cross-jurisdictional recognition of arrangements; and

- (d) mechanisms for consistent and national data collection.

Any review should include, but not be limited to, laws with respect to guardianship and administration; informed consent to medical treatment; mental health; and disability services.

11. Other Issues

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

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

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

Question 11–3 Should the *Superannuation Industry (Supervision) Act 1993* (Cth) and *Superannuation Industry (Supervision) Regulations 1994* (Cth) be amended to provide:

- (a) for supported decision-making regarding a binding death nomination of a beneficiary;
- (b) that a state or territory decision-maker (such as under an enduring power of attorney) may nominate a beneficiary on behalf of the member?

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

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

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

